HAS THE FCPA BEEN SUCCESSFUL IN ACHIEVING ITS OBJECTIVES?

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In 1977, the U.S. enacted the Foreign Corrupt Practices Act ("FCPA"), the first law of its kind in the world governing the conduct of domestic actors in their interactions with foreign *officials in* foreign *markets. Four decades later, this Article addresses the salient question of whether the FCPA has been successful in achieving its objectives. In addressing this difficult question, various plausible meanings of FCPA success are offered and analyzed through various FCPA enforcement statistics, FCPA enforcement agency statements, qualitative FCPA data points, and other FCPA relevant information. While answering the question posed by this Article may be inconclusive, the main goal of this Article is to foster a dialogue on the best meaning of FCPA success and force those in the FCPA space to pause, reflect, and come to their own conclusions whether the FCPA, in its four decades, has been successful in achieving its objectives.*

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I. INTRODUCTION

As long as there has been law, inquisitive minds have contemplated the salient question of whether the law has been successful in achieving its objectives. In 1977, the U.S. enacted the Foreign Corrupt Practices Act ("FCPA"), the first law of its kind in the world governing the conduct of *domestic* actors in their interactions with *foreign* officials in *foreign* markets. Upon the 40th anniversary of the FCPA, it is appropriate to ask the salient question of whether the FCPA has been successful in achieving its objectives.

To answer this question, success in the FCPA context must first be defined. Admittedly, this is no easy task as there are various plausible meanings of success in analyzing any law, including the FCPA. Prior to highlighting the various plausible meanings of FCPA success, Part II of this Article provides a brief overview of the real-world events and policy reasons which resulted in Congress enacting the FCPA in 1977. From there, Part III of this Article draws upon attempts to measure the success of other laws and highlights various plausible meanings of FCPA success. Part IV discusses "hard" enforcement metrics such as the quantity of FCPA enforcement actions as well as the quality of enforcement actions given how the FCPA is being enforced as well as outcomes in actual FCPA actions when government enforcement agencies are put to their burden of proof. Part V discusses "soft" enforcement metrics, such as voluntary compliance with the FCPA as well as deterrence. Part VI discusses "modeling" metrics—namely whether the pioneering FCPA law motivated other countries to enact similar laws. Even with these various plausible meanings of FCPA success, actual measurement is difficult because some meanings are measurable, other meanings are largely unmeasurable, whereas other measures of success, while measurable, assume causation between an event and a subsequent development. Nevertheless, each plausible meaning of FCPA success is analyzed through various FCPA enforcement statistics, FCPA enforcement agency statements, qualitative FCPA data points, and other FCPA relevant information.

This Article concludes that it is inconclusive whether the FCPA, upon its 40th anniversary, has been successful in achieving its objectives—it all depends on one's best definition of success. Reasonable minds can certainly differ as to the best meaning of FCPA success and whether the FCPA has been successful in achieving its objectives. Indeed, this Article's main goal is to foster a dialogue on the best meaning of FCPA success and force those in the FCPA space to pause, reflect, and come to their own conclusion upon the FCPA's 40th anniversary regarding the salient question of whether the FCPA has been successful in achieving its objectives.

II. THE ORIGINS OF THE FCPA

Prior to analyzing the question posed by this Article, it is first useful to understand and appreciate why the FCPA became a law in 1977. As with most new laws, the FCPA did not appear out of thin air. Rather, real events and real policy reasons motivated Congress to act and pass the FCPA. A brief overview of the FCPA's origins is not merely historically interesting, but it is also relevant to measuring the FCPA's success; in enacting the FCPA, Congress articulated specific objectives that the law was to accomplish.[1]

In the mid-1970s, Congress journeyed into uncharted territory. Discovery of the so-called foreign corporate payments problem resulted from a combination of work by the Office of the Watergate Special Prosecutor, including related follow-up work and investigations by the Securities and Exchange Commission ("SEC"), and Senator Frank Church's Subcommittee on Multinational Corporations ("Church Committee"). The SEC's Report on Questionable and Illegal Corporate Payments and Practices describes the problem as follows:

> In 1973, as a result of the work of the Office of the [Watergate] Special Prosecutor, several corporations and executive officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. . . . The Commission's inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred. The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret "slush funds" disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments. These practices cast doubt on the integrity and reliability of the corporate books and records, which are the very foundation of the disclosure system established by the federal securities laws.[2]

Along with the SEC's work, the Church Committee also helped shine a light on questionable foreign corporate payments.[3] In mid-1975, the Church Committee held the first of several hearings generally dealing with U.S. corporate political contributions to foreign governments, and Senator Church opened the hearings as follows:

1. For a detailed summary of the FCPA's extensive legislative history, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934 (2012).

2. SEC, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2 (1976) [hereinafter SEC REPORT].

3. Chaired by Senator Church, the Subcommittee on Multinational Corporations of the Senate Foreign Relations Committee was established in 1972, and among other things, this subcommittee investigated relationships between U.S. oil companies and Middle East producing nations, corporate plans to influence elections in Chile, and complicity between U.S. companies and other foreign countries. *See generally* RALPH W. HANSEN & DEBORAH J. ROBERTS, THE FRANK CHURCH PAPERS: A SUMMARY GUIDE 1 (1988).

> In the course of the Watergate Committee hearings and the investigation by the Special Prosecutor, it became apparent that major American corporations had made illegal political contributions in the United States. More recently, the [SEC] has revealed that several multinational corporations had failed to report to their shareholders millions of dollars of offshore payments in violation of the Securities laws of the United States. . . . The [SEC] is understandably concerned that the disclosure requirements of U.S. laws are complied with. This subcommittee is concerned with the foreign policy consequences of these payments by U.S.-based multinational corporations. This is not a pleasant or easy subject for the corporations involved or U.S. Government officials to discuss in a public forum. This subcommittee deliberated long and hard as to whether it should pursue this matter, and, if so, in what fashion. It decided by a unanimous vote to initiate this investigation and to do so in open public hearings. For what we are concerned with is not a question of private or public morality. What concerns us here is a major issue of foreign policy for the United States.[4]

Over the course of four months in 1975, the Church Committee held separate hearings regarding Gulf Oil, Northrop, Mobil Oil, and Lockheed.[5] Each of these corporations were the subject of allegations, or had already made admissions, concerning questionable payments made directly or indirectly to foreign government officials or foreign political parties in connection with a business purpose. For instance, Gulf Oil principally involved contributions to the political campaign of the President of the Republic of Korea.[6] Northrop principally involved payments to a Saudi Arabian general.[7] Exxon principally involved contributions to Italian political parties.[8] Mobil Oil also principally involved contributions to Italian political parties.[9] Lockheed principally involved payments to Japanese Prime Minister Tanaka, Prince Bernhard (the Inspector General of the Dutch Armed Forces and the husband of Queen Juliana of the Netherlands), and Italian

4. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 94th Cong. 1 (1975) [hereinafter *Multinational Corporations*].

5. Koehler, *supra* note 1, at 934.

6. *See, e.g.*, *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 2 (1975) [hereinafter *American Multinational Corporations Abroad*] (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

7. *Id.*

8. *Multinational Corporations*, *supra* note 4, at 239–40 (statement of Sen. Frank Church, Chairman, Subcomm. on Multinational Corps., S. Comm. on Foreign Relations).

9. *See Multinational Corporations*, *supra* note 4, at 315–16 (statement of Everett Checket, Exec. Vice President, Int'l Div., Mobil Oil Corp).

political parties.[10] In addition, Congress was also concerned with foreign payments by United Brands to Oswaldo Lopez Arellano, the President of Honduras.[11]

The Lockheed scandal prompted significant congressional concern given that during the time period Lockheed made the payments it was the recipient of a $250 million federal loan guarantee intended to keep the company out of bankruptcy.[12] A *Washington Post* editorial included in the legislative record noted:

> It would have been unfortunate enough to have any American corporation involved in this kind of transaction. But Lockheed is not considered, in other countries, to be just another American company. It is the largest U.S. defense contractor, and it owes its existence to federally guaranteed loans. It is seen abroad as almost an arm of the U.S. government. Its misdeeds, thus, have done proportionately great damage to this country and its reputation.[13]

In Senate testimony, SEC Chairman Roderick Hills described the types of corporate payments discovered:

> The practices uncovered in the course of these investigations revealed problems of a serious magnitude:
>
> (1) Bonuses to selected corporate employees which were rebated for use in making illegal domestic political contributions by such corporations;
>
> (2) Use of an offshore corporate subsidiary as "cover" for a revolving cash fund for distributing diverted corporate funds for both domestic and foreign political activities, all of which were illegal in the place where paid;
>
> (3) Anonymous foreign bearer stock corporations, used as depositories for secret illegal "kickbacks" on purchase or sales contracts;
>
> (4) Payments, to foreign consultants which were diverted to management and used for illegal domestic political contributions and commercial bribery;
>
> (5) Direct, corporate payments to foreign government officials in return for favorable business concessions; and
>
> (6) Payments, aggregating tens of millions of dollars, to consultants or commission agents, made with accounting procedures, controls and

10. *See Foreign Payments Disclosure: Hearings Before the Subcomm. On Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce on H.R. 15481 and S. 3664 and H.R. 13870 and H.R. 13953*, 94th Cong. 2 (1976) (statement of Rep. John M. Murphy, Chairman, Subcomm. On Consumer Prot. and Fin., H. Comm. on Interstate and Foreign Commerce).

11. *See American Multinational Corporations Abroad*, *supra* note 6, at 2 (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations).

12. *Lockheed Bribery: Hearings Before the S. Comm. on Banking, Hous. and Urban Affairs*, 94th Cong. 1–2 (1975) (statement of Sen. William Proxmire, Chairman, S. Comm. Banking, Hous. and Urban Affairs).

13. 122 CONG. REC. 30,336 (daily ed. Sept. 14, 1976) (citing Editorial, *Mr. Tanaka and Lockheed*, Wash. Post, Aug. 21, 1976, at A10).

> records which, if existent at all, were insufficient to document whether any services were even rendered by such consultants or agents, or whether such services were commensurate with the amounts paid. In some cases the parties involved have stated that the payments were used to bribe foreign government officials in order to procure business.[14]

Within the U.S. government, there were divergent views as to the best remedy for the foreign corporate payments problem, and Congress encountered many difficult and complex issues in crafting a legislative response.[15] Yet, after more than two years of investigation, deliberation, and consideration, including numerous competing bills, Congress completed its journey in 1977 and passed the first law in the world governing *domestic* business conduct with *foreign* government officials in *foreign* markets. Speaking on the House floor, a key Congressional leader summed up the journey and stated that the FCPA was "one of the more important pieces of legislation to be considered by the Congress."[16]

Forty years later, the FCPA remains important. Indeed, in the FCPA's modern era the Department of Justice has a specialized FCPA Unit and declared FCPA criminal prosecution to be among its "top priorities" out of the approximately nine hundred federal statutes that its Criminal Division enforces.[17] The SEC has also created a specialized FCPA Unit (one of only five specialized units at the SEC) and declared the FCPA to be a "vital part" of its overall enforcement program.[18] Because of the FCPA's "top priority" status, and its importance to international commerce, it is appropriate upon the FCPA's 40th anniversary to ask the salient question of whether the FCPA has been successful in achieving its objectives. To answer this question, success in the FCPA context must first be defined. Admittedly, this is no easy task as there are various plausible meanings of success in analyzing any law, including the FCPA.

III. PLAUSIBLE MEANINGS OF FCPA SUCCESS

As long as there has been law, inquisitive minds have contemplated the salient question of whether the law has been successful in achieving its objectives. In "The Effectiveness of Laws" it was noted:

> The remedy for every social ill, the mechanism for achieving every social goal, is–it seems–to make a law. But the ills continue, and the goals are not attained. Why?

14. *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. 13 (1976) (statement of Roderick Hills, Chairman, U.S. Sec. & Exch. Comm'n).

15. Koehler, *supra* note 1, at 951–80.

16. 123 CONG. REC. 38,778 (1977) (statement of Rep. Bob Eckhardt).

17. Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum 1–2 (Nov. 12, 2009), http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf.

18. Cheryl J. Scarboro, Chief of the Foreign Corrupt Practices Act Unit, Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), https://www.sec.gov/news/speech/2010/spch011310newsconf.htm.

> . . . .
>
> . . . A general test of the effectiveness of a law . . . is therefore to see how far it realizes its objectives, *i.e.* fulfills its purposes.[19]

In analyzing the FCPA's success, this Article is not unique, but rather consistent with other attempts to measure the success of other laws. For instance, attempts have been made to measure the success of drug laws,[20] environmental laws,[21] antitrust laws,[22] terrorism laws,[23] sexual assault laws,[24] and intellectual property laws.[25] In doing so, meanings of success had to be defined, and this was often no easy task as there can often be various plausible meanings of success.

For instance, in terms of drug laws it was noted:

> While there is no doubt that a key role of drug law enforcement is to remove drugs and high-risk offenders from the community, the most critical factor is what this actually achieves in the longer term. That is, a community that is less burdened by the impact of drugs, such as crime, illness, injury and death.[26]

In terms of environmental laws, it was noted:

> How best to measure the effectiveness of environmental enforcement is a long-standing question. Over the [approximate four decades] during which the U.S. Environmental Protection Agency (EPA) has engaged in enforcement work, the agency's system for evaluating its own enforcement efforts (as well as those of the states) has evolved considerably. Beginning with a simple counting of numbers of formal enforcement actions taken, the Agency has added measures such as the volume of pollutants cleaned up as a result of enforcement activities, the beneficial public health impacts of enforcement actions, and the number of years of incarceration of criminal defendants convicted of environmental crimes.[27]

19. Anthony Allott, *The Effectiveness of Laws*, 15 VAL. U. L. REV. 229, 230–33 (1981).

20. *See* Katie Willis et al., *Measuring the effectiveness of drug law enforcement*, AUSTL. INST. CRIMINOLOGY, 1–2 (2011).

21. *See* Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 ENVTL. L. REP. 10751, 10751 (2014).

22. Timothy Westrick et al., *U.S. Antitrust Criminal Enforcement: Recent Developments and Future Trends Post Realignment*, A.B.A. 2–3 (2014), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/us_antitrust_criminal_enforcement.pdf.

23. *See* Raphael Perl, CONG. RESEARCH SERV., RL 33160, COMBATING TERRORISM: THE CHALLENGE OF MEASURING EFFECTIVENESS (2002), https://fas.org/sgp/crs/terror/RL33160.pdf; Jenna McLaughlin, *FBI Won't Explain Its Bizarre New Way of Measuring Its Success Fighting Terror*, THE INTERCEPT (Feb. 18, 2016, 5:18 PM), https://theintercept.com/2016/02/18/fbi-wont-explain-its-bizarre-new-way-of-measuring-its-success-fighting-terror/.

24. *See* Joanne Archambault, *Evaluating and Measuring Law Enforcement Success*, NAT'L CTR. DOMESTIC & SEXUAL VIOLENCE 1, http://www.ncdsv.org/images/Evaluating_Measuring_Law_Enforcement_Success.pdf (last visited May 14, 2019).

25. *See* Sarah Laskow, *Does copyright law work?*, COLUM. JOURNALISM. REV. (Sept. 23, 2013), https://archives.cjr.org/cloud_control/empirical_ip.php.

26. *See* Willis et al., *supra* note 20.

27. *See* Mintz, *supra* note 21, at 10751.

In terms of antitrust laws, it was noted: "If an antitrust enforcement regime is being truly effective and creating a deterrent to cartel activity, shouldn't cases and fines actually decrease?"[28] In terms of terrorism laws, it was noted:

> The Federal Bureau of Investigation has quietly developed a new way to measure its success in the war on terror: counting the number of terror threats it has "disrupted" in a year. But good luck trying to figure out what that number means, how it was derived, or why it doesn't jibe with any other law enforcement statistic, most notably, the number of terror suspects actually charged or arrested.[29]

It was further noted: "common pitfall of governments seeking to demonstrate success in anti-terrorist measures is overreliance on quantitative indicators, particularly those which may correlate with progress but not accurately measure it, such as the amount of money spent on anti-terror efforts."[30]

Analyzing the FCPA's success is no different and not an easy task as there are various plausible meanings of success. Drawing on attempts to measure the success of other laws, the following meanings of success are identified and analyzed: "hard" enforcement metrics, "soft" enforcement metrics, and "modeling" metrics.

Before doing so, however, it is important not to equate measuring the FCPA's success with the position or inference that the FCPA is a bad law or ought to be repealed. To the contrary, in my 2010 Senate testimony during a hearing titled "Examining Enforcement of the Foreign Corrupt Practices Act," I noted: "The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for a very specific and valid reason . . . . That the FCPA is a fundamentally sound statute does not mean that FCPA enforcement is always fundamentally sound."[31]

Indeed, as the U.S. Trade Representative stated during FCPA reform efforts in the mid-1980s:

> Just because the [FCPA] spotlights a sensitive subject, some people might wish to turn a blind eye to its shortcomings rather than risk being accused of being soft on bribery, and that is a cop out. Retreating from controversy will not cure the law's deficiencies. . . . Is there any U.S. law that ought to be above such review and clarification, especially one that is as complex as the [FCPA].[32]

The answer should be no, and relevant to the question posed in this Article is the fact that less than ten years into the United Kingdom Bribery Act, the U.K. government is reviewing the effectiveness of its FCPA-like law. As stated by the Chair of the government committee examining the issue:

28. Westrick et al., *supra* note 22, at 5.

29. McLaughlin, *supra* note 23.

30. Perl, *supra* note 23.

31. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 13 (2010) (statement of Mike Koehler, Assistant Professor of Business Law, Butler University).

32. *The Foreign Trade Practices Act: Hearings Before the Subcomm. on Int'l Econ. Pol'y & Trade of the H. Comm. on Foreign Aff.*, 98th Cong. 22–23 (1983) (statement of William E. Brock, U.S. Trade Rep.).

> Seven years since it came into force, and with the majority of bribery cases being prosecuted under the Bribery Act 2010, now is the opportune time for post-legislative scrutiny. The Committee will examine the effectiveness of the Act, whether there has been stricter prosecution of corrupt conduct, a higher conviction rate, and a reduction in such conduct.[33]

IV. "HARD" ENFORCEMENT METRICS

One plausible meaning of FCPA success is analyzing various "hard" enforcement metrics, such as the quantity of FCPA enforcement actions, the quality of enforcement actions given how the FCPA is being enforced, as well as outcomes in actual FCPA actions when government enforcement agencies are put to their burden of proof. As highlighted in this section, if the success of the FCPA in achieving its objectives is analyzed through this lens, then the FCPA is not successful given that: the quantity of enforcement actions has increased, not decreased, over time; the quality of FCPA enforcement, both in terms of resolution vehicles and certain enforcement theories, is highly questionable; and the enforcement agencies have generally struggled when put to their burden of proof.[34]

A. Quantity of Enforcement Actions

Both the DOJ and SEC have specific FCPA websites[35] that track FCPA enforcement, and during most of the FCPA's modern era, enforcement agency officials frequently tout "hard" enforcement metrics as seeming indications of the FCPA's success. For instance, in 2011, the DOJ's Assistant Attorney General for the Criminal Divisions stated: "we have dramatically increased our enforcement of the FCPA" and "the numbers speak for themselves."[36] In 2013, the DOJ's Acting Assistant Attorney General for the Criminal Division stated: "our stellar FCPA Unit continues to go gangbusters, bringing case after case."[37] In 2016, the SEC's Chair stated: "The SEC's record enforcing the FCPA is very strong and 2016 is no exception. This fiscal year, the SEC has already filed seventeen actions against entities and individuals for FCPA violations, a nearly

33. Press release, House of Lords, Lords select committee appointed to examine Bribery Act 2010 (May 17, 2018), https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/house-of-lords-media-notices---2018/may-2018/lords-select-committee-appointed-to-examine-bribery-act-2010/.

34. *See infra* Sections IV.A, IV.B.

35. *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (last updated Feb. 3, 2017); *SEC Enforcement Actions: FCPA Cases*, SEC. EXCH. COMM'N, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified May 13, 2019).

36. Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Franz-Hermann Brüner Memorial Lecture at the World Bank (May 25, 2011), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-criminal-division-speaks-franz-hermann-br-ner.

37. *"Our Stellar FCPA Unit Continues to Go Gangbusters, Brining Case After Case"*, FCPA PROFESSOR (May 6, 2013), http://fcpaprofessor.com/our-stellar-fcpa-unit-continues-to-go-gangbusters-bringing-case-after-case/.

thirty percent increase from last year, and obtained more than $290 million in monetary remedies."[38]

In 2017, the DOJ's Deputy Assistant Attorney General stated:

> [T]he 40-year span of the FCPA's existence leaves no question that there has been continuous enforcement of the law. And that enforcement has steadily increased over time. . . . This brings us to the last 15 to 20 years of enforcement, which is, by any measure, the most robust period of FCPA enforcement. This era, which started under President George W. Bush and continued under President Obama, has seen an increase in the number of FCPA prosecutions, the number of resolutions, the amount of penalties and fines, and the number and lengths of sentences.[39]

Such emphasis on "hard" FCPA enforcement metrics by political appointees is not surprising—after all, rare is the government official who does not tout increased enforcement of the laws they are charged with enforcing. It has been noted that "law enforcement is big business" and that:

> [A]gencies seeking to build reputations as effective enforcers will tend to emphasize easily measurable accomplishments rather than more amorphous forms of success. . . .
>
> [F]inancial recoveries purport to convey information about the size or importance of the agency's enforcement program. . . .
>
> [H]igh recoveries (either in a single case or in the aggregate) can make an enforcement program appear effective. An agency that is trying to cultivate a reputation as an effective enforcer may therefore find special value in financial awards.[40]

This seemingly narrow emphasis by the government on "hard" FCPA enforcement metrics, however, is concerning particularly since this is how enforcement agency officials largely self-define themselves when leaving government service for lucrative positions in the private sector, helping business organizations navigate the enforcement climate they helped create. For instance, in 2013, the DOJ's press release upon the Assistant Attorney General for the Criminal Division leaving noted:

> Under [his] leadership[,] . . . [t]he Criminal Division has also substantially increased enforcement of the Foreign Corrupt Practices Act (FCPA), con-

38. Mary Jo White, Chair, SEC, Keynote Remarks at the International Bar Association Annual Conference Legal Practice Division Luncheon (Sept. 21, 2016), https://www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html.

39. Trevor N. Mcfadden, Deputy Assistant Attorney Gen., Remarks at the Global Investigations Review Conference (Feb. 16, 2017), https://anticorruptionblog.files.wordpress.com/2017/02/gir-speech-by-doj-daag-trevor-mcfadden.docx.

40. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 876–77 (2014).

> victing three dozen individuals for FCPA-related offenses–a record number – and entering into more than 40 corporate resolutions involving eight of the top 10 largest FCPA penalties in history.[41]

The number of FCPA enforcement actions brought during his tenure was also prominently mentioned in the press release of the law firm that hired him. It stated: "At the Justice Department, [he] increased enforcement of the FCPA, overseeing more than 40 corporate resolutions and eight of the top 10 largest penalties in U.S. history. The Criminal Division secured convictions of more than three dozen individuals on overseas corruption-related offenses, a department record."[42]

Likewise, in 2014, when the DOJ's FCPA Unit Chief left for private practice, the law firm that hired the individual stated: "Under his leadership, the FCPA Unit resolved more than 40 corporate cases, which include about two-thirds of the top 25 biggest corporate resolutions ever. Those matters resulted in approximately $1.9 billion in monetary penalties and the conviction of more than two dozen business executives and money launderers."[43]

Similarly, in 2017, when the SEC's FCPA Unit Chief left for private practice, the SEC's release stated:

> [Her] creativity and perseverance have led to truly outstanding results in the SEC's FCPA program . . . . Her leadership of the unit has led to many successes in the FCPA area. . . . Under [her] supervision of the FCPA unit, the SEC has brought 72 FCPA enforcement actions addressing a wide range of misconduct and resulting in judgments and orders totaling more than $2 billion in disgorgement, prejudgment interest, and penalties.[44]

Nonprofits and civil society groups focused on bribery and corruption laws also appear obsessed with "hard" enforcement metrics. For instance, in the OECD's 2010 review of U.S. enforcement of the FCPA, the OECD "commended the United States for its . . . substantial enforcement, and commitment from the highest levels of the U.S. Government" and noted that "the United States has investigated and prosecuted the most foreign bribery cases among the Parties to the Anti-Bribery Convention."[45] Further to the concept that "law enforcement is big

41. Press Release, DOJ., Assistant Attorney General Lanny A. Breuer Announces Departure from Department of Justice (Jan. 30, 2013), https://www.justice.gov/opa/pr/assistant-attorney-general-lanny-breuer-announces-departure-department-justice.

42. Covington & Burling, *DOJ Criminal Division Head Lanny A. Breuer Returns to Covington As Vice Chair*, CISION (Mar. 28, 2013, 11:00 AM), https://www.prnewswire.com/news-releases/doj-criminal-division-head-lanny-a-breuer-returns-to-covington-as-vice-chair-200434171.html.

43. Press Release, Charles E. Duross, Top Government FCPA Prosecutor Charles Duross to Join Morrison & Foerster from DOJ; Will Lead Global Anti-Corruption Practice (Jan. 27, 2014), https://www.mofo.com/resources/press-releases/top-government-fcpa-prosecutor-charles-duross-to-join-morrison-foerster-from-doj-will-lead-global-anti-corruption-practice.html.

44. Press Release, SEC, Kara Novaco Brockmeyer, Chief of FCPA Unit, to Leave SEC After 17 Years of Service (Apr. 4, 2017), https://www.sec.gov/news/press-release/2017-76.

45. Org. for Econ. Cooperation & Dev., *Phase 3 Report On Implementing The OECD Anti-Bribery Convention in the United States*, at 5, 11 (Oct. 15, 2010). Note however, that comparing U.S. enforcement of the FCPA to other nations enforcement of their FCPA-like laws is largely an "apples to oranges" comparison. To learn more, see Mike Koehler, *Ten Seldom Discussed Foreign Corrupt Practices Act Facts That You Need To Know*, 10 WHITE COLLAR CRIME REP. 347 (BNA) 1,10 (2015).

business," and most troubling from a public policy perspective, a 2010 report from Transparency International stated that certain bribery and corruption settlements in Western countries "should also make clear to laggard governments that investing in adequate enforcement can have substantial returns."[46] Regarding this cash cow dynamic, a former DOJ prosecutor commented on the global trend of increased enforcement as follows:

> I think a lot of it is looking at the numbers . . . I think a lot of the global anti-bribery movement is driven by regulators around the world saying, Okay, a German company just paid $300 million to the U.S. That's sort of funny to us. Where are we in this? I think there is some international pressure. There is the pressure of raising the bar, but there's also a very cynical pressure of raising money. We're in an economic climate today where I don't think there's a single government in the world that isn't struggling to find resource. This area has emerged, again, as a money making center, which is kind of bizarre.[47]

What is also bizarre is that the above-mentioned OECD Report, while loudly praising the U.S. for its "high level" of enforcement, quietly criticized and questioned many of the policies and enforcement theories which yield the "high level" of enforcement—an issue discussed later in this Article concerning the quality of FCPA enforcement.[48]

Unlike other plausible meanings of FCPA success discussed later that are difficult to measure, it is easy to measure the quantity of FCPA enforcement during the FCPA's first four decades, and set forth below are the number of core corporate FCPA enforcement actions brought in the FCPA's first four decades.[49]

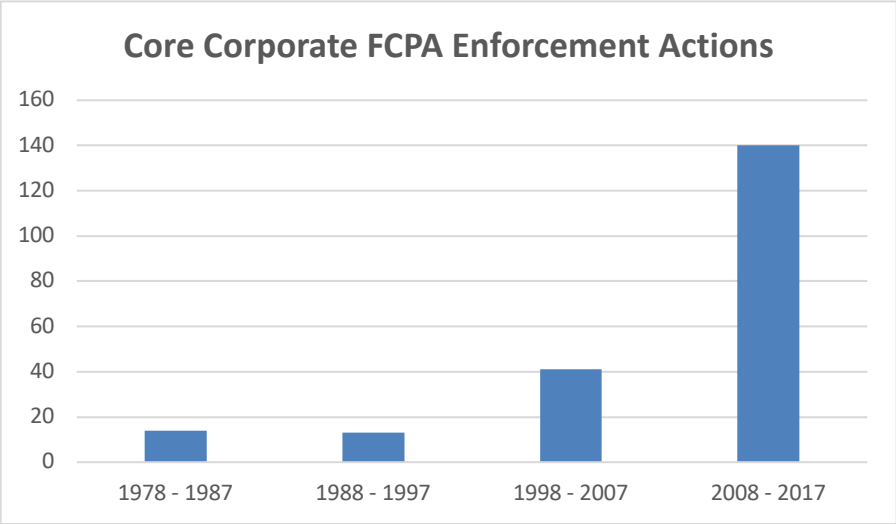
46. *Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention*, TRANSPARENCY INT'L (July 28, 2010), https://www.transparency.org/whatwedo/publication/progress_report_2010_enforcement_of_the_oecd_anti_bribery_convention.

47. MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 264 (2014).

48. Org. for Econ. Cooperation & Dev., *supra* note 45, at 5. For instance, the Report notes that the FCPA's language "does not specifically convey" that cases concerning "an operating license or permit to operate a business, or a reduction in tax or import duty" are in violation of the statute. *Id.* at 26. Yet, many FCPA enforcement actions are based on this theory. *See id.* Further, the Report notes that "due to an absence of explicit language in the definition of 'foreign official'" it is an open question whether employees of so-called state-owned or state controlled enterprises are "foreign officials" under the FCPA. *Id.* at 27. Yet, numerous FCPA enforcement actions "are" based on this theory. The Report notes that the increase in NPAs and DPAs "are one of the reasons for the impressive FCPA enforcement record in the U.S." yet also notes that these agreements are subject to little or no judicial scrutiny. *Id.* at 20.

49. *What is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), http://www.fcpaprofessor.com/what-is-an-fcpa-enforcement-action ("The core approaches focuses on [unique instances of] corporate conduct at issue regardless of whether the conduct at issue involve[d] a DOJ or SEC enforcement action or both (as is frequently the case), regardless of whether the corporate enforcement action involve[d] a parent company, a subsidiary or both (as is frequency the case), and regardless of whether the DOJ and/or SEC br[ought] any related individual enforcement action (as is occasionally the case)"). For additional information on this method of quantifying FCPA enforcement, see *id.* This method of computing FCPA statistics is consistent with the DOJ's approach, see *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), http://www.fcpaprofessor.com/friday-roundup-72 (quoting DOJ's FCPA Unit Chief Chuck Duross), and is a commonly accepted method used by other scholars in other areas. *See, e.g.*, Michael Klausner & Jason Hegland, *SEC Practice In Targeting and Penalizing Individual Defendants*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 3, 2013), http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/.

FIGURE 1



If "hard" enforcement metrics are a meaningful measure of the FCPA's success, do these numbers demonstrate that the FCPA is a success or failure? Perhaps these numbers represent success if one is an FCPA prosecutor judging themselves on the quantity of enforcement actions brought or an FCPA Inc. participant with an interest in expanding their niche practice. The FCPA, however, was never intended to be a "full employment act," but rather to reduce bribery in the global marketplace.[50]

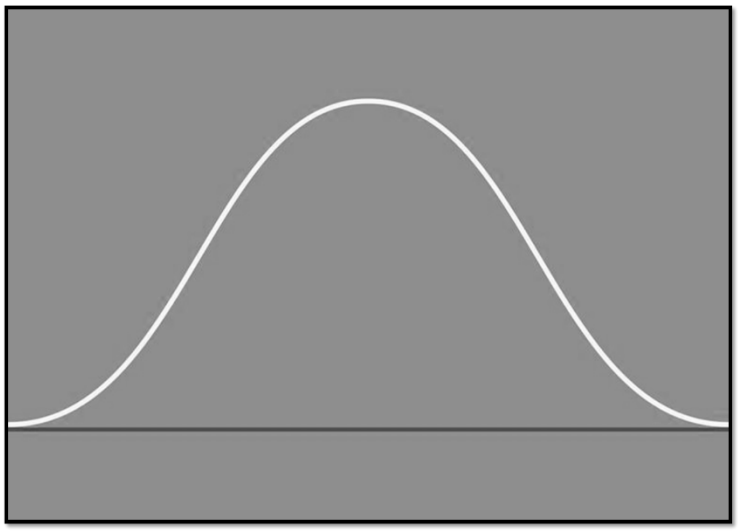
After all, Congressional leaders stated in enacting the FCPA that it "would end corporate bribery"[51] and that its goal was "the elimination of foreign bribery."[52] Granted, politicians have long been known for making optimistic, aspirational statements. If the FCPA is truly successful in achieving its objectives, however, should enforcement decrease—not increase—over time? Perhaps the below bell curve is what Congressional leaders had in mind 40 years after enacting the FCPA, and perhaps this is what enforcement of a successful law should look like.

50. Ashby Jones, *Is the FCPA Just a Full-Employment Act for the Private Bar?*, WALL ST. J.L. BLOG (May 7, 2010, 6:08 PM), https://blogs.wsj.com/law/2010/05/07/the-fcpa-little-more-than-a-full-employment-act-for-the-private-bar/?ns=prod/accounts-wsj.

51. 122 CONG. REC. 12,099 (1976) (statement of Sen. Proxmire).

52. H.R. REP. NO. 95-640, at 19 (1977).

FIGURE 2



In other words, enforcement starts off slow as the enforcement agencies and business organizations alike absorb the law and its new expectations and challenges. Once absorbed and with the enforcement agencies having sufficient resources, one should expect enforcement activity to increase. If a law is successful in achieving its objectives, however, one should expect enforcement activity to drop over time.

But, as the above chart demonstrates, the opposite has occurred in the FCPA context, and there has been more enforcement in the FCPA's fourth decade compared to its third decade, and more enforcement in the FCPA's third decade compared to its second decade. Granted, there are several practical reasons that help explain the general increase in FCPA enforcement over time, but the numbers are what they are and suggest that the FCPA has not been successful in achieving its objectives.[53]

But then again, perhaps "hard" enforcement metrics are not a useful way to analyze whether a law has been successful in achieving its objectives. Notwithstanding the previously highlighted statements from DOJ and SEC enforcement

53. Practical reasons that help explain the general increase in FCPA enforcement over time include the following: (i) the FCPA is a law logically implicated when business organizations subject to the law have points of contact with "foreign officials" in the global marketplace and with each passing year the extent of international business activity seems to be growing; (ii) the FCPA itself was amended in 1998 to add a third prong to the FCPA's anti-bribery provisions making all business organizations in the world—to the extent certain jurisdictional elements are met—potentially subject to FCPA prosecution; (iii) in 2004 the FCPA enforcement agencies introduced alternative resolution vehicles to the FCPA context giving the enforcement agencies more options in resolving enforcement actions; (iv) also in 2004 Sarbanes Oxley Section 404 went live requiring issuers to assess and report through executive officer certifications on the effectiveness of internal controls over financial reporting; (v) international law enforcement cooperation has increased and several FCPA enforcement actions have originated from foreign, not U.S., law enforcement investigations; and (vi) new and expansive enforcement theories continue to emerge.

agency officials, with increasing frequency, current enforcement officials are rightly acknowledging the deficiencies of measuring the success of a law by simply tallying up the number of enforcement actions brought and settlement amounts secured. For instance, in a 2018 speech, SEC Commissioner Hester Peirce stated, under the heading "The Danger of Playing to the Numbers," as follows:

> In the past, we sometimes have taken a less resource-conscious approach—a more-is-always-better approach. From 2013 to 2016, for example, the SEC embraced a "broken windows" philosophy of enforcement. This philosophy was well-intentioned—punish the small violations to make sure that people are always on their toes and to demonstrate that the SEC is serious about enforcement. Punishing every small violation, however, means casting discretion aside in favor of making the SEC look tough. Violations are not all equally serious. . . .
>
> An enforcement program that pursues every minor violation might appear, at first glance, to be a successful one. Under such an approach, the raw number of enforcement actions is likely to be high. A key metric to gauge success becomes the number of enforcement actions. By holding up raw numbers as the measure of success, the broken-windows-era SEC felt pressure to exceed its previous year's enforcement actions. It was an arms race as our lawyers rushed to settle a case or sprint to the courthouse—or the administrative law judge — to file the next action, especially as the SEC's fiscal year end neared: our own version of earnings management.
>
> . . . .
>
> Today, the SEC, no longer measures its success by tallying up enforcement statistics and is making a more concerted effort to bring only meaningful enforcement actions.[54]

Likewise, in a 2018 speech, Stephanie Avakian (Co-Director of the SEC's Enforcement Division) pondered the meaning of success and stated:

> [W]hat does it mean for a civil law enforcement program like ours to be "successful"? Is it simply a numbers exercise? Or something more? We have spent a lot of time thinking about this, particularly at a time when resources are limited and we face many challenges. This exercise takes on even more meaning at this time of year; in the coming weeks, as has happened in past years, I expect to see many commentators analyze the SEC's enforcement performance over the past fiscal year and draw conclusions about the effectiveness of SEC enforcement based on their slicing and dicing of the various numbers.
>
> Let me be emphatic about this. Steve [Peikin, also Co-Director of Enforcement] and I fundamentally reject the premise these analyses embrace –that numbers–standing alone–can adequately measure the success or impact of an enforcement program. Statistics such as the number of actions the SEC brought in a fiscal year and the dollar amount of judgments and

54. Hester M. Peirce, Comm'r, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118 (footnotes omitted).

> orders obtained in that year are interesting so far as they go, but they only tell us so much. Put simply, statistics do not provide a full and meaningful picture of the quality, nature, and effectiveness of the Division's efforts.
>
> So, if numbers do not tell the story, what does? Asked another way, how should one measure the SEC's success as the primary civil enforcer of the federal securities laws? Since being appointed Co-Directors, we have asked ourselves that question many times, and we have maintained that the best way to assess the SEC Enforcement Division's effectiveness is by looking at the nature and quality of the SEC's actions. Are we bringing meaningful cases that send clear and important messages to market participants and investors? Are we making an impact?
>
> . . . .
>
> . . . While statistics provide some information, they do not present a real, full picture of the nature or effectiveness of an enforcement program. Any assessment that suggests our effectiveness should be measured solely based on the number of cases we bring over any particular period of time is misguided. We are committed to *quality*: to have as broad an impact on the landscape we police as possible; to bring cases that send messages of general and specific deterrence; and to seek and obtain remedies tailored to the conduct at issue and the message we want to send. For every enforcement action brought by the Commission, the market should be able to understand why the Commission brought an enforcement action, understand the Commission's view of the conduct at issue, and understand why the Commission's action was in the interest of investors.[55]

Similarly, in a 2018 speech, Steven Peikin (Co-Director of the SEC's Division of Enforcement) stated:

> Many of those who closely follow the work of the Enforcement Division tend to evaluate its effectiveness based on metrics such as the number of enforcement actions the Commission brings each year and the total amount of penalties and disgorgement ordered by the Commission or federal district courts. These quantitative metrics are of some value in assessing the work of the Division; they certainly provide a rough measure of our overall activity level. But statistics such as these do not provide a full and meaningful picture of the quality, nature, and effectiveness of our efforts. Indeed, in my view, when numbers are the primary lens through which our work is viewed, that perspective can be counterproductive.[56]

While none of the above speeches were FCPA-specific, they are certainly FCPA-relevant, and current enforcement officials are spot-on in their observations that "hard" enforcement metrics alone are "misguided" and "counterproductive." The current enforcement officials are also spot-on that the quality of enforcement matters and that another "hard" enforcement metric worthy of analysis is the nature and quality of actual FCPA enforcement actions.

55. Stephanie Avakian, Co-Dir., Div. of Enf't, SEC, Measuring the Impact of the SEC's Enforcement Program (Sept. 20, 2018), https://www.sec.gov/news/speech/speech-avakian-092018.

56. Steven Peikin, Co-Dir., Div. of Enf't, SEC, Remedies and Relief in SEC Enforcement Actions (Oct. 3, 2018), https://www.sec.gov/news/speech/speech-peikin-100318.

B. Quality of Enforcement Actions

One deficiency in measuring the FCPA's success through quantity of enforcement actions is that not all enforcement actions are the same. To use a speeding analogy, if the speed limit is sixty-five, there is a material difference between a driver going sixty-eight compared to a driver going ninety-eight, just as there is a material difference between a driver speeding in a congested urban environment compared to a driver speeding on a deserted rural highway. While all scenarios may result in a speeding ticket, the nature and quality of these legal infractions are materially different.

The same is true when it comes to the nature and quality of many FCPA enforcement actions. For instance, in the $800 million coordinated DOJ and SEC enforcement action against Siemens, the government found:

> for much of its operations across the globe, "bribery was nothing less than standard operating procedure for Siemens";
>
> the "pattern of bribery [by Siemens] was unprecedented in scale and geographic reach";
>
> Siemens had a "corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company"; and
>
> compliance, legal, internal audit, and corporate finance departments of the company played a significant role in the conduct at issue.[57]

On a much-smaller, yet still egregious, scale, the approximate $12 million enforcement action against BizJet International (a small, privately held company) involved conduct by executives at the highest levels of the company as well as the Board of Directors being specifically informed by certain executives that the company "would pay referral fees in order to gain market share in various foreign countries."[58]

On the opposite end of the spectrum are FCPA enforcement actions against Nu-Skin Enterprises and Nordion. The approximate $785,000 Nu-Skin enforcement action involved the following salient facts:

> the company identified the FCPA risks inherent in a charitable donation and advised its Chinese subsidiary to consult with outside U.S. legal counsel based in China to ensure that the donation complied with the FCPA; and outside counsel made recommendations to the Chinese subsidiary, but subsidiary employees acted contrary to counsel's recommendations and otherwise failed to disclose certain relevant information to the company.[59]

Based on these findings, the government found that Nu-Skin violated the FCPA's books and records and internal controls provisions because it "did not ensure that

57. Press Release, DOJ, "Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations" (Dec. 15, 2008).

58. *Where Was The BizJet Board?*, FCPA PROFESSOR (Apr. 11, 2013), http://fcpaprofessor.com/category/bizjet-international/.

59. Nu Skin Enters., Exchange Act Release No. 78,884, 115 SEC Docket 46 (Sept. 20, 2016), https://www.sec.gov/litigation/admin/2016/34-78884.pdf.

adequate due diligence was conducted by the Chinese subsidiary with respect to charitable donations to identify links to government or political party officials and to prevent payments intended to improperly influence such persons."[60]

The $375,000 Nordion enforcement action involved the following salient facts:

> a single employee at the company "conspired [with agent] to use a portion of the funds Nordion paid the agent to bribe Russian government officials to obtain approval" for company product;
>
> the individual received kickbacks from the agent and otherwise "hid the scheme from Nordion" through, among other things, misrepresentations to his employer; and
>
> through his conduct the individual "secretly enrich[ed] himself" and received "at least $100,000 for his role in the arrangement which was not disclosed to Nordion."[61]

Based on these findings, the government found that Nordion violated the FCPA's books and records and internal controls provisions because:

> Nordion failed to record those payments in a manner that accurately and fairly reflected the transactions in its books and records. Nordion also failed to devise and maintain adequate internal accounting controls to provide sufficient reassurances that Nordion funds were used as authorized, that third-party agents were appropriately vetted, and that Nordion adequately trained its employees to conduct business in countries with significant corruption risks.[62]

When analyzing the FCPA through quantity of enforcement actions, the Siemens, BizJet, Nu-Skin and Nordion enforcement actions all count as one FCPA enforcement action. The nature and quality of the enforcement actions, however, were materially different.

Further relevant to the nature and quality of enforcement actions is the undisputed legal point that the FCPA's anti-bribery provisions, as well as the books and records and internal controls provisions, have specific legal elements that must be met in order for a violation to occur. With increasing frequency, however, the FCPA enforcement agencies seem to have converted the law into an all-purpose corporate ethics statute with enforcement actions representing in some instances a game of corporate risk aversion rather than actual provable FCPA violations. A dean of the FCPA bar observed:

> One reality is the enforcement agencies' [FCPA] views on issues and enforcement policies, positions on which they are rarely challenged in court. The other is what knowledgeable counsel believe the government could sustain in court, should their interpretations or positions be challenged. The

60. *Id*.

61. Mikhail Gourevitch, Exchange Act Release No. 77,288, 2016 WL 825661 (Mar. 3, 2016); Nordion (Canada) Inc., Exchange Act Release No. 77,290, 2016 WL 825662 (Mar. 3, 2016).

62. Mikhail Gourevitch, Exchange Act Release No. 77,288, 2016 WL 825661 (Mar. 3, 2016); Nordion (Canada) Inc., Exchange Act Release No. 77,290, 2016 WL 825662 (Mar. 3, 2016).

> two may not be the same. The operative rules of the game are the agencies' views unless a company is prepared to go to court or to mount a serious challenge within the agencies.[63]

For instance, in the FCPA's modern era, there have been many enforcement actions regarding foreign licenses, permits, and other bureaucratic interactions with "foreign officials."[64] Congress specifically chose to exempt such points of contact from the FCPA's reach through a facilitation payments exception, which states that the anti-bribery provisions "shall not apply to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by" a foreign official.[65] In pertinent part, the FCPA defines "routine governmental action" to mean "an action which is ordinarily and commonly performed by a foreign official in obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country."[66]

Notwithstanding this explicit statutory language, in the minds of many, the enforcement agencies have essentially repealed this exception through its enforcement theories. Indeed, the SEC's former Assistant Director of Enforcement has called the facilitation payment exception "illusory" and stated:

> The drafters of the FCPA recognized that such demands for 'grease payments' are a reality in many countries, and accordingly made clear that certain payments made to expedite the approval of permits or licenses, or to prompt the expeditious performance of similar low-level ministerial duties, fell outside the ambit of the statute's anti-bribery provisions. Yet that exception for 'facilitating payments' . . . is becoming harder and harder to rely on. . . . The DOJ and SEC have pressed a narrow view of the exception in recent years . . . Of course, the fact that the FCPA's twin enforcement agencies have treated certain payments as prohibited despite their possible categorization as facilitating payments does not mean a federal court would agree. But because the vast majority of enforcement actions are resolved through DPAs and NPAs, and other settlement devices, these cases never make it to trial. As a result, the DOJ and the SEC's narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts—or Congress—would agree.[67]

For the reasons highlighted above, the many FCPA enforcement actions involving foreign licenses, permits, and other bureaucratic interactions with "foreign officials" are of suspect quality. Yet, the nature and quality of these actions are

63. Homer E. Moyer, Jr., *Hot Topics in General Counsel/Corporate Secretary Becoming an FCPA-Savvy Director*, INTERCONTINENTAL EXCHANGE (Jan. 3, 2014), https://www.nyse.com/corporate-services/nysegs/hot-topics/general-counsel-corporate-secretary/becoming-fcpa-savvy-director.

64. *See, e.g.*, Press Release, SEC, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), https://www.sec.gov/news/pressrelease/2016-109.html.

65. 15 U.S.C. § 78dd-1(b) (2018).

66. *Id.* § 78dd-1(f)(3)(A).

67. Richard Grime & Sara Zdeb, *The Illusory Facilitating Payments Exception: Risks Posed By Ongoing FCPA Enforcement Actions And The U.K. Bribery Act, in* THE FOREIGN CORRUPT PRACTICES ACT 2011 (2011).

not captured when viewing the FCPA through the lens of quantity of enforcement.

Likewise, many FCPA enforcement actions finding violations of the FCPA's books and records and internal controls provisions are of suspect quality. For instance, the books and records and internal controls provisions specifically state that issuers shall: (1) "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly *reflect the transactions and dispositions of the assets of the issuer*;" and (2) "devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances* that":

> *transactions* are executed in accordance with management's general or specific authorization;
>
> *transactions* are recorded as necessary (I) to permit preparation of *financial* statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; and
>
> access to *assets* is permitted only in accordance with management's general or specific authorization; and
>
> the recorded accountability for *assets* is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[68]

The FCPA defines "reasonable assurances" and "reasonable detail" to mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[69] Regarding the books and records provisions, the SEC has stated:

> [R]ecords which are not relevant to accomplishing the objectives specified in the statute for the system of internal controls are *not* within the purview of the recordkeeping provision. . . .
>
> . . . .
>
> . . . [T]his provision is not an independent and unrestrained mandate to the [SEC] to establish novel or unprecedented corporate recordkeeping standards; it is, rather, an integral part of Congress' efforts to assure that the business community *records transactions and assets* in such a way as to maintain adequate control over them. And, this leads to two important conclusions: First, the [FCPA] does not establish any absolute standard of exactitude for corporate records. And, second, *records which are not related to internal or external audits or to the four internal control objectives set forth in the [FCPA] are not within the purview of the [FCPA's] accounting provisions*.[70]

68. 15 U.S.C. § 78m(b)(2)(B)(i)–(iv) (2018) (emphasis added).

69. *Id.* § 78m(b)(7).

70. Harold M. Williams, Chairman, SEC, The Accounting Provisions of the Foreign Corrupt Practices Act: an Analysis, Address at SEC Developments Conference American Institute of Certified Public Accountants (Jan. 13, 1981), https://www.sec.gov/news/speech/1981/011381williams.pdf (emphasis added).

Likewise, in the 2012 FCPA Guidance, the DOJ and SEC state:

> The FCPA's accounting provisions operate in tandem with the anti-bribery provisions and prohibit off-the-books *accounting*. Company management and investors rely on a *company's financial statements* and internal accounting controls to ensure transparency in the *financial health* of the business, the risks undertaken, and the transactions between the company and its customers and business partners. The accounting provisions are designed to "strengthen the accuracy of the *corporate books and records and the reliability of the audit process* which constitute the foundations of our system of corporate disclosure."[71]

As to the internal controls provisions, *SEC v. World-Wide Coin*, the only judicial decision to directly address the substance of the provisions, states:

> The definition of accounting controls does comprehend *reasonable*, but not absolute, assurances that the objectives expressed in it will be accomplished by the system. . . . It does not appear that either the SEC or Congress, which adopted the SEC's recommendations, intended that the statute should require that each affected issuer install a *fail-safe* accounting control system at all costs.[72]

Similarly, the SEC's most extensive guidance on the internal controls provisions state in pertinent part:

> The Act does *not* mandate any particular kind of internal controls system. The test is whether a system, taken as a whole, *reasonably* meets the statute's specified objectives. "Reasonableness,' a familiar legal concept, depends on an evaluation of all the facts and circumstances.
>
> . . . .
>
> . . . The accounting provisions principal objective is to reaching *knowing or reckless conduct*.[73]

Despite the above statutory language, judicial decision, and enforcement agency guidance, the enforcement agencies seemingly take the position that any false or misleading record in a company is actionable. For instance, in the BHP Billiton enforcement action, the objectionable records were "internal forms" that employees prepared in order to invite government officials to the Olympics (of which BHP Billiton was an official sponsor) because the forms did not in reasonable detail accurately and fairly reflect pending negotiations or business dealings with the government official at the time of the invitation.[74] The JPMorgan enforcement action focused on alleged improper hiring and internship practices in Asia and the objectionable records were "inaccurate compliance questionnaires" containing false and incomplete information which failed to disclose the intended, improper purpose of making certain client referral hires."[75]

71. S. REP. NO. 95-114, at 7 (1977) (emphasis added).

72. S.E.C. v. World-Wide Coin Investments, Ltd., 567 F. Supp. 724, 751 (N.D. Ga. 1983) (emphasis added).

73. Foreign Corrupt Practices Act of 1977, Exchange Act Release No. 17500, 46 Fed. Reg. 11544, 11545 (Jan. 29, 1981) (emphasis added).

74. BHP Billiton Ltd., SEC Release No. 74998, File No. 3-16546 (ALJ May 20, 2015).

75. JP Morgan Chase & Co., Exchange Act Release No. 79335, File No. 3-17684 (ALJ Nov. 17, 2016).

Likewise, despite the above statutory language, judicial decision, and enforcement agency guidance, the enforcement agencies seemingly take the position that if alleged improper payments occurred somewhere within a business organization (even if in a distant subsidiary or unit), then issuer internal controls were deficient. For instance, Hewlett-Packard (a technology company with over 300,000 employees worldwide) resolved a $108 million enforcement action based on the following government finding: "HP Co.'s indirect, wholly-owned subsidiaries in Russia, Mexico and Poland, by and through their employees, agents and intermediaries, made unlawful payments to various foreign government officials to obtain business. These payments were also falsely recorded in the subsidiaries' books and records and, ultimately, in HP Co.'s books and records."[76]

Yet in the resolution documents, the government acknowledged the following about HP's internal control environment at the time of the alleged improper conduct:

> HP had existing FCPA and related policies and procedures in place and all relevant employees received training on the policies;
>
> HP had existing policies and procedures in place related to commission payments to channel partners, due diligence of channel partners, and other tracking policies regarding channel partners;
>
> HP had an existing approval process in place that applied to all service-related projects valued at greater than $500,000 anywhere in the world and as part of that process HP managers questioned relevant subsidiary employees at questionable information; and
>
> HP had an existing SOX certification and sub-certification process in place as relevant to the referenced subsidiaries.[77]

It seems quite clear that the government would have found violations of the internal controls provisions if:

> HP did not have FCPA policies relevant to all employees;
>
> HP did not have policies relevant to third party commission payments and due diligence of third parties; or
>
> HP did not have an approval process or SOX certification and sub-certification process.[78]

Although the government found that HP did these things, it still found HP to be in violation of the accounting provisions because a "small fraction" of employees at certain foreign subsidiaries engaged in covert means to willfully circumvent HP's internal controls.[79] Among the covert means used by this "small fraction"

76. *HP And Related Entities Resolve $108 Million FCPA Enforcement Action*, FCPA PROFESSOR (Apr. 10, 2014), http://fcpaprofessor.com/hp-and-related-entities-resolve-108-million-fcpa-enforcement-action/.

77. *Id*.

78. *Id.*

79. *Id*.

of employees was communicating through anonymous e-mail accounts and prepaid mobile telephones, with a subsidiary employee and alleged foreign official driving around in vehicles in "remote locations" and typing "messages in a text file, passing the computer between themselves."[80] According to the government, "communications were made in this fashion to avoid possible audio recording of the discussions by hidden devices, and to circumvent HP's internal controls."[81]

The above FCPA enforcement actions against BHP Billiton, JPMorgan, and HP are difficult to reconcile with actual legal authority and even enforcement agency guidance relevant to the FCPA's books and records and internal controls provisions. The nature and quality of these enforcement actions, however, are not captured when viewing FCPA enforcement through the lens of the quantity of enforcement.

Perhaps most concerning when it comes to certain FCPA enforcement actions involving the internal controls provisions is that the government does not even invoke the correct legal standard. For instance, in several enforcement actions, the SEC has found that issuer companies have failed to "prevent or detect" alleged improper conduct.[82] As highlighted above, though, the FCPA's internal controls do not require issuers to "prevent or detect" improper payments. Rather, the statutory standard is to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that" certain financial objectives are met with the FCPA specifically defining the terms "reasonable assurances" and "reasonable detail" to "mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[83] Once again, however, the nature and quality of these enforcement actions are not captured when viewing FCPA enforcement through the lens of the quantity of enforcement.

Other issues also impacting the nature and quality of FCPA enforcement actions include enforcement actions involving minute actors within a large business organization as well as enforcing actions concerning very old conduct. For instance, the Legg Mason enforcement action was based on conduct that occurred nine to fourteen years prior to the enforcement action by "only two mid-to-lower level employees" of a company subsidiary.[84] Such FCPA enforcement actions are not unusual. For instance, an enforcement action against medical device company Biomet concerned conduct twelve years prior to the enforcement action; an enforcement action against pharmaceutical company Pfizer concerned conduct fifteen years prior to the enforcement action; an enforcement action against trading and investment firm Marubeni concerned conduct seventeen years prior to the enforcement action;[85] and an enforcement action against oil

80. *Id*.

81. *Id*.

82. *See, e.g.*, Complaint ¶1, SEC v. Schering-Plough Corp., No. 1:04-cv-00945 (D.D.C. June 9, 2004).

83. In re Legg Mason, Inc., Exemptive Letter, 8 Foreign Corrupt Prac. Act Rep. § 41:13 (2d ed.) (June 4, 2018).

84. *Id*.

85. *Next Up–Biomet*, FCPA PROFESSOR (Mar. 27, 2012), http://fcpaprofessor.com/next-up-biomet; *Next Up–Pfizer*, FCPA PROFESSOR (Aug. 8, 2012), http://fcpaprofessor.com/next-up-pfizer; Press Release, DOJ,

and gas company Total concerned conduct eighteen years prior to the enforcement action.[86] So old was the conduct in the Total enforcement action that the government made the unusual statement in the resolution document that "evidentiary challenges" were present for both parties given that "most of the underlying conduct occurred in the 1990s and early 2000s."[87]

Commenting on this concerning dynamic of modern FCPA enforcement, a former high-ranking DOJ enforcement official called this "The Foreign Bribery Sinkhole at Justice" and stated:

> The Justice Department needs to do more than churn out resolutions to foreign bribery cases notable only for their record-breaking penalties.[88] The interests of justice are neither served nor advanced when FCPA investigations routinely drag on for five or more years. Rigorous and prompt FCPA enforcement with respect to current bribery schemes can have a dramatic impact on the insidious and corrosive effect of corruption overseas.[89]

Yet when FCPA enforcement actions concern conduct occurring over many years, in some cases decades ago, the impact of enforcement is diminished as is the FCPA's success in best achieving its objectives. Once again, however, this dynamic is not captured when viewing FCPA enforcement through the lens of the quantity of enforcement.

As referenced earlier, the vast majority of corporate enforcement actions are resolved through alternative resolution vehicles such as non-prosecution agreements ("NPAs"), deferred prosecution agreements ("DPAs"), administrative actions, and with increasing frequency so-called "declinations with disgorgement."[90] The common thread in all of these resolution vehicles is the absence of any judicial scrutiny—or in the case of DPAs meaningful judicial

Marubeni Corp. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $54.6 Million Criminal Penalty (Jan. 17, 2012).

86. *"Total"ly Milking the FCPA Cash Cow?*, FCPA PROFESSOR (June 3, 2013), http://fcpaprofessor.com/totally-milking-the-fcpa-cash-cow/ (containing links to original source documents). Ordinarily, statute of limitations are the remedy the law provides for long-draw out investigations. However, in the FCPA cooperation seems to be the name of the game and companies under FCPA scrutiny typically toll the statute of limitations or waive statute of limitations defense to demonstrate cooperation to the enforcement agencies. *See* Breon Peace, Ryan Becker & Elizabeth Hanley, *The FCPA Statute of Limitations—A Way Out for Wal-Mart?*, BLOOMBERG L. (Sept. 27, 2012).

87. *"Total"ly Milking the FCPA Cash Cow?*, *supra* note 86.

88. Paul Pelletier, Opinion, *The Foreign-Bribery Sinkhole at Justice*, WALL ST. J. (Apr. 20, 2015, 7:27 PM), https://www.wsj.com/articles/the-foreign-bribery-sinkhole-at-justice-1429572436.

89. Paul Pelletier, *Lengthy and Costly FCPA Investigations Disserve Both Business and Justice*, THOMSON REUTERS: LEGAL SOLUTIONS BLOG (May 22, 2015), http://blog.legalsolutions.thomsonreuters.com/current-awareness-2/lengthy-and-costly-fcpa-investigations-disserve-both-business-and-justice/.

90. *DOJ FCPA Enforcement—2017 Year in Review*, FCPA PROFESSOR (Jan. 16, 2018), http://fcpaprofessor.com/doj-fcpa-enforcement-2017-year-review/ [hereinafter *DOJ FCPA Enforcement*] (detailing resolution vehicles used in 2017 DOJ corporate enforcement actions along with historical comparisons); *SEC FCPA Enforcement—2017 Year in Review*, FCPA PROFESSOR (Jan. 9, 2018), http://fcpaprofessor.com/sec-fcpa-enforcement-2017-year-review/ [hereinafter *SEC FCPA Enforcement*] (detailing resolution vehicles used in 2017 SEC corporate enforcement actions along with historical comparisons); *see also* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC DAVIS L. REV. 497, 499 (2015).

scrutiny.[91] This dynamic of FCPA enforcement, which first appeared in 2004 and has become more prominent since, is also relevant to analyzing the nature and quality of FCPA enforcement actions.[92] Once again, however, this aspect of FCPA enforcement is not captured when viewing FCPA enforcement through the lens of the quantity of enforcement.

Prior to NPAs and DPAs becoming the dominant way for the DOJ to resolve corporate FCPA scrutiny, the DOJ had two choices when a business organization was the subject of legal scrutiny. The two choices, which have served as the foundation of the U.S. criminal justice system for nearly a century when corporate criminal liability was first recognized, were either to charge the entity with a legal violation or to not charge. This binary option resulted in high-quality FCPA enforcement.

In 2004, the DOJ used an alternative resolution vehicle for the first time in an FCPA enforcement action against InVision Technologies, Inc. As stated in the InVision NPA, the DOJ "agreed not to prosecute InVision under the Foreign Corrupt Practices Act . . . for conduct that *potentially* violates the FCPA based on certain foreign transactions and attempted transactions conducted by InVision in [Thailand, China, and the Philippines]."[93] At this time, the unique way in which the InVision enforcement action was resolved did not generate much attention, although certain astute FCPA commentators noted perhaps a new trend of the DOJ's "use of more creative methods in resolution of criminal cases" and further noted that the "DOJ appears to have adopted a new approach."[94]

91. An NPA is a privately negotiated agreement between the DOJ and a business organization. These agreements, while often made public but not filed in court, take the form of a letter agreement from the DOJ to a business organization's lawyer and generally include a brief, often times bare-bones, statement of facts replete with legal conclusions that the company acknowledges responsibility for, as well as a host of compliance undertakings that the company agrees to implement. Because an NPA is not filed with a court, there is absolutely no judicial scrutiny of these agreements, including the statement of facts and legal conclusions that serve as the foundation of the agreement. Thus, there is no independent review to determine if evidence exists to support the essential elements of the "crime" not prosecuted or to determine whether valid and legitimate defenses are relevant to the alleged conduct. In other words, when utilizing an NPA, the DOJ occupies the role of prosecutor, judge, and jury all at the same time. A DPA, on the other hand, is filed with a court and has the look and feel of a pleading, although the factual allegations are likewise often bare-bones and replete with legal conclusions. Like NPAs, DPAs are also the result of privately negotiated agreements between the DOJ and a business organization's lawyer. In exchange for the DOJ agreeing to defer prosecution of the crime alleged (usually for an eighteen-month to three-year period), the company acknowledges responsibility for the alleged conduct and agrees to implement a host of compliance undertakings. Because a DPA is filed with a court, these agreements, at least in theory, could be subject to meaningful judicial scrutiny. A 2009 report by the Government Accountability Office ("GAO"), however, concluded that judicial scrutiny of DPAs was essentially nonexistent as well. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009), http://www.gao.gov/assets/300/299781.pdf [hereinafter CORPORATE CRIME].

92. Koehler, *supra* note 90, at 499.

93. *See* Letter from Joshua R. Hochberg, Chief of Fraud Section, DOJ, to Brad D. Brian, Munger, Tolles & Olson LLP 1 (Dec. 3, 2004), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04invisiontech-agree-ge.pdf.

94. *Recent Trends and Patterns in FCPA Enforcement*, Shearman & Sterling LLP 1, 4 (Mar. 2006), https://www.shearman.com/~/media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT_032706.pdf.

An open question regarding this new approach, however, concerns the quality of corporate FCPA enforcement resolved through alternative resolution vehicles, including whether such enforcement actions necessarily represent provable FCPA violations. While many issues regarding FCPA enforcement remain opaque other than what the government chooses to describe in the final resolution agreement, one aspect of FCPA enforcement that is transparent and thus can be measured is the extent to which company employees are also charged in connection with a corporate FCPA enforcement action. After all, business organizations can only act through employees and agents, and if a business organization resolves an FCPA enforcement action, it would seem to suggest that provable facts exist that a real person acted in violation of the FCPA. Indeed, in the words of DOJ's Deputy Assistant Attorney General, "corporations do not act criminally, but for the actions of individuals."[95] Likewise, the DOJ's Assistant Attorney General stated: "corporations do not act, but for the actions of individuals. In all but a few cases, an individual or group of individuals is responsible for the corporation's criminal conduct."[96]

Nevertheless, in the FCPA's modern era (that is, since alternative resolution vehicles began to flourish circa 2008), there is a wide gap between corporate enforcement and individual enforcement. Specifically, approximately 80% of corporate FCPA enforcement actions lack related individual charges against company employees.[97] Some people have responded to this gap by asking "but why was nobody charged."[98] Another way to respond to the same question, as I did during the Senate's 2010 FCPA hearing, is to question the quality and legitimacy of corporate enforcement actions resolved through alternative resolution vehicles. In other words, perhaps the more appropriate question regarding the gap of individual FCPA charges in connection with most corporate enforcement actions is not "but why was nobody charged," but rather, do alternative resolution vehicles necessarily represent provable FCPA violations?

In flipping the salient question, it is important to recognize that unlike business organizations, individuals can be put in jail and have their liberty as well as personal assets and reputation at stake in an FCPA enforcement action. Thus, individuals are more likely to contest FCPA charges, put the enforcement agencies to burdens of proof at trial, and potentially expose aggressive legal theories or interpretation of facts giving rise to the related enforcement action against the

95. Press Release, DOJ, Deputy Assistant Attorney General Sung-Hee Suh Speaks at the PLI's 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (Jan. 20, 2015), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities.

96. Press Release, DOJ, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics.

97. *DOJ FCPA Enforcement*, *supra* note 90 (detailing resolution vehicles used in 2017 DOJ corporate enforcement actions along with historical comparisons); *SEC FCPA Enforcement*, *supra* note 90 (detailing resolution vehicles used in 2017 SEC corporate enforcement actions along with historical comparisons); *see also* Koehler, *supra* note 90, at 538.

98. James B. Stewart, *Bribery, but Nobody Was Charged*, N.Y. TIMES (June 24, 2011), https://www.nytimes.com/2011/06/25/business/25stewart.html.

business organization. Against this backdrop, it is not surprising why so few corporate FCPA enforcement actions result in related individual enforcement actions. Perhaps the enforcement agencies do not have sufficient evidence to establish provable FCPA violations against individuals, even though risk-averse business organizations are willing to resolve scrutiny through alternative resolution vehicles. Perhaps the enforcement agencies are hesitant to expose certain aggressive enforcement theories to judicial scrutiny in an individual enforcement action and risk losing the theory to extract lucrative FCPA settlements against risk-averse business organizations.

To better understand these questions, a working hypothesis was constructed to assess whether corporate FCPA enforcement actions resolved through an NPA or DPA necessarily represent provable FCPA violations. Working assumptions included:

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

An analysis of corporate FCPA enforcement actions resolved through NPAs and DPAs provide compelling empirical data points that seem to validate the hypothesis. Since 2008, when NPAs and DPAs became the dominant way for the DOJ to resolve corporate FCPA enforcement actions, only 9% of enforcement actions resolved solely with an NPA or DPA have resulted in related criminal charges against company employees.[99] In stark contrast, since 2008, 75% of corporate enforcement actions that were the result of a criminal indictment or resulted in a guilty plea by a legal entity have resulted in related criminal charges against company employees.[100]

An analysis of so-called "declinations with disgorgement" provides further compelling empirical data points that also seem to validate the hypothesis. This form of resolution was first used by the DOJ in 2016 and simply refers to a two-to-three-page letter agreement between the DOJ and a business organization's counsel. The letter agreement is not subjected to any judicial scrutiny and typically contains a single paragraph of substantive, often vague, allegations.[101] In

99. Koehler, *supra* note 90, at 545.

100. *See id.* The statistics in this article were current as of 2015. For relevant information since then, see *DOJ FCPA Enforcement*, *supra* note 90 (detailing resolution vehicles used in 2017 DOJ corporate enforcement actions along with historical comparisons).

101. *See, e.g.*, Letter from Lorinda Laryea, Trial Attorney, DOJ, to Steven A. Tyrrell, Weil, Gotshal & Manges LLP 1 (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download.

the letter agreement, the DOJ agrees to close its FCPA investigation of the organization in exchange for the company disgorging profits from the alleged improper conduct.[102] Since 2016, the DOJ has used "declinations with disgorgement" to resolve five corporate enforcement actions and has secured approximately $20 million in settlement amounts.[103] In no instance, however, has a company employee ever been charged in connection with the underlying conduct set forth in the letter agreement.[104]

In seeming validation of the conclusion that FCPA enforcement actions resolved through alternative resolution vehicles do not necessarily represent actual provable FCPA violations, the former chief of the DOJ's FCPA Unit noted the "danger" of NPAs and DPAs and how "it is tempting for the [DOJ] . . . to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the law."[105] Moreover, in a policy speech devoted to NPAs and DPAs, the DOJ's Assistant Attorney General stated: "[companies] know that they will be answerable even for conduct that in years past would have resulted in a declination."[106] Other practitioners have stated:

> [NPA and DPA] documents provide fertile ground for the prosecution to advance expansive enforcement theories based on bare-boned and undeveloped factual assertions without having to meet the burden of proof beyond a reasonable doubt, given that the promise of avoiding the costly and risky endeavor of litigation through settlement provides every incentive to corporate defendants to accept the prosecution's position so long as the matter is resolved quickly and for the lowest fine possible.[107]

102. *Id*. at 1–2.

103. Letter from Jacob T. Elberg, Chief, Healthcare & Gov't Fraud Unit, U.S. Attorney's Office, Dist. of N.J., Laura N. Perkins, Assistant Chief & Nicholas Acker, Senior Trial Attorney, DOJ, Criminal Div., Fraud Section, to Lucinda Low & Thomas Best, Steptoe & Johnson LLP (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download; Letter from Laura N. Perkins, Assistant Chief, Rohan A. Virginkar, Trial Attorney, & Daniel S. Kahn, Deputy Chief, DOJ, Criminal Div., Fraud Section, to Paul E. Coggins & Kiprian Mendrygal, Locke Lord LLP (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download; Letter from Lorinda Laryea, Trial Attorney, & Daniel Kahn, Deputy Dir., DOJ, Criminal Div., Fraud Section to Steven A. Tyrrell, Weil, Gotshal & Manges LLP (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download; Letter from Nicola J. Mrazek, Senior Litigation Counsel & Daniel Khan, Chief Foreign Corrupt Practices Unit, Fraud Section, DOJ, Criminal Div., Fraud Section, to Nathaniel B. Edmonds, Paul Hastings LLP (June 21, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download; Letter from Richard P. Donoghue, U.S. Attorney, E. Dist. of N.Y. & Sandra L. Moser, Acting Chief, Fraud Section, Criminal Div., DOJ, Criminal Div., Fraud Section, to Adam B. Siegel, Freshfields Bruckhaus Deringer US LLP (Aug. 23, 2018), https://www.justice.gov/criminal-fraud/page/file/1089626/download.

104. *See* sources cited *supra* note 103.

105. *Corporation Admits to Serious Wrongdoing But Individuals Aren't Prosecuted. Why Not?*, CORP. CRIME REP. (Oct. 1, 2014, 1:24 PM), http://www.corporatecrimereporter.com/news/200/corporation-admits-serious-wrongdoing-individuals-arent-prosecuted/.

106. Press Release, DOJ, Assistant Attorney Gen. Lanny A. Breuer Speaks at the N.Y.C. Bar Ass'n (Sept. 13, 2012), http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

107. Barry J. Pollack & Annie Wartanian Reisinger, Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?, 51 AM. CRIM. L. REV. 121, 136 (2014).

Likewise, a practitioner who previously served in various high-level DOJ positions observed:

> The public has every right to wonder how it can be that the government brings no charges against individuals in the wake of [corporate criminal settlements]. Companies act only through the conduct of individuals—if the conduct is as egregious as portrayed in these settlements, and if the massive penalties are appropriate, how is it that so often the government charges no individuals?
>
> . . . .
>
> . . . Prosecutors' increasing appreciation of the leverage they enjoy over corporate entities, coupled with companies' determinations that a "bad" settlement is likely better than a "good" litigation, has resulted in a greater number of corporate settlements in cases where the government would be unlikely to prevail if forced to prove its case in court. . . .
>
> . . . .
>
> The leverage the government can exercise over companies has tipped the scales to a troubling degree. By using their considerable leverage to induce companies to enter into settlements in increasingly marginal cases and forcing them to admit to egregious conduct to settle charges that likely would not survive a legal challenge or be proved to a jury, prosecutors have created a situation where the public is deceived into thinking that the individuals involved in corporate criminal conduct are receiving a free pass. If these cases were exposed to the light of day by the adversarial system, the public would learn that they are often far murkier than they appear in the DPA's statement of facts.[108]

Civil society monitoring organizations active in the bribery and corruption space have also picked up on this dynamic. Indeed, an irony of the OECD Report praising the United States for its "impressive FCPA enforcement record" was that the OECD quietly criticized and questioned many of the policies and enforcement theories that have yielded the "high level" of enforcement.[109] Moreover, the OECD Report noted that the increase in NPAs and DPAs "is one of the reasons for the impressive FCPA enforcement record in the U.S.," yet also noted that these agreements are subject to little or no judicial scrutiny.[110] Similarly, a joint World Bank Group/United Nations report praised the U.S. for "resolv[ing] more foreign bribery cases by way of settlement than any other nation," yet also noted that the U.S. has some "unique procedural features" and that NPAs and DPAs are "unique even among the common law jurisdictions."[111] Regarding the lack of judicial involvement in U.S. NPAs, the report stated: "in general, if a judge oversees the [settlement] process, the public will have more confidence in the

108. Matthew E. Fishbein, *Why Individuals Aren't Prosecuted for Conduct Companies Admit*, N.Y. L.J., Sept. 19, 2014, at 1, 3.

109. *See* Org. for Econ. Cooperation & Dev., *supra* note 45, at 20, 32, 62–63.

110. *Id.* at 20, 33.

111. JANCINTA ANYANGO ODOUR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 32, 34 (2014).

outcome" and that "[w]ithout the stamp of judicial approval, settlements may have less legitimacy."[112]

By this measure, most modern corporate FCPA enforcement actions have less legitimacy because rarely are they even subject to any meaningful judicial scrutiny. Once again, this aspect of FCPA enforcement is not captured when viewing FCPA enforcement through the lens of the quantity of enforcement.

Regardless, if one accepts that alternative resolution vehicles do represent quality enforcement actions, the remaining question is whether such alternative vehicles are successful in achieving the FCPA's objectives of reducing bribery in the global marketplace. There is, however, no data to suggest that resolving alleged instances of corporate criminal liability through NPAs or DPAs achieves any meaningful deterrence. For instance, the GAO study on NPAs and DPAs found:

> DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs—in addition to other tools, such as prosecution—contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met. . . .
>
> . . . .
>
> . . . [W]hile DOJ has stated that DPAs and NPAs are useful tools for combating and deterring corporate crime, without performance measures, it will be difficult for DOJ to demonstrate that these agreements are effective at helping the department achieve this goal.[113]

Likewise, the OECD report on FCPA enforcement observed that the "actual deterrent effect [of NPAs and DPAs] has not been quantified," and it requested that the U.S. "[m]ake public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials."[114] The DOJ's response to this request stated:

> Scholars have recognized that quantifying deterrence is extremely difficult. This is equally true for the deterrent effect of DPAs and NPAs. Thus, . . . measuring "the impact of NPAs and DPAs in deterring the bribery of foreign public officials" would be a difficult task, save providing certain anecdotal and other circumstantial evidence.[115]

As highlighted in Part V of this Article, the anecdotal evidence suggests that alternative resolution vehicles do not achieve deterrence because several companies that have resolved FCPA enforcement actions through such resolution vehicles have become repeat offenders.

A final way to assess the quality of FCPA enforcement is to analyze the relatively rare situations in which the enforcement agencies are actually put to

112. *Id*. at 41.

113. *See* CORPORATE CRIME, *supra* note 91, at 20–28.

114. Org. for Econ. Cooperation & Dev., *supra* note 45, at 20, 63.

115. OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 10 (2012), http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf.

burdens of proof in an adversarial proceeding (something that rarely occurs given the alternative resolution highlighted above). This form of success would seem to matter in a legal system based on the rule of law and should be a better measure of success compared to FCPA enforcement agencies exercising leverage against risk averse business organizations and securing corporate settlement amounts through resolution vehicles not subjected to any meaningful judicial scrutiny.

In the FCPA's forty-year history, the DOJ has only been put to its burden of proof twice in a corporate FCPA enforcement action, and its ultimate record is 0–2.[116] In 1990, the DOJ criminally charged Harris Corporation (a company that manufactured telephone switching systems) and two executives, John Iacobucci and Ronald Schultz, with conspiracy to violate the FCPA.[117] According to the charging documents, the defendants paid and authorized the payment of money to a third-party "while knowing that a portion of such money" would be offered or given, directly or indirectly, to officials of the Government of Colombia in order to influence the officials to award government telecommunications contracts to Harris."[118] Upon filing of the criminal charges, the Chairman and CEO of Harris stated: "We believe that these charges are based upon a distorted view of the facts, and they represent a radical departure from existing enforcement policies. We have cooperated fully with the DOJ in its investigation of the allegations, providing clear evidence refuting the charges."[119] The company, along with the individuals, put the DOJ to its burden of proof at trial, and in 1991, the trial court judge granted a motion for judgment of acquittal. Media reports stated:

> Shortly after the government rested its case, [the trial court judge] ruled from the bench that 'no reasonable jury' could convict the company nor its executives on any of the five bribery-related counts for which they were indicted. Citing insufficient evidence, [the judge] said the government had failed to show any intent by the defendants to enter into a criminal conspiracy. [The judge] also said it was the first time in his six years on the federal bench that he had dismissed a criminal case at mid-trial for lack of evidence.[120]

A 2010 FCPA enforcement action against Lindsey Manufacturing Company and two of its executives (CEO Keith Lindsey and CFO Steve Lee) is the only other instance of the DOJ being put to its burden of proof in a corporate enforcement action. The DOJ charged the defendants with FCPA offenses for their alleged roles in a conspiracy to pay bribes to alleged Mexican "foreign officials."[121] The

116. It is believed that the SEC has never been put to its burden of proof in a corporate FCPA enforcement action.

117. Michael Koehler, *One Win, One Loss*, FCPA PROFESSOR (May 16, 2011), http://fcpaprofessor.com/one-win-one-loss/ (containing links to original source documents).

118. *Id*.

119. *Id*.

120. *Id*.

121. Press Release, DOJ, California Company and Two Executives Indicted for Their Alleged Participation in Scheme to Bribe Officials at State-owned Electrical Utility in Mexico (Oct. 21, 2010), https://www.justice.gov/opa/pr/california-company-and-two-executives-indicted-their-alleged-participation-scheme-bribe.

company and its executives were found guilty of various FCPA charges after a five-week jury trial, and the DOJ issued a press release calling the verdict an "important milestone" in its FCPA enforcement efforts as Lindsey Manufacturing was the first company ever to be tried and convicted of FCPA offenses.[122]

The trial, however, was flawed, and the milestone was short-lived as the trial judge, after months of post-trial legal wrangling, vacated the convictions and dismissed the indictment after finding numerous instances of prosecutorial misconduct. According to the judge, the instances of misconduct were so varied and occurred over such a long period of time "that they add[ed] up to an unusual and extreme picture of a prosecution gone badly awry."[123] The judge specifically cited the following missteps:

> The Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's order, engaged in questionable behavior during close arguments and even made misrepresentations to the court.[124]

In a striking close to his order dismissing the case, the judge stated:

> Dr. Lindsey and Mr. Lee were put through a severe ordeal. Charges were filed against them as a result of a sloppy, incomplete and notably overzealous investigation, an investigation that was so flawed that the Government's lawyers tried to prevent inquiry into it. In some instances, motives, statements and conduct were attributed to them that were wholly unfounded or were obtained unlawfully. . . . The financial costs of the investigation and trial were immense, but the emotional drubbing [Lindsey and Lee] absorbed was even worse. As for [Lindsey Manufacturing], the very survival of that small, once highly-respected enterprise has been placed in jeopardy.[125]

Because most measures of FCPA enforcement actions focus on actions brought and not outcomes, the end results of the Harris Corp. and Lindsey Manufacturing enforcement actions (not to mention the numerous instances in which the DOJ or SEC failed in individual FCPA enforcement actions when put to the burden of proof) are not captured when viewing the FCPA through the lens of quantity of enforcement.[126]

122. Press Release, DOJ, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011).

123. United States v. Aguilar Noriega, 831 F. Supp. 1180, 1185 (C.D. Cal. 2011).

124. *Id.* at 1182.

125. *Id.* at 1209.

126. For DOJ or SEC failures when put to the burden of proof in individual actions, see Mike Koehler, *What Percentage of DOJ FCPA Losses Is Acceptable?*, 90 BLOOMBERG CRIM. L. REP. 823 (2012); *A Summary of the SEC's Trial Court Woes in FCPA Enforcement Actions*, FCPA PROFESSOR (July 18, 2018), http://fcpaprofessor.com/summary-secs-trial-court-woes-fcpa-enforcement-actions/; *Second Circuit Rejects DOJ's Expansive*

As this section has demonstrated, "hard" FCPA enforcement metrics are easy to measure, but the results suggest that the FCPA is not being successful in achieving its objective because with each passing decade there has been more, not less, FCPA enforcement. Moreover, measuring the FCPA's success based on the quantity of enforcement has several deficiencies because the nature and quality of enforcement are not captured in such measurements.

V. "SOFT" ENFORCEMENT METRICS

As distinguished from "hard" enforcement of law by enforcement agencies, "soft" enforcement generally refers to a law's ability to facilitate self-policing and compliance to a greater degree than can be accomplished through "hard" enforcement alone. Those subject to such a law, whether a traffic law or otherwise, comply with the law's prohibitions because they could be found in violation of the law even though the prospect of "hard" enforcement is largely an unknown variable and likely low. One of the most notable statements from the FCPA's legislative history relevant to "soft" enforcement was made by the Chairman of Lockheed, who stated:

> So it is true that we knew about the practice of payments on some occasions to foreign officials. But so did everyone else who was at all knowledgeable about foreign sales. There were no U.S. rules or laws which banned the practice or made it illegal. . . . If Congress passes laws dealing with commissions and direct or indirect payments to foreign officials in other countries, Lockheed, of course, will fully comply with them.[127]

In enacting the FCPA, Congress anticipated that the "criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing preventative mechanism."[128] This "soft" enforcement effect of the FCPA continues into the FCPA's modern era. For instance, in the Senate's 2010 hearing entitled "Examination of Foreign Corrupt Practices Act Enforcement," Senator Amy Klobuchar (D-MN) observed:

> [T]he goal is not just to punish bad actors after a [FCPA] violation is committed, but rather to prohibit actions from happening in the first place. So a lot of my questions are focused on how we can incentivize corporations to make sure they have appropriate compliance procedures in place and that they voluntarily disclose violations when a rogue employee violates the law.[129]

Since the FCPA's earliest days, the DOJ has also recognized that the "most efficient means of implementing the FCPA is voluntary compliance by the American

Jurisdictional Theory of Prosecution in U.S. v. Hoskins, FCPA PROFESSOR (Aug. 27, 2018), http://fcpaprofessor.com/second-circuit-rejects-dojs-expansive-jurisdictional-theory-prosecution-u-s-v-hoskins/.

127. *Lockheed Bribery: Hearings Before the S. Comm. on Banking, Hous. and Urban Affairs*, 94th Cong. 27–28 (1975) (statement of D.J. Haughton, Chairman of the Board, Lockheed Aircraft Corporation).

128. S. REP. NO. 95-114, at 10 (1977).

129. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Hon. Greg Andres, Acting Deputy Assistant Attorney General, DOJ).

business community."[130] This aspect of the FCPA continues into the modern era as the DOJ's Acting Principal Deputy Assistant Attorney General stated in 2017: "the Criminal Division's aims are not to prosecute every company we can, nor to break our own records for the largest fines or longest prison sentences. Our goal is for companies and individuals to voluntarily comply with the law."[131] The SEC has also recognized from the FCPA's earliest days that its "eventual success or failure will . . . depend primarily upon business's response."[132] In the FCPA's modern era, the SEC's Director of Enforcement likewise stated in 2015: "The Commission's enforcement efforts over the last ten years, along with those of our partners at the DOJ and FBI, have resulted in a sea change in enhancing the focus on FCPA compliance issues."[133]

Similarly, in 2017, the same enforcement official observed: "[In recent years] we have seen tremendous improvement in FCPA awareness and compliance both in the United States and abroad, and there is no question that we have made great progress in our attempts to curb corruption under the FCPA and its foreign counterparts."[134] This "soft" enforcement aspect of the FCPA was further recognized by an appellate court that observed that the inclusion of a DOJ opinion program within the FCPA statute (pursuant to which the DOJ provides an enforcement opinion regarding specified, prospective conduct) "clearly evinces a preference for compliance in lieu of prosecution."[135] In short, "soft" enforcement is clearly a plausible meaning of the FCPA's success.

A. "Soft" Enforcement Anecdotes

Compared to "hard" FCPA enforcement, which is easy to measure, "soft" enforcement of the FCPA, or any law for that matter, is difficult to measure because it seeks to assess something that is not occurring. In other words, given the millions of business organizations subject to the FCPA and the tens of millions of business transactions and other points of contact these organizations have with foreign officials, how can one actually measure the FCPA's impact on this expansive universe? Despite measurement challenges, it is safe to assume that the increase in "hard" FCPA enforcement has led to an increase in "soft" FCPA enforcement, and there are plenty of anecdotes to support this assumption.

130. *The Success of "Soft Enforcement" in the U.K.*, FCPA PROFESSOR (Aug. 18, 2015) (quoting *Justice Outlines Priorities in Prosecuting Violations of For. Corrupt Practices Act*, AMERICAN BANKER (Nov. 21, 1979), http://fcpaprofessor.com/the-success-of-soft-enforcement-in-the-u-k/).

131. Trevor N. McFadden, Acting Principal Deputy Assistant Attorney Gen., Address at the Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017) (prepared remarks available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti).

132. Harold M. Williams, Chairman, SEC, The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis (Jan. 13, 1981), https://www.sec.gov/news/speech/1981/011381williams.pdf.

133. Andrew Ceresney, Dir., Div. of Enf't, SEC, Keynote Address at ACI's 32nd FCPA Conference (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

134. Andrew Ceresney, Dir., Div. of Enf't, SEC, Keynote Address at ACI's 33rd FCPA Conference (Nov. 30, 2016), https://www.sec.gov/news/speech/speech-ceresney-113016.html.

135. Lamb v. Phillip Morris Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

For instance, in its 2002 review of FCPA enforcement, the OECD reported "the commonly-held view among the members of the Bar who met with the examiners was that the reputation for aggressive pursuit that the Fraud Section of the DOJ has developed over the years has been a major factor in deterring companies from bribery."[136] The OECD report further stated:

> An important effect of the FCPA is that it encourages the development of compliance programs. According to one member of the Bar with a specialist FCPA practice, corporate compliance programs are the single most important measure contributing to prevention and deterrence. . . . Compliance programs are by now well-developed and well-understood among large public companies, especially those operating in risk-averse industry sectors such as defense procurement, and others involved in government contracting for which there are stringent standards of eligibility and the risk of disbarment. The indirect or collateral damage that would be inflicted on such companies by an indictment for violation of the FCPA of itself operates as a powerful incentive to enforce compliance throughout the entire organization.[137]

Likewise, in its 2010 review of FCPA enforcement, the OECD stated:

> In meetings with . . . private sector representatives, of which the vast majority were large multi-national companies, it was clear that serious efforts have been taken to ensure effective compliance with the FCPA. These companies have a high level of sensitivity to risk areas, and what needs to be done to address them. Across the board, these companies cited active enforcement by the DOJ and the SEC, in particular recently imposed large financial penalties, as the main thrust for putting into place these measures. . . . Overall, the evaluators believe that the heightened concern has had a very positive impact on the development of corporate controls in the United States, and thereby the prevention and detection of foreign bribery.[138]

Former FCPA enforcement officials currently in private practice along with current FCPA enforcement officials previously in private practice have unique insights into "soft" FCPA enforcement and have provided further observations to support the assumption that the increase in "hard" enforcement has led to an increase in "soft" enforcement. For instance, writing in 2012 in connection with the FCPA's 35th anniversary, a former DOJ FCPA prosecutor observed that "this new era of more aggressive [FCPA] prosecution has, in turn, encouraged corporations to pay even greater attention to their internal compliance programs, matching the 'hard' enforcement with 'soft' enforcement."[139] Likewise, in 2017, the DOJ's Acting Principal Deputy Assistant Attorney General observed:

136. Org. for Econ. Cooperation & Dev., IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION 12 (2004).

137. *Id*. at 22–23.

138. ORG. FOR ECON. COOPERATION & DEV. WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 30–32 (2010).

139. Philip Urofsky et al., *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1158 (2012).

> I have rejoined the Department of Justice after a four-year stint in private practice. While I am glad to be back at the department, my experience on the private side was extremely valuable to me. Having worked regularly with general counsels and corporate executives, it is clear to me that the vast majority of international businesses and business leaders want to get compliance right. I saw companies working hard to do the right thing–not because they were afraid of getting caught–but because that's how they wanted to run their businesses. In my experience, most corporate leaders care about their corporate values and ethos, and they don't want anything to do with corrupt deals or shady transactions. I've seen companies give up potentially lucrative business opportunities or forgo entry into certain markets because they valued their brand reputation over additional profits made under dubious circumstances. This is quite impressive to compare the status quo to when the Foreign Corrupt Practices Act (FCPA) was enacted 40 years ago, when bribing foreign officials in order to gain business advantages abroad was often considered a routine business expense.[140]

Even though there are many anecdotes to support the assumption that "soft" FCPA enforcement has increased as a result of "hard" FCPA enforcement, such anecdotes do not of course establish the truth of the matter asserted or answer the question of whether "soft" enforcement could perhaps be better achieved by amending the FCPA to include a compliance defense. As highlighted in the article "*Revisiting an FCPA Compliance Defense*," such a defense is hardly a new or novel idea—a compliance defense passed the House of Representatives during prior FCPA reform hearings, and numerous peer countries have compliance-like defenses embedded in their FCPA laws.[141] In addition, numerous former DOJ enforcement officials favor a compliance defense, and in the words of the DOJ's former Fraud Section chief: "The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations."[142]

Most pertinent, a compliance defense could perhaps better facilitate "soft" FCPA enforcement. In other words, perhaps the FCPA's laudable goal of preventing bribery of foreign officials can be better achieved not solely through ad hoc "hard" enforcement, but by better incentivizing corporate compliance to minimize the risk of improper payments. Compliance is a cost center within a business organization, and expenditure of finite resources on FCPA compliance is an investment best sold if it can reduce legal exposure, not merely lessen the impact of legal exposure. At present, the incentives organizations have to adopt FCPA compliance policies and procedures are solely to lessen the impact of legal

140. McFadden, *supra* note 131.

141. Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 631 (2012).

142. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 89 (2010) (written testimony of Andrew Weissmann).

exposure.[143] These present incentives thus represent "baby carrots" when what is needed to better incentivize more robust FCPA compliance are real "carrots." An FCPA compliance defense is a real "carrot" that can better incentivize compliance across the business landscape. Organizations with existing FCPA compliance policies and procedures will be incentivized to make existing programs better and organizations without FCPA compliance policies and procedures will be incentivized to spend finite resources to implement such risk-management policies.

In this regard, the United Kingdom offers a useful case study as its FCPA analog, which went live in 2011, contains a so-called adequate procedures defense designed "to influence behaviour and encourage bribery prevention as part of corporate good governance."[144] In reference to this adequate procedures defense, a former DOJ prosecutor stated: "[The U.K. Bribery Act has a] wonderful feature to it, which is that a corporation is legally not responsible if it had adopted adequate procedures. It's a great argument that we can take to the business about why they ought to invest in an appropriate compliance program."[145] And this appears to be happening as the Joint Head of Bribery and Corruption at the U.K. Serious Fraud Office stated in 2018: "it is clear that the Bribery Act has led to significant amounts of work by companies in developing strong and more ethical corporate cultures."[146]

Regardless of whether an FCPA compliance defense can better achieve "soft" FCPA enforcement, difficult-to-measure anecdotes seem to suggest that "soft" enforcement has indeed increased and that the FCPA is therefore successful given that this was one of the main objectives of the law.

Yet, perhaps the "soft" enforcement answer is not so simple. Indeed, if there has been a "sea change in enhancing focus on FCPA compliance issues" and a "tremendous improvement in FCPA awareness and compliance" as government officials have stated, the following questions remain:

> If "soft" enforcement has increased, then why has "hard" enforcement increased as well?
>
> If "soft" enforcement has increased, then why has the government acknowledged "that foreign corruption remains a problem of significant magnitude" with the "World Bank estimate[ing] that more than $1 trillion in bribes are paid each year, roughly 3 percent of the world economy?"
>
> If "soft" enforcement has increased, then why does survey data suggest that the "scale of bribery and corruption has shown no improvement glob-

143. Koehler, *supra* note 141, at 655.

144. MINISTRY OF JUSTICE, INSIGHT INTO AWARENESS AND IMPACT OF THE BRIBERY ACT 2010 3 (2015).

145. *Turning a New Page Against Corruption at the Corporate Level: Freshfield's Partner Explains Impact of UK Bribery Act*, ARGYLE (last visited May 14, 2019), https://www.argyleforum.com/session-transcript-adam-siegel-partner-freshfields-bruckhaus-deringer-llp/.

146. *FCPA Flash – A Conversation With Camilla de Silva (Joint Head of Bribery And Corruption – U.K. Serious Fraud Office)*, FCPA PROFESSOR (Apr. 4, 2018), http://fcpaprofessor.com/fcpa-flash-conversation-camilla-de-silva-joint-head-bribery-corruption-u-k-serious-fraud-office/.

ally since 2012, despite the unprecedented level of enforcement activity and introduction of new corporate criminal liability laws in that time"?[147]

If "soft" enforcement has increased, then why are there numerous FCPA repeat offenders as highlighted next?[148]

B. Repeat Offenders

During the FCPA's modern era, the government has advanced the policy position that its most common form of corporate resolution (DPAs and NPAs) "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe."[149] Specifically, in the FCPA context, the government has stated that "the companies against which DPAs and NPAs have been brought have often undergone dramatic changes."[150] In the aftermath of such "hard" FCPA enforcement, one might expect the ultimate in "soft" enforcement as business organizations that have violated the FCPA would seem to have the greatest incentive to comply with the FCPA in the future. Contrary to the government's rhetoric that common forms of corporate resolution "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe," and that the "companies against which DPAs and NPAs have been brought have often undergone dramatic changes," there are several FCPA repeat offenders suggesting that perhaps "soft" FCPA enforcement is not as successful as previously highlighted.[151]

147. Jessica Thomas, *More Than US $11b in Fines Fails to Deter Global Corruption, EY Survey Finds*, EY (Apr. 25, 2018), https://www.ey.com/en_gl/news/2018/04/more-than-us-11b-in-fines-fails-to-deter-global-corruption-ey-survey-finds.

148. *Foreign Corrupt Practices Act Enforcement*, CSPAN (Nov. 30, 2010), https://www.c-span.org/video/?296805-1/foreign-corrupt-practices-act-enforcement.

149. Press Release, DOJ, Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012).

150. OECD, *supra* note 115, at 10.

151. OECD, *supra* note 115, at 10; Press Release, *supra* note 149.

TABLE 1: FCPA REPEAT OFFENDERS[152]

Company	First Enforcement Action	Second Enforcement Action
ABB	2004 $16.4 million enforcement action concerning conduct in Nigeria, Angola and Kazakhstan[153]	2010 $58.3 million enforcement action concerning conduct in Mexico and Iraq[154]
Aibel Group / Vetco	2007 $26 million enforcement action concerning conduct in Nigeria[155]	2008 $4.2 million enforcement action concerning conduct in Nigeria[156]
Baker Hughes	2001 Cease and desist enforcement action concerning conduct in Indonesia, India and Brazil[157]	2007 $44 million enforcement action concerning conduct in Kazakhstan, Nigeria, Angola, Indonesia, Russia, Uzbekistan[158]

152. Repeat offender refers to a business organization that has resolved more than one FCPA enforcement action regardless of which agency (the DOJ or SEC) brought the enforcement action; regardless of the form of the enforcement action (plea agreement, NPA, administrative order, etc.) and regardless of the charges or findings (anti-bribery provisions vs. books and records and internal controls provisions). The term repeat offender excludes companies such as Maxwell Technologies and others who violated the FCPA's books and records and internal controls provisions in connection with an alleged foreign bribery scheme as well as violation the generic provisions in connection with conduct outside the context of foreign bribery. *See Maxwell Technologies Becomes A Repeat Offender Of The FCPA's Books And Records And Internal Controls Provisions*, FCPA PROFESSOR (Mar. 28, 2018), http://fcpaprofessor.com/maxwell-technologies-becomes-repeat-offender-fcpas-books-records-internal-controls-provisions/.

153. SEC v. ABB Ltd., Litigation Release No. 18775, 2004 WL 1514888, at *1 (July 6, 2004).

154. Press Release, DOJ, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010); Press Release, SEC, SEC Charges ABB For Bribery Schemes in Mexico and Iraq (Sept. 29, 2010).

155. Press Release, DOJ, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007).

156. Press Release, DOJ, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008).

157. Baker Hughes Inc., Release No. 44784, 2001 WL 1090832, at *2 (Sept. 12, 2001).

158. Press Release, SEC, SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007).

Biomet	2012 $22.8 million enforcement action concerning conduct in Brazil, Argentina and China[159]	2017 $30.4 million enforcement action concerning conduct in Brazil and Mexico[160]
General Electric	1992 $9.5 million enforcement action concerning conduct in Israel[161]	2010 $23.4 million enforcement action concerning conduct in Iraq[162]
Goodyear	1989 $250,000 enforcement action concerning conduct in Iraq[163]	2015 $16 million enforcement action concerning conduct in Kenya and Angola[164]
Halliburton	2009 $177 million enforcement action concerning conduct in Nigeria[165]	2017 $29.2 million enforcement action concerning conduct in Angola[166]
IBM	2000 Cease and desist enforcement action concerning conduct in Argentina[167]	2011 $10 million enforcement action concerning conduct in South Korea and China[168]

159. Press Release, SEC, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012); Press Release, DOJ, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012).

160. Press Release, DOJ, Biomet Charged With Repeating FCPA Violations (Jan. 12, 2007); Press Release, DOJ, Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017).

161. Richard W. Stevenson, *G.E. Guilty Plea in U.S. Aid to Israel,* N.Y. TIMES (July 23, 1992), https://www.nytimes.com/1992/07/23/business/company-news-ge-guilty-plea-in-us-aid-to-israel.html.

162. Press Release, SEC, SEC Charges General Electric and Two Subsidiaries with FCPA Violations (July 27, 2010).

163. *United States v. Goodyear Int'l Corp. Court Docket No.: 89-CR-156*, DOJ (1989), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/22/1989-05-11-goodyear-judgment.pdf.

164. Press Release, SEC, SEC Charges Goodyear With FCPA Violations, 2015-38 (Feb. 24, 2015), https://www.sec.gov/news/pressrelease/2015-38.html#.VOy19fnF91Z.

165. Press Release, SEC, SEC Charges KBR and Halliburton for FCPA Violations, 2009-23 (Feb. 11, 2009), https://www.sec.gov/news/press/2009/2009-23.htm.

166. Press Release, SEC, Halliburton Paying $29.2 Million to Settle FCPA Violations, 2017-133 (July 27, 2017), https://www.sec.gov/news/press-release/2017-133.

167. Litigation Release, SEC, SEC Settles Foreign Corrupt Practices Act Case Against IBM, NO. 16839 (Dec. 21, 2000), https://www.sec.gov/litigation/litreleases/lr16839.htm.

168. Litigation Release, SEC, IBM to Pay $10 Million in Settled FCPA Enforcement Action, NO. 21889 (Mar. 18, 2011), https://www.sec.gov/litigation/litreleases/2011/lr21889.htm.

Marubeni	2012 $55 million enforcement action concerning conduct in Nigeria[169]	2014 $88 million enforcement action concerning conduct in Indonesia[170]
Lucent / Alcatel-Lucent	2007 $2.5 million enforcement action concerning conduct in China[171]	2010 $137.4 million enforcement action concerning conduct in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, the Ivory Coast, Burkina Faso, Uganda, and Mali[172]
Orthofix	2012 $7.4 million enforcement action concerning conduct in Mexico[173]	2017 $6 million enforcement action concerning conduct in Brazil[174]
Stryker	2013 $13.2 million enforcement action concerning conduct in Mexico, Poland, Romania, Argentina, and Greece[175]	2018 $7.8 million enforcement action concerning conduct in India, China and Kuwait[176]

169. Press Release, Off. Pub. Aff., DOJ, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty, 12-060 (Jan. 17, 2012), https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546.

170. Press Release, Off. Pub. Aff., DOJ, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine, 14-290 (Mar. 19, 2014), https://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine.

171. Press Release, Off. Pub. Aff., DOJ, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations, 07-1028 (Dec. 21, 2007), https://www.justice.gov/archive/opa/pr/2007/December/07_crm_1028.html.

172. Press Release, Off. Pub. Aff., DOJ, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation, 10-1481 (Dec. 27, 2010), https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt (last updated Sept. 15, 2014); Press Release, SEC, Company to Pay More Than $137 Million to Settle SEC and DOJ Charges, 2010-258 (Dec. 27, 2010), https://www.sec.gov/news/press/2010/2010-258.htm.

173. Press Release, SEC, Company to Pay More Than $137 Million to Settle SEC and DOJ Charges, 2010-258 (Dec. 27, 2010), https://www.justice.gov/criminal-fraud/case/united-states-v-orthofix-international-nv-court-docket-number-412-cr-00150-ras; Press Release, SEC, SEC Charges Orthofix International With FCPA Violations, 2012-133 (July 10, 2012), https://www.sec.gov/news/press-release/2012-2012-133htm.

174. Press Release, SEC, Medical Device Company Charged With Accounting Failures and FCPA Violations, 2017-18 (Jan. 18, 2017), https://www.sec.gov/news/pressrelease/2017-18.html.

175. Press Release, SEC, SEC Charges Stryker Corporation With FCPA Violations, 2013-229 (Oct. 24, 2013), https://www.sec.gov/news/press-release/2013-229.

176. Press Release, SEC, SEC Charges Stryker A Second Time for FCPA Violations, 2018-222 (Sept. 28, 2018), https://www.sec.gov/news/press-release/2018-222.

Tyco	2006 $50 million enforcement action concerning conduct in Brazil[177]	2012 $26.8 million enforcement action concerning conduct in China, India, Thailand, Laos, Indonesia, Bosnia, Croatia, Serbia, Slovenia, Slovakia, Iran, Saudia Arabia, Libya, Syria, the United Arab Emirates, Mauritania, Congo, Niger, Madagascar, Turkey, Malaysia, Egypt, and Poland[178]

Several of the above examples of FCPA repeat offenders are worthy of additional analysis in determining whether "soft" FCPA enforcement has been successful in achieving the FCPA's objectives.[179] For instance, in the 2008 Aibel Group enforcement action, the company "admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."[180] As stated by the DOJ: "This is the third time since July 2004 that entities affiliated with Aibel Group have pleaded guilty to violating the FCPA."[181]

The Biomet example highlighted above is particularly egregious in that the company was not just a repeat FCPA offender, but the conduct at issue in the second enforcement action included the same country and involved the same distributor at issue in the first enforcement action. Moreover, the conduct involved the actions of a high-level Biomet attorney responsible for overseeing post-enforcement action compliance obligations from the first enforcement action. As stated by the DOJ:

> [I]n connection with the 2012 DPA, Biomet knew that Brazilian Distributor [described as the principal owner of Brazilian Distributor Company A and at relevant times controlled Brazilian Distributor Company B] previously had paid bribes to win business for Biomet through Brazilian Distributor Company A, and as a result, Biomet had prohibited its employees from using all companies affiliated with Brazilian Distributor. Despite knowing

177. Litigation Release, SEC, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud, NO. 19657 (Apr. 17, 2006), https://www.sec.gov/litigation/litreleases/2006/lr19657.htm (this enforcement action was largely an accounting fraud matter that included FCPA violations).

178. Press Release, Off. Pub. Aff., DOJ, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act, 12-1149 (Sept. 24, 2012), https://www.justice.gov/opa/pr/subsidiary-tyco-international-ltd-pleads-guilty-sentenced-conspiracy-violate-foreign-corrupt (last updated Sept. 15, 2014); Press Release, SEC, SEC Charges Tyco for Illicit Payments to Foreign Officials, 2012-196 (Sept. 24, 2012), https://www.sec.gov/news/press-release/2012-2012-196htm.

179. At present, there have been no FCPA "three" peaters but it may just be a matter of time as ABB is currently the subject of FCPA scrutiny once again. *See Will ABB Become a THREE-Time FCPA Violator?*, FCPA PROFESSOR (Feb. 10, 2017), http://fcpaprofessor.com/will-abb-become-three-time-fcpa-violator/.

180. Press Release, DOJ, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines, 08-1041 (Nov. 21, 2008), http://www.justice.gov/archive/opa/pr/2008/November/08-crm-1041.html.

181. *Id*.

> this, Biomet, through its employees and agents, including Biomet Executive allowed Brazilian Distributor to sell, import, and market its products through Brazilian Distributor Company B and took steps to conceal Brazilian Distributor's relationship with Brazilian Distributor Company B.[182]

The numerous instances of FCPA repeat offenders highlighted above can be viewed in two ways and do not necessarily demonstrate that "soft" FCPA enforcement is unsuccessful. On the one hand, FCPA repeat offenders represent the ultimate failure of "soft" FCPA enforcement and wholly undermine the FCPA enforcement agencies rhetoric that common FCPA resolution vehicles "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe" and that "companies against which DPAs and NPAs have been brought have often undergone dramatic changes."[183] On the other hand, many FCPA repeat offenders perhaps demonstrate just how difficult FCPA compliance can be—at least based on current expansive enforcement theories.

Perhaps many FCPA repeat offenders demonstrate that FCPA compliance cannot be guaranteed in a business organization, but that only steps can be taken to minimize the risk of FCPA violations. On this issue, it is notable that a former Chief of the DOJ's Fraud Section stated, while in private practice, that business organizations that want to do business in certain countries are "going to trip up on many of the provisions of the FCPA [and] will likely have an FCPA problem and it will make it very easy for the people in the DOJ and SEC to basically impose a tax for doing business in that country."[184] Perhaps this is the ultimate conclusion of the FCPA's success (or lack thereof) in achieving its objectives or at the very least the ultimate indictment of FCPA enforcement in the modern era.

C. Too Much "Soft" Enforcement Results In Excessive Risk Aversion

While "soft" FCPA enforcement is generally good, too much "soft" enforcement can result in excessive risk aversion with real-world consequences. That the FCPA may result in various unintended consequences has long been recognized. For instance, in 1980, the Carter administration (recall President Carter signed the FCPA into law in 1977) sent a report to Congress prepared by the Secretary of Commerce and the U.S. Trade Representative entitled "Report of the President on Export Promotion Functions and Potential Export Disincentives," which stated in pertinent part:

182. General Allegations at 20, United States v. Zimmer Biomet Holdings Inc., 12-CR-00080 RBW (D.D.C. Jan. 12, 2017), https://www.justice.gov/opa/press-release/file/925171/download.

183. Assistant Attorney Gen. Lanny A. Breuer, Criminal Division, DOJ, Address at the New York City Bar Association (Sept. 13, 2012), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

184. *Andrew Weissmann on the FCPA*, C-SPAN (Oct. 27, 2010), https://www.c-span.org/video/?c4618484/andrew-weissmann-fcpa.

> The [FCPA] is identified by businessmen and attorneys as one of the most significant export disincentives. . . . [T]he Act inhibits exporting because of uncertainty within the business community about the meaning and application of some of its key provisions.
>
> . . . .
>
> . . . Uncertainty about the meaning of key provisions of the FCPA and how it will be applied is having a negative effect on U.S. exports. Many of the businessmen and attorneys consulted expressed the view that this uncertainty has a far greater impact than the actual prohibition against bribery.
>
> The problem described, in essence, is that what conduct is prohibited and what conduct is not prohibited under the Act is often unclear. In order to avoid possible violations of the Act, attorneys often give such cautious guidance that their clients simply forego any transactions where the FCPA could possibly become an issue.
>
> . . . .
>
> The effects of these uncertainties reportedly manifest themselves in various ways. Consultations with the private sector revealed instances in which U.S. companies: [w]ithdrew from joint ventures for fear they later could be held responsible for the acts of their foreign partners; [i]ncurred substantial legal and investigative costs to check the backgrounds of their sales agents abroad; [w]ere unable to obtain the services of effective sales agents; [l]ost contracts simply because of the time needed to investigate sales agents abroad and institute safeguards; [w]ithdrew from existing markets; and [d]eclined to enter new markets.
>
> Finally, companies point out that the extent to which companies have been successfully prosecuted under the FCPA does not define the extent of the disincentive. Uncertainty can be a disincentive without any prosecutions and, moreover, exports are inhibited merely by the possibility of public charges and the adverse publicity surrounding them. Even where a company is totally convinced that a court would find that it had not violated the FCPA, it nonetheless may forego the export opportunity for fear that an enforcement agency could publicly charge it with a violation of the Act.[185]

Fast forward to the FCPA's modern era and such concerns remain and are perhaps more prominent given the extent of international business activity. For instance, following the Senate's 2010 FCPA hearing, Democratic Senators Amy Klobuchar and Christopher Coons stated in a letter to the Attorney General as follows:

> It has become apparent that too many companies are devoting a disproportionate amount of resources to FCPA compliance and internal investigations. To be clear, it is both necessary and desirable that companies pay adequate attention to compliance efforts, and in certain cases, adequate

185. U.S. DEP'T OF COM., REPORT OF THE PRESIDENT ON EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES: TOGETHER WITH THE REVIEW OF EXECUTIVE BRANCH EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES, TRANS. TO THE CONG. 9-1 to 9-3 (1980).

> anti-corruption initiatives may require a significant corporate commitment. Over-compliance, however, can have a negative effect on product development, export promotion, and workforce expansion.[186]

Like other aspects of "soft" enforcement, it is difficult to measure excessive risk aversion in response to the current FCPA enforcement climate. Nevertheless, several real-world anecdotes suggest that it is indeed a real dynamic as thus relevant in analyzing the FCPA's success. For instance, during an investor conference call an executive from CF Industries Holdings (a U.S.-based manufacturer and distributor of agricultural fertilizers with a largely North American footprint) was asked: "What are the next stages of capital deployment, especially as the market is now relatively more stable? Do you still feel industry consolidation is necessary? And just generally, what do you see as your own potential role in the process? And should we limit our thinking to North America?"[187]

The company's President, CEO, and Director responded:

> We're open to being outside the U.S., as you've seen with our U.K. acquisition. That has been a tremendous benefit for us and we're really pleased with it. But there are some regions in the world where we're more likely to go than others. It's easier to operate as a U.S. company subject to a FCPA and OFAC and other kinds of challenges in certain regions and more difficult in others. And we'll be focused on places where we think we can operate in ways that are in keeping with our culture and the strict interpretation of the law. So that limits the universe to some extent.[188]

Likewise, the President and CEO of U.S.-based Capstone Turbine Corporation was asked during an investor conference call about the status of an Ecuador deal—described as a "large megawatt opportunity"—and stated:

> That deal has been put on hold for now. There's another wave of corruption that unfortunately hit the Ecuadorian government. We're hopeful that once things settle down, new folks will be put in place [and] that opportunity will come back. But right now, I'd say that, that opportunity is on hold. And I will say that Capstone takes Foreign Corrupt Practices Act, or FCPA, very seriously. And we do have a zero-tolerance policy. So we do get into areas where there is potential corruption or graft, we have to separate ourselves from those opportunities.[189]

The FCPA risk aversion of Hercules Offshore and how it abandoned a $92 million contract previously awarded to it in Angola is also an instructive example of the negative real-world consequences of perhaps too much "soft" FCPA enforcement.[190] In explaining the decision, the company's CEO and President stated:

186. Letter from Senators Klobuchar and Coons Regarding FCPA Guidance to AG Holder (Feb. 15, 2012) (on file with author).

187. *See The FCPA "Limits The Universe" Of Business Opportunities*, FCPA PROFESSOR (Apr. 5, 2018), http://fcpaprofessor.com/fcpa-limits-universe-business-opportunities/.

188. *Id.*

189. *Is This An FCPA Success Or Failure?*, FCPA PROFESSOR (Aug. 28, 2017), http://fcpaprofessor.com/fcpa-success-failure/.

190. *Id.*

> [W]e pulled out of Angola [recently]. Tough decision for us. We could not get comfortable, and then the agents that we sent to Sonangol [*Angola's state-owned and state-controlled oil and gas company that has been the focus of several other FCPA enforcement actions*] that had gone through our vetting process they would not accept. So we walked away from 2 1/2 years at $110,000 a day and three years at north of $200,000 a day on two assets, but it's the right thing to do. We're not going to get embroiled in an FCPA investigation. So it was a tough decision, but it was the right decision, and a decision we will make every time around the world every day.[191]

Do the above examples involving CF Industries, Capstone Turbine, and Hercules Offshore represent a success or failure of "soft" FCPA enforcement, given that the goal of the FCPA is to reduce instances of foreign bribery? Is the world a better place, and is bribery in the global marketplace being reduced, because these U.S. companies with a commitment to FCPA compliance became risk averse? The world still needs fertilizer, turbines, and oil and gas development, and if these companies aren't going to engage with the world because of FCPA risk aversion, which companies will, and what is their commitment to compliance with bribery and corruption laws?

Consider also a charitable donation that did not occur because of FCPA risk aversion. In terms of background, in the FCPA's modern era, several corporate enforcement actions have been based on the enforcement theory that corporate giving to even bona fide charitable causes favored by alleged "foreign officials" is a form of bribery.[192] In some instances, the rational corporate response has been to stop contributing to humanitarian causes or otherwise pulling support from foreign communities or institutions in need. For instance, corporate counsel at a well-known U.S.-based publicly traded company offered the following example and observation:

> Most people can agree that preventing corruption is a good thing, and that vigorous enforcement of the FCPA can help in advancing this compelling public policy aim. But can it go too far? Can vigorous enforcement create an environment that not only limits corruption but that also prevents businesses from acting altruistically, and potentially improving communities and lives, because of risk aversion made necessary by that enforcement?

Here is a real world example, with names and locations omitted. Take the case of my company—a U.S.-based company that trades publicly on the New York Stock Exchange. My company operates principally in the U.S., but has an operational footprint that includes North America, Latin America, and Asia. As such, my company is aware that its operations implicate FCPA risk. Consistent with

191. *Hercules Offshore: A Case Study In Risk Aversion*, FCPA PROFESSOR (June 30, 2014), http://fcpaprofessor.com/hercules-offshore-a-case-study-in-risk-aversion/.

192. *Dubious As It Was, The Schering-Plough Enforcement Action Was Notable*, FCPA PROFESSOR (Feb. 5, 2018), http://fcpaprofessor.com/dubious-schering-plough-enforcement-action-notable/; *A Blemish–Nu Skin Enterprises Resolves SEC FCPA Enforcement Action Based On Its Chinese Subsidiary's "Charitable Donation"*, FCPA PROFESSOR (Sept. 21, 2016), http://fcpaprofessor.com/blemish-nu-skin-enterprises-resolves-sec-fcpa-enforcement-action-based-chinese-subsidiarys-charitable-donation/.

enterprise risk-ranking methodology, and on the advice of external vendors specializing in FCPA compliance, my company categorizes vendor and third-party relationships based on degree of risk (whether low, medium, or high). My company further specifies that vendor and third-party relationships need to be managed in accordance with guidelines that are aligned to risk category. These guidelines run from sanctions/watch-list screenings, to contractual language requirements, enhanced due diligence, written certifications, training, and billing requirements. All of which looks objectively reasonable and which would seem to protect the company from FCPA risks while also providing operational flexibility.

But, let's look at a situation where one of my company's units operating in a high-risk jurisdiction was interested in making a modest charitable donation to a worthy humanitarian organization. Consistent with the aforementioned guidelines, the company considers foreign charities to be high risk relationships. Why? Because of the expansive way in which the "anything of value" element has been interpreted and enforced. We know that prosecuting authorities are likely to view foreign charitable contributions as a possible method for bribery. Accordingly, in order to mitigate against the risk of having a charitable donation being seen as corrupt, a prudent actor should follow the same steps for these relationships as it would for other high-risk relationships. In my company's case, the steps for vetting a high-risk relationship involve a strenuous due diligence requirement consisting of outsourced screening and internal review with follow up. All of this costs time and money.

Returning to our example, let's assume that the proposed donation is of surplus cleaning and office supplies which have little value to the company, but which might be assessed objectively at $500 USD. In order to follow protocol, however, the steps for vetting the charitable organization implicate many thousands of dollars in due diligence fees, and several hours of employee time. So what should my company do? Assume that there is no risk in making the donation and throw caution to the wind? Or should my company insist on following protocol thereby making the process of vetting and documenting the relationship so costly so as to remove any incentive for making the donation in the first place?

Is there a right answer? For my company, the business sponsors decided that making the donation was not worth the expenses of time and effort that would have been required to comply with the applicable compliance policies. In other words, the juice was simply not worth the squeeze. As a result, a few things happened:

A needy organization was deprived of useful goods and equipment;

My company was deprived of the opportunity to act altruistically and to gain good will in the local community;

Trust between the company's internal groups was affected because it was difficult for compliance to articulate the need to follow controls and procedures without seeming unreasonable.

Looked at another way, everyone lost out.

Is this the type of situation that the FCPA was enacted to address? It is hard to imagine that it was, or that a compelling argument can be advanced that preventing nominal value charitable donations is aligned with U.S. foreign policy interests. But, in light of aggressive enforcement theories, this is the effect that the FCPA can have. Companies become risk-averse to the point that they avoid efforts with the potential to benefit all parties involved.[193] Does the above charitable donation that did not occur represent a success or failure of "soft" FCPA enforcement? Finally, consider the many country exits that have occurred in the aftermath of a business organization resolving an FCPA enforcement action:

> Ralph Lauren resolved an enforcement action based on alleged conduct in Argentina and thereafter "ceased retail operations" in the country;
>
> Bio-Rad Laboratories resolved an enforcement action based in part on alleged conduct in Vietnam and thereafter "closed its Vietnam office";
>
> Construction and drilling company Layne Christensen resolved an enforcement action based on alleged conduct in a variety of African countries and thereafter its Minerals Services division exited Africa; and
>
> General Cable resolved an enforcement action based in part on alleged conduct in Thailand and during its scrutiny completed the sale of its Thai operations.[194]

In certain of these examples, the FCPA enforcement agencies seemingly viewed the country exits as a good thing and specifically mentioned them in the resolution documents as a "remedial measure." Given the FCPA's goal of reducing foreign bribery, though, are such country exits necessarily a good thing? Is a foreign country (including its government and its citizens) in a better position when an otherwise ethically sound company (notwithstanding it resolving an enforcement action based on rather isolated conduct) leaves the country? Who takes that company's place, and what if that company has less of a commitment to compliance and ethics?

As this section has demonstrated, "soft" FCPA enforcement is certainly relevant in assessing the FCPA's success in achieving its objectives. While difficult to measure, anecdotes suggest that "soft" enforcement has increased in the FCPA's modern era and that, therefore, the FCPA has been successful. This conclusion, however, seems undermined by numerous instances of FCPA repeat offenders and ignores whether perhaps "soft" FCPA enforcement could be improved through a compliance defense. Moreover, there is an open question of whether too much "soft" FCPA enforcement is occurring as a result of the current enforcement landscape and whether the real-world consequences of this excessive risk aversion are actually undermining the FCPA's objectives.

193. *The Charitable Donation That Did Not Occur*, FCPA PROFESSOR (Mar. 26, 2018), http://fcpaprofessor.com/charitable-donation-not-occur/.

194. *See Merely A Coincidence Or FCPA-Related?*, FCPA PROFESSOR (Oct. 19, 2015), http://fcpaprofessor.com/merely-a-coincidence-or-fcpa-related/.

VI. MODELING METRICS

Thus far this Article has discussed various "hard" and "soft" enforcement metrics relevant to the question of whether the FCPA has been successful in achieving its objectives. Another plausible meaning of FCPA success is "modeling" metrics; in other words, analyzing whether the pioneering FCPA law motivated other countries to enact similar laws.

The FCPA's legislative history is clear that Congress hoped that the FCPA would spur other countries to enact FCPA-like laws governing the conduct of their business organizations in their interactions with foreign officials in the global marketplace. For instance, Senator Proxmire stated:

> [I]f we have a reputation of being the one country that enforces the law and everything that we sell is sold on the basis of merit and competition and not on the basis of bribery, it seems to me that's an enormous advantage that shouldn't be overlooked. I would think unilateral action wouldn't isolate us. It would give us a great advantage and other countries would per force be constrained to follow.[195]

Likewise, Senator Williams stated: "[A]n affirmative action by our Government will facilitate, what I believe is generally agreed is necessary, an international solution. Once the bill becomes law our Government will be in a position to argue forcefully, with integrity and credibility, for bilateral and multilateral agreements."[196]

That modeling was a main goal of the FCPA is perhaps best demonstrated by President Jimmy Carter's FCPA signing statement in December 1977, which stated:

> I am pleased to sign into law S. 305, the Foreign Corrupt Practices Act of 1977 and the Domestic and Foreign Investment Improved Disclosure Act of 1977. During my campaign for the Presidency, I repeatedly stressed the need for tough legislation to prohibit corporate bribery. S. 305 provides that necessary sanction. I share Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.
>
> This law makes corrupt payments to foreign officials illegal under United States law. It requires publicly held corporations to keep accurate books and records and establish accounting controls to prevent the use of "off-the-books" devices, which have been used to disguise corporate bribes in the past. The law also requires more extensive disclosure of ownership

195. *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 46 (1976) (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous., and Urban Affairs).

196. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing Before the S. Comm on Banking, Hous., and Urban Affairs*, 95th Cong. 98–99 (1977) (statement of Sen. Harrison Williams, Jr., Member, S. Comm. on Banking, Hous., and Urban Affairs).

> of stocks registered with the [SEC]. *These efforts, however, can only be fully successful in combating bribery and extortion if other countries and business itself take comparable action. Therefore, I hope progress will continue in the United Nations toward the negotiation of a treaty on illicit payments. I am also encouraged by the International Chamber of Commerce's new Code of Ethical Business Practices*."[197]

On one level, modeling is easy to measure by simply referring to the countries that enacted FCPA-like laws following passage of the FCPA in 1977. At present, the following approximately 40 countries have FCPA-like laws.[198]

TABLE 2

Argentina
Australia
Austria
Belgium
Brazil
Bulgaria
Canada
Chile
Colombia
Costa Rica
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Iceland
Ireland
Israel
Italy
Japan
Korea
Latvia
Lithuania
Luxembourg
Mexico
Netherlands
New Zealand
Norway
Poland
Portugal

197. *The FCPA Turns 41*, FCPA PROFESSOR (Dec. 19, 2018), http://fcpaprofessor.com/fcpa-turns-41/ (emphasis added).

198. Org. for Econ. Cooperation and Dev., *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD (May 2017), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf.

Russia
Slovakia
Slovenia
South Africa
Spain
Sweden
Switzerland
Turkey
United Kingdom

It may be a bit too simplistic, however, to attribute these other FCPA-like laws solely to the fact that the U.S. enacted the FCPA in 1977. To do so is perhaps reflective of the logical fallacy *post hoc propter hoc* (in other words, since event Y followed event X, event Y must have been caused by event X). Indeed, the vast majority of these countries did not adopt FCPA-like laws until the late 1990's or early 2000's—approximately twenty to twenty-five years after the FCPA was enacted. As with any causation analysis, a potential causal link diminishes with the passage of time. Moreover, it would seem a bit chesty and U.S.-centric to attribute other nations adopting laws governing international business transactions solely to the U.S. enacting the FCPA in 1977. No doubt Canada, Australia, Germany, the United Kingdom and other countries adopted such laws for their own political and public policy reasons just as the U.S. enacted the FCPA for its own political and public policy reasons.[199] For instance, the U.K. Secretary of State for Justice noted regarding the Bribery Act 2010: "[T]he Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading role in stamping out corruption and supporting trade-led international development."[200]

Moreover, if one asserts that the countries listed above passed their own foreign corruption statutes solely because of the FCPA does it follow that these other countries also passed drug laws, environmental laws, antitrust laws, and others solely because the U.S. previously had such laws?

Further relevant to analyzing modeling metrics is the fact that the countries highlighted above modeled their domestic legislation, not specifically on the FCPA, but rather the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD"), which entered into force in 1999.[201] Substantively, there are key differences between the FCPA and the OECD Convention. For instance, the FCPA's anti-bribery provisions have a limiting "obtain or retain business" element whereas the OECD Conven-

199. *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 949 (2012).

200. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 2–3 (2011), https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

201. CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (lasted visited May 14, 2018).

tion concerns things of value "to obtain or retain business or other improper advantage."[202] In addition, the FCPA's payment prohibition applies to, among others, "any foreign political party or official thereof or any candidate for foreign political office" whereas the OECD Convention concerns things of value to "foreign public officials" defined to mean "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."[203] In other words, unlike the FCPA, the OECD Convention does not capture payments or things of value offered or provided to political parties or candidates for foreign political offices. Moreover, the FCPA expressly exempts so-called facilitation payments from its anti-bribery provisions whereas the OECD Convention merely addresses the concept of facilitation payments in the commentary portion of the Convention.[204]

In short, it is dubious to suggest that approximately forty countries have laws governing the conduct of their business organizations in their interactions with foreign officials in the global marketplace solely because the U.S. enacted the FCPA in 1977.

Even accepting this premise, however, when analyzing modeling metrics, it is also necessary to examine other attributes of FCPA enforcement that are increasingly being modeled by foreign countries. As previously highlighted in Part IV of this Article, in the FCPA's modern era, the vast majority of corporate enforcement actions are resolved through NPAs, DPAs, administrative orders, or so-called declinations with disgorgement, and the common thread in these alternative resolution vehicles is the lack of any meaningful judicial scrutiny.

Other countries have not sought the full buffet of options U.S. law enforcement has invented for resolving alleged FCPA violations, however, in seeking deferred prosecution agreement other countries have asserted that such vehicles have been successful in the U.S. For instance, in seeking DPAs, the U.K. Ministry of Justice stated that such vehicles have been "successfully adopted" in the U.S. and that such vehicles "support an existing culture of self-reporting of serious economic crimes."[205] Likewise, Australian and Canadian law enforcement authorities have sought to justify use of DPAs based on the U.S. experience with alternative resolution vehicles.[206] Yet, as highlighted above in Part IV, it is an open question whether common FCPA resolution vehicles have been successful in achieving the FCPA's objectives.

202. *Id*. at 7.

203. *Id*.

204. *Id*. at 15.

205. *Deferred Prosecution Agreements*, Ministry of Justice (Oct. 25, 2012), https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/.

206. *See Make Your Voice Heard–Canada's DPA Consultation* Process, FCPA PROFESSOR (Nov. 13, 2017), http://fcpaprofessor.com/make-voice-heard-canadas-dpa-consultation-process/; *Canada Should Say No To DPAs*, FCPA Professor (Sept. 6, 2017), http://fcpaprofessor.com/canada-say-no-dpas/; *Australia Should Say No To DPAs For Foreign Bribery Offenses*, FCPA PROFESSOR (May 1, 2017), http://fcpaprofessor.com/australia-say-no-dpas-foreign-bribery-offenses/.

In short, modeling metrics are certainly relevant in assessing the FCPA's success in achieving its objectives, and by one measure, other countries have followed the U.S.'s lead, as Congress hoped, by enacting FCPA-like laws. The casual link between the FCPA and other FCPA-like laws, however, is weak and other negative aspects of U.S. FCPA enforcement are increasingly being modeled as well.

VII. CONCLUSION

Some questions are worthy of exploring even though the answers are complex or perhaps unknown. The question of whether the FCPA has been successful in achieving its objectives is one such question. As this Article has demonstrated, there are several plausible meanings of FCPA success ranging from "hard" enforcement metrics to "soft" enforcement metrics to "modeling" metrics. Some of these forms of success are easy to measure whereas some are not. Some of these forms of success suggest that the FCPA is not being successful in achieving its objectives, whereas others suggest that it is being successful.

For the reasons highlighted above, this Article concludes that it is inconclusive whether the FCPA, upon its 40th anniversary, has been successful in achieving its objectives. It all depends on one's best definition of success. Reasonable minds can certainly differ as to the best meaning of the FCPA's success and whether the FCPA has been successful in achieving its objectives. Indeed, the main goal of this Article was to foster a dialogue on the best meaning of FCPA success and force those in the FCPA space to pause, reflect, and come to their own conclusion upon the FCPA's 40th anniversary regarding the salient question of whether the FCPA has been successful in achieving its objectives.