MY "THEORY OF EVERYTHING:" † THE EVOLUTION OF CORPORATE GOVERNANCE IN THE 40 YEARS SINCE PASSAGE OF THE FOREIGN CORRUPT PRACTICES ACT

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Although the Foreign Corrupt Practices Act ("FCPA") was not necessarily needed to combat bribery and corruption when it was adopted in 1977, it has helped shape corporate governance standards worldwide. This Article examines the four decades of the FCPA. It begins by reviewing the origins of the Act, looking at the context in which the Act emerged, and summarizing key provisions of the FCPA. The Article then highlights important developments under the FCPA. The Article concludes by providing core lessons on the subject of FCPA training and the impact the FCPA has had over the last forty years.

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† "The Theory of Everything" is a 2014 movie title about the legendary Stephen Hawking. Readers should NOT expect anything that defines the universe or human condition in this paper.

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I. INTRODUCTION

It is with a sense of irony and nostalgia that I try to capture forty years of "lessons" under the Foreign Corrupt Practices Act ("FCPA")[1] in a single paper. For better or worse, my legal career started the same year that the FCPA was adopted—1977. In the forty years that followed, I supervised the Fraud Section in considering the application of the FCPA in a major banking case, defended and designed prevention mechanisms for numerous FCPA moments, and served as the General Counsel of a subject company negotiating the settlement of a multi-year and agency investigation.

The lessons of these experiences with background cases and related statutory developments are the subject of this Article—the result is my unified theory of everything.

II. PREQUEL

Prior to the adoption of the FCPA, federal prosecutors had an array of tools at their disposal. To be clear, it was the mail fraud,[2] aiding and abetting,[3] and conspiracy[4] statues that were the most commonly used charges of choice in bribery/kickback cases. The charges eventually included Hobbs Act (extortion under

1. 15 U.S.C. §§ 78dd-1–3 (2018).

2. *See* McNally v. United States, 483 U.S. 350 (1987) and compare Skilling v. United States, 483 U.S. 358, 368 (2010), which narrowed the statute again notwithstanding the intervening passage of "McNally Fix" legislation by Congress. The USAO ND Illinois strategy for saving 999 of the 1000 impacted matters as well as the drafting of § 1346 was primarily the work of AUSA James R. Ferguson (NUL '76). 18 U.S.C. § 1346 (2018).

3. 18 U.S.C. § 2 (2018).

4. *Id.* § 371.

color of official right),[5] money laundering,[6] and Racketeer Influenced and Corrupt Organizations Act ("RICO").[7] RICO was a reverse-engineered acronym based on the name of an Edward G. Robinson character in a movie about a mobster.[8] It was signed into law by President Richard M. Nixon in 1970.[9] Despite that almost comedic but definitely ironic origin in the Nixon years, it was and probably remains the most powerful tool in the federal prosecutive arsenal as it provided for organizational death penalties through forfeiture.[10] In fact, there are many examples of how federal prosecutors used these laws effectively before the adoption of the FCPA and even after. One striking example post-FCPA is the prosecution of Bank of Commerce & Credit International ("BCCI") in 1991, when the Department of Justice ("DOJ") was looking for an appropriate mechanism to address the massive bribery, anti-money laundering, international bank fraud that was the BCCI scandal.[11] The decision to use RICO instead of the FCPA spoke volumes about the Department's view of the relative utility of the statutes at the time.[12] The rationale may well resonate differently today. At the time, RICO appeared to be the most comprehensive device for achieving forfeiture of fixed sums on deposit in banks in the United States. It also provided a means to apply the proceeds for the compensation of victims in the discretion of the Attorney General—a feature that the FCPA lacks.

To provide some sense of proportion, in 1987, when the Supreme Court struck the fiduciary duty theory commonly utilized under the mail fraud statute since the 1970s, it impacted more than 1000 prosecutions that occurred between 1973 and the decision in Chicago alone.[13] In contrast, during the entire forty-year history of the FCPA, the DOJ has undertaken just over 300 cases.[14] Indeed, in the first four years of the statute, the DOJ used it only twice.[15] Of course, this statistic may be misleading as the DOJ's use of the statute in the corporate setting tended to be in the form of nonpublic settlement or declination letters.

If "all politics is ultimately local,"[16] then it is fitting for this Chicago native to start any anti-corruption discussion in Chicago. As we are pursuing unifying themes, we begin with the proposition that Richard Nixon's conduct in the Wa-

5. *Id.* § 1951.
6. *Id.* §§ 1956–1957.
7. *Id.* §§ 1961–1968.
8. William Safire, Essay, *The End of* RICO, N.Y. TIMES, Jan. 30, 1989, at A17.
9. *Id.*
10. 18 U.S.C. § 1964.
11. *See* United States v. BCCI Holdings (Lux.), S.A., 980 F. Supp. 529, 530–33 (D.D.C. 1997) (describing the factual background of the scandal).
12. *See id.* (describing the case's factual background, including the charges brought); Final Order of Forfeiture and Disbursement, United States v. BCCI Holdings (Lux.), S.A., 980 F. Supp. 529 (D.D.C. 1997) (No. 91-0655); *see generally* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES (2d ed. 2013).
13. *See generally* McNally v. United States, 483 U.S. 350 (1987).
14. Richard L. Cassin, *Someone Had to Be the First FCPA Defendant*, FCPA BLOG (Dec. 19, 2017, 7:28 AM), http://www.fcpablog.com/blog/2017/12/19/someone-had-to-be-the-first-fcpa-defendant.html.
15. *Id.*
16. BRIJ V. LAL, IN THE EYE OF THE STORM: JAI RAM REDDY AND THE POLITICS OF POSTCOLONIAL FIJI 16 (2010).

tergate scandal was corrupt—his enablers (several of whom were licensed attorneys) went to jail for it. To be clear from the outset, notwithstanding the fact that Nixon opened the door to China and closed the door on the Vietnam war, I believe Nixon should have been impeached, not pardoned. That said, the Nixon legacy is not without benefits in the fight against corruption. Some would call the "law of unintended consequences":[17] good, even coming from not so good.

First and foremost, Nixon's resignation resonated throughout the bar as his crimes were facilitated by lawyers who were eventually convicted but initially investigated by a special prosecutor that Nixon ordered to be fired.[18] Though many took pride in the refusal of the Attorney General and his Deputy to fire Special Prosecutor Archibald Cox, the organized bar believed itself to be so shamed by the events at the Nixon White House that it eventually introduced a mandatory ethics exam as a condition for admission to the bar.[19] I know because I was part of the class of 1977 that took that first examination. The core lesson that public officials work for the public—and not anyone else—is not the only benefit Nixon left in this area.

In the same year, Nixon signed RICO into law and he also gave Chicago the "Days of the Giants."[20] In Chicago, this term does not refer to sports teams. Rather, it refers to a team of extraordinary lawyers who put the U.S. Attorney's Office there in a leadership position in prosecuting public corruption that spanned four decades and conviction of four governors, countless local officials, eighty state court judges, and hundreds of lawyers.[21] It began with Nixon's appointment in 1970 of William J. Bauer as U.S. Attorney.[22] Mr. Bauer was a circuit court judge in DuPage County at the time of his appointment,[23] and he had been slated to be appointed a district court judge but there were no openings at the time. He was asked to serve as U.S. Attorney while awaiting appointment, and he agreed on two conditions: that he pick his First Assistant and that his First Assistant succeed him as U.S. Attorney.[24] The White House agreed, and James R. Thompson became First Assistant U.S. Attorney.[25] The next year, U.S. District Judge Bauer saw his pick sworn in as U.S. Attorney, a position "Big Jim"

17. This concept is generally credited in social science to Robert K. Merton. *See, e.g.*, Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894–98 (1936).

18. For a discussion of the infamous Saturday night massacre, see Susan Brenneman, *'Saturday Night Massacre': Key Figures in Nixon's 1973 Justice Department Purge*, L.A. TIMES (May 9, 2017, 4:15 PM), http://www.latimes.com/opinion/la-ol-the-saturday-night-massacre-20170130-htmlstory.html.

19. John W. Dean & James Robenalt, *The Legacy of Watergate*, A.B.A. (Sept. 18, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2011_12/spring/watergate_legacy/.

20. Cheryl Lavin, *The Kiddie Corps*, CHI. TRIB. (Mar. 4, 1990), http://articles.chicagotribune.com/1990-03-04/features/9001180689_1_chief-judge-practice-law-private-practice.

21. *See id.* ("'Everyone in the city thought we [the USAO lawyers] were pretty crazy then. We were . . . setting new rules. We prosecuted over 2,000 public officials.'").

22. *History of the DuPage County State's Attorney's Office*, DUPAGE COUNTY IL, https://www.dupageco.org/States_Attorney/32381/ (last visited Apr. 17, 2019).

23. *Id.*

24. Robert Davis, *Days in Court*, CHI. TRIB. (Jan. 13, 1985), https://www.chicagotribune.com/news/ct-xpm-1985-01-13-8501030323-story.html.

25. *Id.*

held for four years.[26] Judge Bauer eventually was appointed to the Seventh Circuit and has served with distinction as Judge, Chief Judge, and now Senior Judge.[27] He was not alone there long as others from the Days of Giants joined him.

James R. Thompson became an Illinois, if not national, treasure. He has served in countless public and private capacities. His service as four-term governor makes him the longest serving governor in state history.[28] Mr. Thompson was a graduate of Northwestern University Law School ('59), where he also taught law.[29] He earned a reputation as a corruption prosecutor, cementing the Office he led as a bulwark against Chicago's well-deserved reputation for corruption.[30] His team was also the stuff of legends, populating the federal district and appellate courts, providing public service, leading major Chicago law firms, and being the most highly regarded lawyers in the state.[31] As a Chicago public high school student, I was an avid reader of their exploits as prosecutors. I wanted to do what they did. I wanted to go to Northwestern Law School and study under Professor Fred Inbau,[32] who taught Thompson when he was a student, as well as many other Chicago prosecutors and defense lawyers.[33]

In 1974, I started law school shortly after President Nixon resigned the Presidency in the face of impending impeachment over the Watergate scandal.[34]

26. Tom Emery, *A Look Back at Folksy Jim Thompson, Illinois' Longest-Serving Governor*, DISPATCH ARGUS (Dec. 17, 2016), https://qconline.com/news/illinois/a-look-back-at-folksy-jim-thompson-illinois-longest-serving/article_24b6833b-6702-58f2-8cff-2f8a37703a4b.html.

27. *Seventh Circuit Court of Appeals–Judge William J. Bauer*, DCBA BRIEF, https://www.dcba.org/mpage/judgebauer (last visited Apr. 17, 2019). Among others, Judge Bauer was the author of a literary gem of an opinion in a corruption case entitled United States v. Wallace Davis, 890 F.2d 1373 (7th Cir. 1989).

28. Emery, *supra* note 26.

29. *Id.*

30. Lavin, *supra* note 20.

31. Claire Bushey, *Thompson Retiring from Winston & Strawn*, CRAIN'S CHI. BUS. (Feb. 24, 2015, 6:00 AM), https://www.chicagobusiness.com/article/20150224/NEWS04/150229935/former-illinois-gov-james-thompson-to-retire-from-winston-strawn. Team members in addition to Mr. Skinner included: Hon. Joel M. Flaum (former First Assistant and Senior (former Chief) Judge of the Seventh Circuit) (NUL-JD '63; ML '64); Hon. Charles P. Kokoras (Judge and former Chief Judge U.S. District Court ND Illinois); Hon. Ilana D. Rovner (Judge of the Seventh Circuit and former Deputy Governor and former Chief of Civil Rights in U.S. Attorneys Office); Dan K. Webb (former U.S. Attorney and former Chief of Special Prosecutions under Thompson); Anthony R. Valukas (former U.S. Attorney and former Chief of Special Prosecutions under Thompson) (NUL '68); Tyrone Fahner (former Illinois Attorney General and former Division Chief under Thompson) (NUL-LLM '71); James Burns (former U.S. Attorney, former Lt. Governor, former Division Chief in Office, and former Deputy Chief under Thompson) (NUL). Lavin, *supra* note 20.

32. Robert McG. Thomas Jr., *Fred Inbau, 89, Criminologist Who Perfected Interrogation*, N.Y. TIMES (May 28, 1998), http://www.nytimes.com/1998/05/28/us/fred-inbau-89-criminologist-who-perfected-interrogation.html.

33. James R. Thompson, *Fred E. Inbau*, 68 J. CRIM. L. & CRIMINOLOGY 180, 180 (1977). I wanted to go to Northwestern Law School and join the U.S. Attorney's Office. I was fortunate to do both those things serving under the U.S. Attorney who started Greylord (Sullivan) and two of Thompson's giants (Webb and Valukas).

34. Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm.

Also, in 1974, Thompson and his then-First Assistant Samuel K. Skinner[35] tried the number-two official in Chicago for corruption-related mail fraud[36] charges—Alderman Keane—and the jury convicted him.[37]

The aftermath of Keane and related prosecutions may be that the mail fraud statute became a favorite tool of federal prosecutors in the prosecution of corruption. In the Seventh Circuit, it all began with a purchasing kickback scheme prosecution at Zenith Radio Corporation.[38]

As I left law school in 1977, Chicago U.S. Attorney Thomas P. Sullivan was trying and convicting Illinois Attorney General William Scott for corruption.[39] I did not join the office until three years later. Instead, I became an Assistant State's Attorney in Cook County where I had a front-row seat to the rampant corruption in the courts there that the Office eventually prosecuted as part of Operation Greylord.[40] Joining the U.S. Attorney's Office in time to be a small part of that effort was a breath of professional fresh air. Unlike the congressional carve-out of "facilitating" bribes, the Greylord[41] prosecutions found no small bribes. The relationships formed by "tips" from lawyers to clerks almost inevitably led to the access needed to pass bribes large and small to judges to "fix" cases, civil and criminal—traffic to murder. Corruption was corrosive and unacceptable. But I am ahead of the historical narrative now.

III. THE ACT

The FCPA was signed into law on December 19, 1977.[42] The introduction to the House Legislative History is instructive on the policies underlying the Act:

> PURPOSE OF THE LEGISLATION H.R. 3815 is designed to prohibit the corrupt use of the mails or other means and instrumentalities of interstate commerce by U.S. corporations, directly or indirectly, to bribe foreign officials, foreign political parties, or candidates for foreign political office. The bill's coverage does not extend to so-called grease or facilitating payments.

35. *Samuel K. Skinner*, GREENBERG TRAURIG, https://www.gtlaw.com/en/professionals/s/skinner-samuel-k (last visited Mar. 23, 2019). In later iterations of public service, Mr. Skinner was U.S. Attorney in Chicago, Secretary of Transportation, and Chief of Staff to President George H.W. Bush. *Id.*

36. 18 U.S.C. § 1341 (2018).

37. *Chicago Aldermen and Corruption Cases: Hall of Shame*, CHI. TRIB. (Jan. 3, 2019, 1:38 PM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-convicted-aldermen-htmlstory.html.

38. United States v. George, 477 F.2d 508, 508 (7th Cir. 1973).

39. *See William J. Scott Dies; Ex-Official in Illinois*, N.Y. TIMES (June 23, 1986), https://www.nytimes.com/1986/06/23/obituaries/william-j-scott-dies-ex-official-in-illinois.html.

40. *See* Maurice Possley, *Archives: Operation Greylord: A Federal Probe of Court Corruption Sets the Standard for Future Investigations*, CHI. TRIB. (Jan. 19, 2017, 4:41 PM), http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-greylord-story-story.html.

41. *Id.* Greylord was led within the office by Special Prosecutions Chief Daniel K. Reidy and a core team including Charles Sklarsky, Candace Fabri, and Scott Lassar (NUL '76) (who later served as U.S. Attorney himself). William B. Crawford Jr., *This 'Greylord' Story Is Full of Holes*, CHI. TRIB. (Jan. 12, 1989), https://www.chicagotribune.com/news/ct-xpm-1989-01-12-8902240691-story.html.

42. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

> NEED FOR THE LEGISLATION More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries. The abuses disclosed run the gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharge certain ministrial [sic] or clerical duties. Sectors of industry typically involved are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals. The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas. Corporate bribery is also unnecessary. The Secretary of Treasury testified before the Subcommittee on Consumer Protection and Finance: Paying bribes . . . is simply not necessary to the successful conduct of business in the United States or overseas. My own experience as Chairman of the Bendix Corp. was that it was not necessary to pay bribes to have a successful export sales program.[43]

A. The Anti-Bribery Provisions

The DOJ and SEC in their FCPA Guidance Handbook (2012) set the background as follows:

> Congress enacted the U.S. Foreign Corrupt Practices Act . . . in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest business, and restore public confidence in the integrity of the marketplace.[44]

43. H.R. REP. No. 95-640, at 4–5 (1977).

44. CRIMINAL DIV. U.S. DEP'T OF JUSTICE & ENF'T DIV. U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter RESOURCE GUIDE FCPA].

The anti-bribery provisions prohibit giving or promising anything of value, directly or indirectly, to a foreign government official (his/her relatives or nominees), political parties, or party officials in exchange for getting or keeping business, or gaining any improper business advantage.[45]

The Act carves out facilitating payments and provides affirmative defenses for legitimate promotional activity and local (written) law (not custom).[46]

Over time, the Department and courts have defined various parts of the provision. There is a corrupt intent element in the statute but that is almost assumed by DOJ where there is payment and expectation—let alone realization—of a quid pro quo.[47] The use of cash, nominees, and third-country accounts are all indicia of corruption as well. The courts attempted to clarify the line between a covered government official and a government employee of an entity that does not perform a governmental function but is owned by the government,[48] but for the most part, the "law" under the FCPA has been set by settlement and executive branch pronouncement rather than courts—or administrative law judges for SEC matters—as few businesses can afford to litigate with the government given the collateral consequences.

The DOJ brings criminal proceedings against issuers, non-issuers, and individuals. Penalties under the anti-bribery provisions can be severe:

Individuals (*e.g.*, officers, directors, employees) fined up to $250,000 or imprisonment of up to 5 years, or both; fine cannot be paid by company;

Business entities may be fined up to $2 million per violation;

For both individuals and corporations, if the offense results in pecuniary gain or loss, they may be fined twice the gross gain or loss;

Alternative fines for corporate entities and individuals where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss pursuant to 18 U.S.C. § 3571(d);

Disgorgement of net profits obtained through improper offers or payments;

Debarment from federal contracting and roles in public companies are also potential consequences.[49]

B. The Books and Records Provisions §13

The FCPA books and records provisions evolved from an extensive study of corporate corruption by the Securities Exchange Commission ("SEC").[50]

Unlike the anti-bribery provisions, the books and records provisions apply only to issuers, who must:

45. *Id.*
46. 15 U.S.C. § 78dd-1(c) (2018).
47. H.R. REP. NO. 99-640, at 7–8 (1977).
48. United States v. Esquenazi, 752 F.3d 912, 920–26 (11th Cir. 2014).
49. *See, e.g.*, 15 U.S.C. § 78dd-2(g) (2018); *see also* RESOURCE GUIDE FCPA, *supra* note 44, at 68–72.
50. S. REP. NO. 95-114, at 16 (1977).

Keep books in reasonable detail, which "accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[51]

Have internal accounting controls, which provide reasonable assurance that:

all transactions are authorized;

all transactions are recorded to allow reporting and accounting;

assets can only be accessed with authorization from management; and

recorded and actual assets can be compared.[52]

Under the FCPA's record-keeping provisions, issuers must also ensure that their wholly-owned or majority-owned affiliates—even if they are neither issuers nor domestic concerns—follow the record-keeping provisions.[53] The obligation to use reasonable efforts to adopt U.S.-style controls start at 20% ownership.[54]

The SEC may bring administrative enforcement actions that can result in fines and disgorgement of profits as well.

One other aspect of the FCPA is worth noting. It contains a provision that allows the DOJ to issue opinions either spontaneously or at the request of business to assist business in complying with the Act.[55] This unusual procedure has produced a substantial body of information over the decades and is an important guide for practitioners and their clients.

IV. STATUTORY AND REGULATORY POSTSCRIPTS TO THE ACT

There can be no serious question about the FCPA having an enormous effect on how business operations occur. It has not, however, seemingly reduced the amount of bribery. Indeed, the $300 million figure attributed to multiple U.S. companies over time in the legislative history quoted above has been exceeded by individual companies in corrupt payments and in disgorgement/fines many times.[56] Of course, many of the examples in the last twenty years include the

51. 15 U.S.C. § 78m(b)(2)(A) (2018).

52. *Id.* § 78m(b)(2)(B)(i)–(iv).

53. RESOURCE GUIDE FCPA, *supra* note 44, at 68–69.

54. Section 13(b)(6) amended in 1988 in recognition of limited control a minority shareholder as to provide that an "issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied." *See* 15 U.S.C. § 78m(b)(6) (2018); *see also* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT 3 (2016).

55. 28 C.F.R. § 80.1 (2018).

56. Indeed, in 2008, Siemens by itself was convicted of paying more in bribes and then paid more than a billion to its internal investigators and was fined in US and Germany more than $1.6 billion combined. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008). In 2016 and 2017, two European telecoms settled charges on a similar scale. *See* Press Release, SEC, Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017); Press Release, SEC, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).

extension of an informal "affects test" to sweep in prosecutions of foreign companies as well as U.S. companies.[57] This is one way our government levels the playing field.

But in 1977, it was far from certain that the FCPA was needed to enable prosecution of corruption by U.S. companies abroad. This is amply demonstrated in Chicago and elsewhere by federal prosecutors around the country. If organizations can be dismantled through RICO and officials convicted under the Hobbs Act with a minimal nexus to interstate commerce (coffee grounds were sufficient according to one case),[58] then why the FCPA? Respectfully, the phenomenon may be rooted in the Congressional dynamic of perceived need to respond to adverse publicity. In the late 1980s, the thrifts collapsed in the aftermath of a real estate collapse. Some in Congress loudly demanded that the DOJ "put the . . . crooks in jail."[59] In order to prove that Congress—which was largely responsible for the thrift collapse when it deregulated thrifts and allowed them to invest in commercial real estate without expertise[60]—was tough on crime, it created a bank fraud statute[61] that was not needed or applicable retrospectively.[62]

If the FCPA was not needed to combat bribery/corruption in 1977, and the foregoing certainly suggests it was not, the Act nonetheless has had an impressive impact on corporate governance standards worldwide. Like Nixon's signing of RICO, appointment of Jim Thompson, and unintended inspiration of ethics programs for lawyers, the adoption of the anti-corruption and controls provisions of the FCPA have had a laudable effect around the world.

In between the bribery scandals that led to the FCPA in 1977, the accounting scandals that led to the adoption of Sarbanes-Oxley ("SarBox"),[63] and later financial scandals that led to Dodd-Frank, there were a number of legislative and regulatory developments that shaped corporate governance in the U.S. and the world—all of which are derivative of the FCPA's controls provisions.

More than 100 national anti-corruption regimes and the Office of Economic Cooperation and Development treaty have ensued. Many of them, like the 2010 U.K. Anti-Bribery Act,[64] do not carve out facilitating payments and purport to cover commercial as well as official corruption. Somewhat ironically, however,

57. At the end of 2017, only three of the top ten FCPA settlements (Halliburton, Och-Ziff, and Alcoa) involved US companies.

58. *See* United States v. Boulahanis, 677 F.2d 586, 589–90 (7th Cir. 1982). Note also the reemergence of coffee in a recent Massachusetts-based prosecution. Richard L. Cassin, *Feds: Dunkin' Donuts Operator Bribed Massachusetts Politician with . . . . . Coffee*, FCPA BLOG (Dec. 15, 2017, 11:08 AM), http://www.fcpablog.com/blog/2017/12/15/feds-dunkin-donuts-operator-bribed-massachusetts-politician.html.

59. KITTY CALAVITA ET AL., BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS 208 (1997).

60. Deregulation and economic factors in real state rather than fraud as driving forces in thrift collapse was the conclusion of a 1993 Presidential Commission on the Thrift Crisis. NAT'L COMM'N ON FIN. INST. REFORM, RECOVERY & ENFORCEMENT, ORIGINS AND CAUSES OF THE S&L DEBACLE: A BLUEPRINT FOR REFORM 7 (1993).

61. 18 U.S.C. § 1344 (2018).

62. U.S. CONST. art. I, § 9, cl. 3 (prohibiting passage of *ex post facto* laws).

63. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002).

64. *See generally* Bribery Act 2010, c. 23 (Eng.).

a tougher regime can quickly cause panic, as was the case with the U.K. As the Act was about to become effective, the Serious Frauds Office, which was tasked with prosecuting violations, issued reassurance to the business community that business entertainment at such events as Wimbledon could continue notwithstanding the Act's seeming inflexibility on "gifts" in all forms that could serve as an inducement.[65] But the full legacy of the FCPA should be considered in the context of related standards it spawned.

In 1991, the U.S. Sentencing Commission expanded the *1988 Sentencing Guidelines* to add Chapter 8—***Sentencing Guidelines for Organizations***.[66] Chapter 8 set forth a fine calculation process for crimes involving corporations to include a corporate death penalty.[67] Mitigation credit could be obtained in the "points" system where the crime occurred despite the existence of an "effective compliance program."[68] Such programs were required to have at least seven elements.[69]

In 2002, the economy was reeling as a series of accounting scandals impacted major companies such as Enron, Worldcom, MCI, Quest, and Rite-Aid.[70] The prosecution and demise of Arthur Andersen[71] for its role in destroying evidence in the Enron matter shook the accounting world as the Big Five became the Big Four. Seemingly eager to demonstrate its ability to close the door after the barn burned down, Congress adopted SarBox. Though largely derivative of the FCPA controls provisions, it added some interesting twists for companies and public accounting firms. Among other things, it:

- essentially eliminated the 20% best efforts trigger for minority owners to require reasonable efforts to secure controls regimes as Section 404 did not distinguish between majority and minority owners;
- mandated a certification and sub-certification process underlying CEO and CFO affidavits to the effect that the books are accurate and fraud has been reported/remediated;[72]
- made false certifications punishable as crimes;[73]

65. Jonathan Russell, *SFO Plans Rules for Hospitality*, TELEGRAPH (Dec. 19, 2010, 1:26 PM), http://www.telegraph.co.uk/finance/globalbusiness/8211872/SFO-plans-rules-for-hospitality.html.

66. U.S. SENTENCING GUIDELINES MANUAL § 8 (U.S. SENTENCING COMM'N 1991); LAWRENCE D. FINDER & A. MICHAEL WARNECKE, OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AND CORPORATE COMPLIANCE PROGRAMS 1 (2005).

67. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (U.S. SENTENCING COMM'N 1991).

68. *Id.* § 8C2.5(f); FINDER & WARNECKE, *supra* note 66, at 9.

69. The elements are: (1) Standards and procedures; (2) Oversight by senior management; (3) Avoid hiring people with criminal propensities; (4) Training/communication; (5) Monitored/audited/disclosed; (6) Discipline; and (7) Corrective action. FINDER & WARNECKE, *supra* note 66, at 18–20.

70. Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L. Q. 357, 357–60, 363 n.27, 397 (2003).

71. Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST (Nov. 23, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201852.html.

72. 15 U.S.C. §§ 7241, 7262 (2018) (implementing Sections 302 and 404 of the Sarbanes-Oxley Act of 2002).

73. *Id.* § 1350 (implementing Section 1350 of the Sarbanes-Oxley Act of 2002).

required clawback of executive bonuses in the event of restatement;[74]

created the Public Company Accounting Oversight Board ("PCAOB");

mandated the use of independent directors on the audit committees of issuer companies and the disclosure of financial experts;[75] and

required lawyers to go up the chain and resign if they observed criminality, reported it, and it was not remediated.[76]

Though the demise of Enron and Arthur Anderson reshaped public accounting, the PCAOB exists to ensure audit standards and those enforcing them do so in a manner independent (redundant) of corporate management.

In 2004, the amended *Sentencing Guidelines* explicitly shifted responsibility for oversight to the Board and a designated senior executive but eliminated the third "propensities" element, which had been the subject of substantial criticism as an impossible to define or achieve standard.[77] The pertinent section stated:

> (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
>
> (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.[78]

In 2010, in the aftermath of the financial crisis of 2008–2009, Congress once again demonstrated its urge to reactively legislate. Like 18 U.S.C. § 1347, the Dodd-Frank Wall Street Reform and Consumer Protection Act[79] did not contribute to the prosecution of a single individual or entity involved in the financial crisis. It did, however, do three things, some of which have remained controversial:

Established the Bureau of Consumer Protection which has been the subject of substantial criticism by the Trump administration;

Required periodic shareholder approval of executive compensation plans/levels and detailed disclosure of CEO pay; and

Created a rewards system administered by the SEC for corporate whistleblowers, who were not required to exhaust internal remedies even where

74. *Id.* § 7243 (implementing Section 304 of the Sarbanes-Oxley Act of 2002).

75. *Id.* §§ 7241, 7265 (implementing Sections 302 and 407 of the Sarbanes-Oxley Act of 2002).

76. *Id.* § 7245 (implementing Section 307 of the Sarbanes-Oxley Act of 2002).

77. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2004); U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 110 (2004).

78. *Id.* § 8B2.1(b)(2).

79. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

> a company has a robust disclosure program with the ability to disclose anonymously.[80]

The whistleblower provisions of Dodd-Frank do not distinguish between whistleblowers involved in—or even solely responsible for—the wrongdoing complained of and bystanders. The Supreme Court, however, has recently ruled that the provisions apply to whistleblowing to the SEC.[81] As millions of dollars are awarded to whistleblowers by the SEC, many state employment or tort regimes protect whistleblowing, and compliance program design requires reporting mechanisms, the level of care and caution to this subject is still an important concern.[82]

An additional complication for lawyers, notwithstanding SarBox Section 307, are the state rules regarding client confidentiality in matters that would not be impacted by the crime-fraud exception to attorney-client privilege.[83] Nine years after Dodd-Frank, this water remains muddy when one compares the Second Circuit in *Fair Laboratory Practices Assocs. v. Quest Diagnostics et al.*[84] to the $7.96 million jury award in the case of the BioRad General Counsel termination.[85]

V. MY TAKE ON THE MOST IMPORTANT DEVELOPMENTS UNDER THE ACT

As 2017, the fortieth anniversary year for the FCPA, came to an end, many practitioners were asked and attempted to answer what was the most important FCPA matter/development of the last forty years. Richard L. Cassin, one of the primary contributors to the excellent FCPA Blog, answered with a number of candidates—*Telia*,[86] *Siemns*,[87] *TSKJ grouping (including Halliburton*, *KBR, Technip and JGC)*,[88] *the Africa Sting*,[89] *U.S. v. Kay*.[90] I defer to his list though I

80. *Id.* at 1899, 1904, 1955, 1740–41.

81. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772–73 (2018).

82. *See* Int'l Game Tech., Exchange Release No. 78991, 2016 WL 5464611 (Sept. 29, 2016); Schering-Plough Corp., Exchange Act Release No. 49838, 2004 WL 1267922 (June 9, 2004).

83. *See, e.g.*, ILL. RULES OF PROF'L CONDUCT RULE 1.6 (2016).

84. *See generally* United States v. Quest Diagnostics Inc., 734 F.3d 154 (2d Cir. 2013).

85. Wadler v. Bio-Rad Labs., Inc., No. 15-cv-02356-JCS, 2017 WL 1910057, at *1 (N.D. Cal. May 10, 2017).

86. Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

87. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

88. Press Release, U.S. Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), https://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188.

89. A series of highly publicized prosecutions arising from an FBI undercover project that failed to reach its potential (or result in convictions) not unlike *Abscam* decades before. *See ABSCAM*, FBI: HISTORY, https://www.fbi.gov/history/famous-cases/abscam (last visited Apr. 17, 2019).

90. Richard L. Cassin, *What's the Most Important FCPA Case Ever?*, FCPA BLOG (Dec. 13, 2017, 8:02 AM), http://www.fcpablog.com/blog/2017/12/13/whats-the-most-important-fcpa-case-ever.html.

have one of my own that only overlaps at *Kay*. Although in fairness, I am casting a wider net than enforcement actions in providing my list.

A. What's the Practical Gateway to Corruption?

Through the entire history of SEC enforcement, much of the motivation behind DOJ actions and guidance can be read as a single message—controls should stop, or at least detect, bribery—the practical aspects of corporate governance are not always obvious. As a prosecutor, one sees the aftermath. As a defense counsel, one either sees the aftermath or one works with corporate insiders to customize compliance controls that may or may not be effectively implemented or practically workable. As a corporate insider, whether General Counsel, compliance/ethics professional, executive, or board member, you confront the daily reality that corruption takes root at the micro-level. There simply is no such thing as a free lunch. At the recent University of Illinois Symposium on the fortieth Anniversary of the FCPA, one of the moderators retold a classroom anecdote where she was asked what was the gateway to corruption. Other participants offered their perspectives. I found mine to be rooted in "mooncakes."

Mooncakes are traditional gifts given in China at seasonable holidays. Practitioners railed against the language of the Act that excluded "custom" from the local written-laws exception. With no de minimus exception to the Act, even a mooncake could constitute a bribe if given to an official in pursuit of good will for later benefit. Of course, in many cases the mooncake box was heavier than its pastry content. All too often, businesses met the custom by including cash within the cake box. When the boxes were delivered to "officials," bribery/corruption was deemed to have occurred. Similar analytics played out in the context of "traditional" wedding gifts at the weddings of officials and their children. And yet, these seemingly endless variants could be broken into two categories: meals and gifts, including donations.

In my experience, control these seemingly standard business courtesies and you control all but the most insidious forms of bribery that have been found in the ambit of the Act. No other case so dramatically emphasized the importance of a governance system that scrutinized gifts of all sorts to include charitable contributions as this SEC enforcement action involving a $76,000 corporate payment to a seeming charity on whose board the head of the Polish FDA sat.[91] Rather than merely describe the payment as increasing the official's status in the community (a thing of value), the SEC found that Schering had improperly carried and deducted it as a charitable contribution.[92] While "gift giving" has been the subject of criminal prosecutions starting with *Metcalfe & Eddy, Inc.*,[93] gifts

91. Schering-Plough Corp., Exchange Act Release No. 49838, 2004 WL 1267922 (June 9, 2004).

92. *Id.*

93. SEC v. Metcalfe & Eddy, Inc., No. 99-CV-12566-NG (D. Mass. 1999) (final judgement granting permanent injunction).

became a focus of corporate oversight instead of presumed "business courtesy."[94]

I would argue that the *Schering* action brought home the need for systematic analysis to a far greater degree than either DOJ Opinion Release 95-1[95] or 97-2,[96] both of which provided frames of reference for charitable giving without the same impact. See also *In the Matter of NuSkin*, which involved a $150,000 charitable donation by a China subsidiary intended to influence an official,[97] and *In the Matter of Vimpelcom*, which included at least $114 million in bribe payments funneled through an entity affiliated with an Uzbek official, approximately a half million dollars of which were disguised as charitable donations made to charities directly affiliated with the Uzbek official.[98]

In 2012, the DOJ/SEC Handbook built on *Schering* by cautioning companies thinking of making overseas charitable donations to "consider" five questions:

> *1. What is the purpose of the payment?*
>
> *2. Is the payment consistent with the company's internal guidelines on charitable giving?*
>
> *3. Is the payment at the request of a foreign official?*
>
> *4. Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?*
>
> *5. Is the payment conditioned upon receiving business or other benefits?*[99]

Even the DOJ/SEC Handbook did not impact corporate thinking around gifts/donations in the manner that the relatively obscure *Schering-Plough* enforcement action did, though it did set its general enforcement view as:

> The FCPA does not prohibit gift giving. Rather, just like its domestic bribery counterparts, the FCPA prohibits the payments of bribes, including those disguised as gifts. . . .
>
> Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.

94. Schering-Plough Corp., Exchange Act Release No. 49838, 2004 WL 1267922 (June 9, 2004).

95. U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 95-01 (Jan. 11, 1995).

96. U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 97-02 (Nov. 5, 1997).

97. Nu Skin Enterprises, Inc., Exchange Act Release No. 78884, 2016 WL 5044821 (Sept. 20, 2016).

98. Press Release, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016); Press Release, SEC, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016).

99. RESOURCE GUIDE FCPA, *supra* note 44, at 19.

. . . .

Legitimate charitable giving does not violate the FCPA. Compliance with the FCPA merely requires that charitable giving not be used as a vehicle to conceal payments made to corruptly influence foreign officials.[100]

A small gift or token of esteem or gratitude is often an appropriate way for business people to display respect for each other. Some hallmarks of appropriate gift giving are when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.

Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC. The larger or more extravagant the gift, however, the more likely it was given with an improper purpose.[101]

Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official. The corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions. Thus, it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither the DOJ nor the SEC have ever pursued an investigation on the basis of such conduct.[102]

Companies also may violate the FCPA if they give payments or gifts to third parties, like an official's family members, as an indirect way of corruptly influencing a foreign official. For example, one defendant paid personal bills and provided airline tickets to a cousin and close friend of the foreign official whose influence the defendant sought in obtaining contracts.

As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift giving by the company's directors, officers, employees, and agents. Though not necessarily appropriate for every business, many larger companies have automated gift-giving clearance processes and have set clear monetary thresholds for gifts along with annual limitations, with limited exceptions for gifts approved by appropriate management. Clear guidelines and processes can be an effective and efficient means for controlling gift giving, deterring improper gifts, and protecting corporate assets.

. . . .

100. *Id.* at 16–19.
101. *Id.* at 15.
102. *Id.*

> Proper due diligence and controls are critical for charitable giving. In general, the adequacy of measures taken to prevent misuse of charitable donations will depend on a risk-based analysis and the specific facts at hand.[103]

Consistent with the pronouncements regarding compliance, and perhaps notwithstanding the pronouncements in 2012 regarding low-level entertainment, in 2016, the SEC settlement with *Sands* included citation to the Company's failure to fully track "*complimentary items and services ("comps") such as restaurant meals and hotel stays to actual and potential gaming customers and business contacts*."[104] Though the SEC focus was frustration of the ability to track or audit, the deficiency was in failure to follow the Company's own compliance standards.[105]

Some guidance over the years in this area suggests the following be considered in best practices[106]:

Who invites whom or requests matters

Transparency

Agency permission and official certification of appropriateness

No cash

No per diems

Care in reimbursement methods

Reimbursing agency rather than official

Reimbursing vendor rather than official

Reimbursing for receipts only

No family members (this means no "dates" too)

Watch ratio of education to social

Apply a lavishness test

Appropriate entertainment (no adult clubs)

Accurate records a must

Tracking and approvals internally with aggregation

Some practical controls:

103. *Id.* at 16–19.

104. Las Vegas Sands Corp., Exchange Act Release No. 77555, 2016 WL 1377332 (Apr. 7, 2016) (emphasis added).

105. *Id.*

106. *See, e.g.*, Complaint, SEC v. Lucent Technologies Inc., No. 07-02301 (D.D.C. Dec. 21, 2007); RESOURCE GUIDE FCPA, *supra* note 44, at 52–65 (offering "Guiding Principles of Enforcement"); Press Release, U.S. Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007) (stating that the subject of an FCPA investigation was required, pursuant to settlement agreement, to "adopt new or modify existing internal controls, policies and procedures" to ensure that it "keeps fair and accurate books, records and accounts, as well as a rigorous anti-corruption compliance code, standards and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws").

Meals (or meals above a by-country value to avoid "lavish" entertainment) controlled by pre-approval process involving management and compliance;

Gifts (or gifts above a by-country value to avoid "lavishness" and ensure compliance with local written law);

Aggregation procedures for the foregoing to ensure financial impact does not raise implied bribery allegation;

Payment processes that pay vendors rather than officials and use of non-cash payment methods; and

Processes for approving political and charitable donations to ensure appropriate donative intent and analysis of who requested the donation and for what purpose.

Indeed, this evolved principle against the seemingly entrenched corporate way of making friends on the golf course and through support for local officials' "charities" became statutory standards in other countries like the U.K.'s Anti-Bribery Act's sweeping prohibition against gift giving and the recently enacted Korean legislation specifically precluding official entertainment to include golf.[107] The Korean legislation was passed in response to its Presidential scandal. The following are worth noting from the new legislation:

It prohibits improper solicitations even without any offer or acceptance of money, etc. or even if such solicitations fail, and by prohibiting offer or acceptance of money, etc. even without any quid pro quo.[108]

The term "money, etc." is also broadly defined to include: cash or cash equivalents, meals, drinks, gifts, entertainment, golf outings, promise of employment, exemption of debts, or any other financial advantages.[109]

The act expands the definition of "public officials" to include not only civil servants but also individuals in certain private sectors such as journalists and teachers of private schools.[110]

It contains an explicit provision on corporate vicarious liability.[111]

A corporation may raise an affirmative defense if it can establish that it has not neglected reasonable care or supervision to prevent violations of the act by its employees (like U.K. unlike U.S. statute).[112]

107. Geoffrey Gauci & Jessica Fisher, *The UK Bribery Act and the US FCPA: The Key Differences*, ASS'N CORP. COUNS. (June 1, 2011), https://m.acc.com/legalresources/quickcounsel/UKBAFCPA.cfm; Catherine E. Palmer et al., *Expansive Korean Anti-Corruption Law Comes into Force*, LEXOLOGY (Sept. 12, 2016), https://www.lexology.com/library/detail.aspx?g=5b8f7394-fa99-4db5-9dca-197314d36497.

108. Wonil Kim & Jun Sang Lee, *The New Anti-Corruption Act of Korea and the U.S. Foreign Corrupt Practices Act (FCPA)*, LEXOLOGY (Oct. 19, 2016), https://www.lexology.com/library/detail.aspx?g=5399016f-242b-4a7d-aa9e-aa56a3bb630a.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

2017 also saw Mexico amend its anti-corruption laws to include an extra-territorial application to nondomestic companies,[113] and 2017 saw a new law in Argentina.[114] Of course, as the DOJ pursues cases of Chinese nationals committing bribery in Africa,[115] Macanese businessmen bribing UN officials,[116] and the FIFA scandal,[117] it retains the leading focus on applying the affects test—through New York for instance.

B. Facilitating Payments

For years, legal departments and their outside advisors struggled with the facilitating payment exception within the Act. As a matter of ethical, global citizenship, the Act fell short of the standards set by the U.K. and other countries that adopted anti-corruption legislation without a facilitating payment exception. Invariably, such payments contravened the local written law even if such payments were "customary." For some practitioners, an "extortion" defense was implied by the exception. For others, it was argued that payments for exercise of appropriate discretion, as opposed to favorable treatment, were permitted under the Act. I believe these concepts and perhaps even the facilitating payments defense were eliminated through prosecution. In the *Chiquita Brands* matter,[118] the government prosecuted payments made to insurgents under a theory that they were functional government authorities in territory that controlled sufficiently to extort payments. In *United States v. Kay*, two executives of American Rice were convicted of paying bribes to Haitian tax officials to reduce the corporate taxes imposed on the company.[119] They argued unsuccessfully that the objective was not to obtain and retain business and therefore outside the statute which was too vague to be enforced in any event.[120] The district court and Fifth Circuit disagreed, and the Supreme Court denied certiorari.[121] The circuit court found that lower costs provided an unfair advantage actionable under the statute and that in any event:

113. Michael P. Avila, *For US Employers Operating in Mexico, Anti-Corruption Compliance Now Is a Multi-Jurisdictional Obligation*, FISHER PHILLIPS (Oct. 25, 2017), https://www.fisherphillips.com/Cross-Border-Employer/for-us-employers-operating-in-mexico-anti#page=1.

114. *See* Clara Hudson, *Argentina Introduces Corporate Criminal Liability Laws*, GLOBAL INV. REV. (Nov. 13, 2017), http://globalinvestigationsreview.com/article/1150080/argentina-introduces-corporate-criminal-liability-laws?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=888179.2_GIR%20Headlines%2013%2F11%2F2017&dm_i=1KSF,5AD8G,OWXUUS,KE8PR,1.

115. Richard L. Cassin, *DOJ Charges Two in Chinese Plot to Bribe Africa Officials*, FCPA BLOG (Nov. 27, 2017, 3:08 PM), http://www.fcpablog.com/blog/2017/11/20/doj-charges-two-in-Chinese-plot-to-bribe-Africa-officials.html.

116. Sherisse Pham, *Macau Billionaire Found Guilty of Bribing UN Officials*, CNN (July 28, 2017, 7:51 AM), https://money.cnn.com/2017/07/28/news/world/china-macau-billionaire-bribery/index.html.

117. Press Release, U.S. Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015).

118. Chiquita Brands Int'l, Inc., Exchange Act Release No. 44902, 2001 WL 1165876 (Oct. 3, 2001).

119. United States v. Kay, 513 F.3d 432, 439 (5th Cir. 2007), *cert. denied*, 555 U.S. 813 (2008).

120. *Id.* at 441.

121. *Id.* at 443–46.

> A man of common intelligence, would have understood that . . . in bribing foreign officials, [defendants] treading close to a reasonably-defined line of illegality. . . . *Defendants took this risk, and splitting hairs . . . does not allow them to argue successfully that the FCPA's standards were vague*.[122]

Whatever else can be said about *Kay*, the Fifth Circuit unambiguously put an end to wishful thinking around the scope of the facilitating payments defense.[123]

C. Who Is a Foreign Official?

Though U.S. federal and many state laws preclude commercial bribery, the FCPA—unlike the U.K Anti-Bribery Act and other national regimes—reaches "official" bribery. Dealing with state-owned enterprises raises the question of whether a lavish meal can be hosted for prospective joint venture partners to direct payments and benefits. Unlike many aspects of the Act, which have not received judicial attention, the Eleventh Circuit has provided guidance as to what constitutes an "instrumentality" under section 78dd-2(h)(2)(A).[124] In *United States v. Esquenazi*, the Eleventh Circuit addressed the question of whether a Haitian owned telecom was performing a sufficient government function so as to be an "instrumentality" within the purview of the Act.[125] Though not "friendly" in the sense of permissive, my view is that the Court added little to the guidance required by businesses subject to the Act. *Esquenazi* is not without ambiguity. Nonetheless, securing business or a business advantage from a state-owned enterprise through bribery, anywhere in the world, is not likely to be excused by enforcers of the Act. It should not matter whether the state-owned company is or is not an instrumentality for purposes of deciding whether to pay a corporate bribe. That decision should be made in a boardroom where board members face the ethical question of how they feel about the corporation and their own reputations in the event the bribe becomes public. I would vote no should anyone ever ask.

D. Can We Distill the Guidance Since the 1988 Sentencing Guidelines?

Notwithstanding revisions of the Sentencing Guidelines, enforcement actions, DOJ Opinion Releases, and Deputy Attorney General Prosecution Guidelines, sales agents still pay bribes, executives approve them, and companies profit and then seek mitigating "credit." The persistence of corruption leaves one with the nagging question of whether we are truly learning how to structure a compliance program that will teach morality. This section will attempt to focus on what I have seen that worked.

122. *Id.* at 442 (emphasis added).

123. *See also* the settlements between the U.S. and Baker Hughes. SEC v. KPMG Siddharta & Harsono, Accounting and Auditing Enforcement Act Release No. 17127, 2001 WL 1044993 (Sept. 12, 2001).

124. United States v. Esquenazi, 752 F.3d 912, 920–23 (11th Cir. 2014).

125. *Id.* at 920.

In 1999, Deputy Attorney General (later Attorney General) Eric Holder issued his Memo on Principles of Federal Prosecution [of Corporations],[126] which also included consideration of both a compliance program and cooperation as factors militating in favor of nonprosecution. Those principles were amplified by subsequent Deputies including Larry Thompson, Paul McNulty, Mark Filip, and Sally Yates.[127] Though none of the Deputy Attorney General Memos contained a promise of nonprosecution (a point of criticism), they did provide a path. By comparison, the DOJ Pilot Program, which was made a permanent part of the U.S. Attorney's Manual in late 2017,[128] owes its origins to the Holder Memo.[129]

In addition to the wisdom that could be gleaned from enforcement documents, in 2004, the DOJ issued the first of a series of Opinion Releases detailing elements of an effective compliance regime: Op Release 04-02,[130] Op Release 10-02,[131] and Op Release 14-02.[132] Then, in February 2017, the Department issued new, detailed guidance on compliance program analytics it would employ in evaluating corporate misconduct.[133]

Without pretending to offer any "secret sauce,"[134] let me suggest that a well-structured program with the potential to prevent and detect misconduct as well as serve as mitigation under applicable regimes includes the following:

Sets tone from top in writing;

Reaches employees, consultants, agents, vendors and even customers (through communication/training);

Operates and is monitored and audited through risk based due diligence;

Is enforced consistently;

Is reviewed and improved periodically (not less than every 3 years or in event of lapse, acquisition, or entry to new market).

Perhaps an appropriate end point may be from parenting (and more recently grand-parenting). Shame works where reputation matters. Kids care what we

126. Memorandum from Eric J. Holder, Deputy Attorney General, U.S. Dep't of Justice (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

127. Yates added conditions involving cooperation against executives which have been somewhat controversial but not reversed by Deputy Rod Rosenstein. Memorandum from Sally Q. Yates, Deputy Attorney General, U.S. Dep't of Justice (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

128. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL 9-47.120 (2017), https://www.justice.gov/criminal-fraud/file/838416/download.

129. *See also* the SEC's 2001 *Seaboard* factors. Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, 2001 WL 1301408 (Oct. 23, 2001).

130. U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 04-02 (July 12, 2004).

131. U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 10-02 (July 16, 2010).

132. U.S. Dep't of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 14-02 (Nov. 7, 2014).

133. U.S. DEP'T OF JUSTICE, CRIM. DIV., FRAUD SEC., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2017).

134. KUNG FU PANDA (DreamWorks Animation 2008) (quoting Father Goose).

think of them when they are young. The carrot/stick (metaphorical) that we use to raise them works best when they care. Lessons taught then last lifetimes. If integrity and reputation matter at home, then the prospect of shame within a company, industry, country, or media should matter more than it does. Since I believe that it should, as a board member and executive, there were two "lessons" that drove success:

> Sweat the small stuff as there is no such thing as a small bribe; and
>
> Convey and enforce a zero-tolerance tone from the top—reward good behavior and do not be afraid to terminate for noncompliance in the face of bad behavior.

E. Engage the Board

Board oversight has been and remains a subject of litigation (primarily in Delaware). In 1996, the chancery court in Delaware created a balance between the role of the board to exercise business judgement in an oversight capacity. In *In re Caremark International Inc. Derivative Litigation*[135] the Court set the standard as directors must:

> assur[e] themselves that information and reporting systems exist in the organization that are reasonably designed to provide senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[136]

Caremark remains good law today with special deference given to the business judgments of boards in oversight of remedial actions.[137] But the business judgment defense is not without limits.[138]

In 2017, the massive *Telia* case[139] provided what one commentator described as a teachable moment for boards:

> Whatever the reasons for the Board's failure during the entire course of the bribery scheme, it provides the compliance practitioner with a teachable moment for your Board. You can educate your Board that they need to provide oversight on all the high-priority, high-risk operations, such as the company's due diligence and monitoring program for managing third-party risks. In a high-risk area, such as Uzbekistan, the Board should inquire into the due diligence that was conducted, how any red flags were resolved, and

135. *See generally In re* Caremark Int'l Inc., 698 A.2d 959 (Del. Ch. 1996).

136. *Id.* at 970.

137. *See In re* Qualcomm Inc., No. 11152-VCMR, 2017 WL 2608723, at *2 (Del. Ch. June 16, 2017).

138. See *Puda Coal* where the Delaware Chancery Court refused to dismiss the derivative action involving allegations that the directors had simply collected fees and exercised no oversight. *In re* Puda Coal, Inc., C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013).

139. *See* Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017); Press Release, SEC, Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017).

then outline the risk mitigation strategies. Your Board needs to know about high-risk business opportunities and how the company is handling such risks.[140]

A board that engages in oversight by insisting on reports on enterprise risks and how diligence standards are applied around them is simply less likely to face either the press, lawsuits, or regulatory action.

F. The U.S. Is No Longer the Sole or Most Dominant Force in Anti-Corruption

Throughout much of the first two decades of the FCPA, the DOJ/SEC had international "bragging rights" regarding whose government stood against corporate corruption in the world as the U.S. was largely alone, even as other countries passed legislative lip service to the anti-corruption principle. In one stark example, the U.K.'s Serious Fraud Office seemed to decline to prosecute the massive and massively important BAE for bribery in the middle east for political reasons.[141] BAE's U.S. operations provided a jurisdictional basis for U.S. prosecutors to do so.[142]

Perhaps because of the massive financial recoveries and perhaps for nobler reasons, the latter half of the history of the Act has been marked by cooperative and sometimes cumulative prosecutions of multinational bribery schemes. As noted in an ABA-published critique of the trend, there is no principle of international double jeopardy.[143] *Siemens* was one example of at least two sovereigns recovering massive dollars (U.S. and Germany).[144] There have been many others since. In 2013, the Chinese charged GlaxoSmith Kline with bribery resulting in an almost half-billion-dollar fine and setting off investigations around the world.[145] By mid-2017, the DOJ was cooperating with anti-corruption officials around the world looking for mechanisms to ensure information access and to avoid cumulative punishments.[146] Countries with high rankings on the corruption perception index like China and Brazil were carrying out massive anti-corruption

140. Thomas Fox, *The Telia FCPA Resolution: Part V-Lessons Learned*, JD SUPRA (Sept. 29, 2017), https://www.jdsupra.com/legalnews/the-telia-fcpa-resolution-part-v-96000/.

141. Christopher Adams & James Boxell, *UK Drops BAE-Saudi Bribery Probe*, FIN. TIMES (Dec. 15, 2006), https://www.ft.com/content/0ff015e8-8b99-11db-a61f-0000779e2340.

142. Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010).

143. Lindsay B. Arrieta, *How Multijurisdictional Bribery Enforcement Enhances Risks for Global Enterprises*, ABA (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2016/06/08_arrieta/.

144. *Id.*

145. *GlaxoSmithKline Fined $490m By China for Bribery*, BBC (Sept. 19, 2014), https://www.bbc.com/news/business-29274822.

146. Thomas R. Fox, *DOJ–Aggressive International Anti-Corruption Enforcement to Continue*, FCPA COMPLIANCE & ETHICS (Nov. 10, 2017), http://fcpacompliancereport.com/2017/11/14279/.

crackdowns.[147] In mid-September 2017, China's crackdown on healthcare-related corruption was well entrenched.[148] As the year ended, Keppel Offshore & Marine Ltd agreed to pay $422 million in settling corruption probes in the U.S., Brazil, and Singapore with penalty offsets in its U.S. settlement.[149] Sadly, it was a lawyer who was responsible for and pleaded guilty in the widespread corruption case.[150] Keppel was another of the recent DOJ action/settlements providing for "credit" against the U.S. for fines paid to overseas authorities based on the same underlying activity.[151] But other than voluntary credits by enforcement authorities, there is little prospect for double jeopardy principles to apply.[152]

Yet, with all the internationalization of the war on corruption, I believe that the *Odebrecht* case represents a pivotal point for two reasons: (1) Brazil transformed itself through this series of prosecutions from a country high on Transparency International's corruption perception index into one cleaning its own house; and (2) by the end of 2017, the scope of Brazil's investigations included twenty-nine countries working in conjunction—with a total of thirty-eight cooperating.[153]

Cutting across many industries and countries, the scandal involved millions in bribes and billions in fines (so far).[154]

In moving cross-border, business must now expand its notion of abiding by "applicable law."

147. *See, e.g.*, Associated Press, *China's Anti-Corruption Campaign Recovers $519 Million in a Year*, NBC NEWS (Jan. 11, 2019, 1:49 AM), https://www.nbcnews.com/news/world/china-s-anti-corruption-campaign-recovers-519-million-year-n957491 ("China says its four-year-old campaign to return white collar criminals and recover assets has captured more than 5,000 fugitives in all."); Carlos Ayres, *Anti-Bribery in Brazil: 2017 Developments*, FCPAMÉRICAS BLOG (Mar. 5, 2018), http://fcpamericas.com/english/anti-money-laundering/anti-bribery-brazil-2017-developments/# (outlining five anti-bribery "highlights" of Brazil in 2017).

148. Eric Carlson & Huanhuan Zhang, *Life Science Alert: China Judicial Interpretation Criminalizes Submission of False Clinical Trial Information*, FCPA BLOG (Sept. 13, 2017, 8:08 AM), http://www.fcpablog.com/blog/2017/9/13/life-science-alert-china-judicial-interpretation-criminalize.html.

149. Richard L. Cassin, *Singapore's Keppel Pays $422 Million to Resolve Brazil Bribery Offenses, Lawyer Pleads Guilty*, FCPA BLOG (Dec. 22, 2017, 7:28 PM), http://www.fcpablog.com/blog/2017/12/22/singapores-keppel-pays-422-million-to-resolve-brazil-bribery.html.

150. *Id.*

151. *See* Press Release, U.S. Dep't. of Justice, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2107); Richard L. Cassin, *Keppel Offshore Lands Seventh on Our Top Ten List*, FCPA BLOG (Dec. 26, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html.

152. Kenneth B. Julian et al., *No International Double Jeopardy After U.S. FCPA Guilty Plea*, LEXOLOGY (Oct. 18, 2017), https://www.lexology.com/library/detail.aspx?g=dec9a38e-7c0f-49bf-89ad-0ffcb715de40.

153. Richard L. Cassin, *Now There's a Scoreboard of Odebrecht Bribes*, FCPA BLOG (Sept. 14, 2017, 8:08 AM), http://www.fcpablog.com/blog/2017/9/14/now-theres-a-scoreboard-of-odebrecht-bribes.html; Sue Reisinger, *Odebrecht Bribery Probes Continue Around the World*, CORP. COUNS. (Sept. 14, 2017, 6:00 PM), https://www.law.com/corpcounsel/almID/1202798037067/Odebrecht-Bribery-Probes-Continue-Around-the-World/?kw=Odebrecht%20Bribery%20Probes%20Continue%20Around%20the%20World&et=editorial&bu=Corporate%20Counsel&cn=20170915&src=EMC-Email&pt=Daily%20Alert.

154. Richard L. Cassin, *Now There's a Scoreboard of Odebrecht Bribes*, FCPA BLOG (Sept. 14, 2017, 8:08 AM), http://www.fcpablog.com/blog/2017/9/14/now-theres-a-scoreboard-of-odebrecht-bribes.html.

G. Expanding or Defining the Contours of the Books and Records Provisions

Over time, the SEC has made extensive use of this provision, with assistance from the DOJ in coordinated, parallel investigations, to expand the concept of controls beyond traditional financial controls to include establishing compliance programs and adherence to those policies as a "controls" matter.

In 2002, for instance, the SEC's Assistant Director for Enforcement emphasized compliance as part of the SEC's enforcement priority: "Failure to design and implement robust risk management and compliance systems has evidenced itself in some historic and well-publicized losses and failures. They serve as constant reminders that firms must continually reevaluate the financial environment and enhance risk management and compliance systems correspondingly."[155] Though the trend has been clear, two enforcement actions in the last three years have established the controls provisions as a concept that extends beyond reasonably detailed books to control financial expenditures. In one order also involving systemic bribery, the SEC criticized not only the company's internal accounting controls, but failures in its compliance program as well:

> Throughout this period [Company] failed to devise and maintain a sufficient system of internal accounting controls and lacked an effective anti-corruption compliance program.
>
> The deficiencies in [Company]'s internal accounting controls and compliance program also led to instances of similar improper conduct in connection with sales in other countries in which [Company] operates.[156]

In another SEC settlement,[157] and later parallel resolution with the DOJ,[158] the government established the principle of compliance-lapse as predicate for a controls case without bribery having taken place.

There is little point I think in debating the absence of language referencing "compliance controls" in the books and records provisions of the Act. By relying on the substantially evolved nature of most corporate compliance programs as an enforceable "controls" standard, the U.S. government essentially holds issuers to the standards they themselves announce to their shareholders. Put another way, once a public company sets a standard for itself, the failure to meet it could well be treated as a controls failure by both the DOJ and the SEC.

VI. RISK-BASED DUE DILIGENCE AS A CURE-ALL

Even before the accounting scandals prompted a new look at accounting controls, some practitioners, including this one, privately counseled clients on the importance of applying know-your-customer ("KYC") principles from the

155. Mary Ann Gadziala, Associate Director, Office of Compliance Inspections and Examination, SEC, Keynote Speech at the Fourth Annual Financial Institutions Regulatory Compliance Summit: Compliance and Internal Controls–Key Priorities for US SEC Examination Program (Sept. 23, 2002).

156. GlaxoSmithKline plc, Exchange Act Release No. 79005, Accounting and Auditing Enforcement Release No. 3810, 2016 WL 5571623 (Sept. 30, 2016).

157. Las Vegas Sands Corp., Exchange Act Release No. 77555, 2016 WL 1377332 (Apr. 7, 2016).

158. Press Release, U.S. Dep't of Justice, Las Vegas Sands Corp. Settlement Agreement (Jan. 17, 2017).

regulated world of financial institutions to all forms of business. The idea was to know the counter-party—whether the counter-party was an employee, agent, business partner, reseller, customer, or even customer's customer—on a risk-based approach depending on activity, country, and nature of the relationship.[159] It was the logical extension of knowing how the company spent and made money (and where the money made came from). Effective in 2018, Financial Crimes Enforcement Network ("FINCEN") requires financial institutions to know the beneficial owner involved in certain transactions.[160] Even without the new regulation, FINCEN routinely imposes fines where institutions fail to "ask obvious questions."[161] The Financial Action Task Force, which advises on money laundering risks around the world, even publishes guidance on risk-based diligence.[162]

These standards are not solely applicable in the U.S. In the People's Republic of China ("P.R.C."), sales representatives of Crown Melco gaming (Australia) were arrested and convicted under money-laundering-like standards related to in-country solicitation of P.R.C. citizens to visit Crown Melco casinos as gambling and advertising gambling are both illegal in the P.R.C.[163] The case was a warning to the world's gaming businesses to respect the P.R.C. anti-gambling regime—to know the source of funds.

This was discernable from SEC settlements under the FCPA, DOJ Opinion Releases, the Sentencing Guidelines, Delaware courts, SarBox, and Dodd-Frank as discussed above. In addition, both the NYSE[164] and Nasdaq,[165] the Committee of Sponsoring Organizations of the Treadway Commission (COSO),[166] and, more recently, ISO 30001 all told businesses and their boards that compliance oversight is a core obligation.

159. John Arvanitis, *A Compliance Plan for FinCEN's New Customer Due Diligence Rule*, FCPA BLOG (Oct. 9, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/10/9/john-arvanitis-a-compliance-plan-for-fincens-new-customer-du.html.

160. *Id.*

161. Richard L. Cassin, *FinCEN Fines California Card Club $8 Million for AML Offenses*, FCPA BLOG (Nov. 20, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/11/20/fincen-fines-California-card-club-8-million-for-aml-offenses.html; Richard L. Cassin, *FinCEN: Texas Bank Failed to Ask 'Obvious Due Diligence Questions'*, FCPA BLOG (Nov. 2, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/11/2/fincen-texas-bank-failed-to-ask-obvious-due-diligence-questi.html; *see* Dale Ko, *Dale Ko: Indicted Former Honk Kong Official also Heads Anti-Corruption NGO*, FCPA BLOG (Nov. 27, 2017, 6:28 AM), http://www.fcpablog.com/blog/2017/11/27/dale-ko-indicted-former-hong-kong-official-also-heads-anti-c.html.

162. FINANCIAL ACTION TASK FORCE, GUIDANCE FOR A RISK-BASED APPROACH: THE BANKING SECTOR 3 (Oct. 2014).

163. Benjamin Haas, *Australia's Crown Resorts Staff Sentenced to Jail in China for Gambling Crimes*, GUARDIAN (June 26, 2017, 2:31 AM), https://www.theguardian.com/australia-news/2017/jun/26/australia-crown-resorts-staff-sentenced-jail-china-gambling-crimes.

164. N.Y. STOCK EXCH., CORPORATE GOVERNANCE GUIDE 116 (2014).

165. *Equity Rule 3010 Supervision*, NASDAQ, http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_1_1&manual=/nasdaq/main/nasdaq-equityrules/ (last visited May 23, 2019).

166. COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, ENTERPRISE RISK MANAGEMENT – INTEGRATED FRAMEWORK: EXECUTIVE SUMMARY 6–7 (2004). COSO also provided companies with the enterprise risk management framework for identifying and mitigating risk. *See generally* COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, ENTERPRISE RISK MANAGEMENT – INTEGRATED FRAMEWORK (2004).

In each system, standards (written), training, monitoring, audit, discipline, and remediation are elements. But as impossible a standard as the original Sentencing Guidelines set—avoiding hiring those with criminal propensities (or hiring/doing business with those whose hiring itself was a crime) caused U.S. business to look for ways to conduct background inquiries on their business partners and associates.

Though refined through the years, banks and other financial institutions (including casinos) are required to conduct due diligence on customers to know the customer, his/her source of wealth and source of funds, and to report "suspicious activity" by those customers to the government.[167] Consequences can be devastating for failure of a small branch bank[168] or a single high-rolling[169] or high-wealth customer.[170]

On June 20, 2017, FCPA Tracker, a web-based subscription service, reported that a third of the open investigative matters reported by issuers involved third-party agents.[171] This was somewhat surprising considering long-standing guidance on the importance of doing pre-engagement due diligence on such agents and post-hiring monitoring.

The absence of due diligence on agents was a core basis for finding liability in the settlement of the *InVision* case.[172] The company faced criminal liability, in part, on failure to perform diligence on intermediaries in red-flag countries where intermediary compensated despite knowledge that intermediary paid bribes. The company faced civil liability[173] in part, because the company

> "was aware of a high probability that its foreign sales agents or distributors made or offered to make improper payments to foreign government officials in order to obtain or retain business for *InVision*":
>
> "improperly accounted for certain payments to agents or distributors"; and
>
> "did not have an adequate system of internal controls to detect & prevent FCPA violations."[174]

167. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29397 (May 11, 2016) (to be codified at 48 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

168. Press Release, U.S. Dep't of Justice, Banco Popular De Puerto Rico Enters into Deferred Prosecution Agreement with U.S. Department of Justice (Jan. 16, 2003).

169. Press Release, U.S. Dep't of Justice, Operator of Venetian Resort in Las Vegas Agrees to Return Over $47 Million After Receiving Money Under Suspicious Circumstances (Aug. 27, 2013).

170. Rozanna Latiff, *U.S. Conducting Criminal Probe Focused on Malaysia 1MDB's Stolen Funds*, REUTERS (Aug. 10, 2017, 11:37 PM), https://www.reuters.com/article/us-malaysia-scandal-probe/u-s-conducting-criminal-probe-focused-on-malaysia-1mdbs-stolen-funds-idUSKBN1AR0BS.

171. *Nearly a Third of FCPA Disclosures Mention Intermediaries*, FCPA TRACKER (Jun. 19, 2017), https://blog.fcpatracker.com/2017/06/nearly-a-third-of-fcpa-disclosures-mention-intermediaries/.

172. Settlement Agreement, U.S. Dep't of Justice v. InVision Technologies, Inc. (Dec. 3, 2004) (No. C-05-0660), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04invisiontech-agree.pdf.

173. GE InVision, Inc., Accounting and Auditing Enforcement Act Release No. 19078, 2005 WL 354589 (Feb. 14, 2005).

174. *Id.*

Over the years, enforcement actions combined with DOJ Opinions provided substantial guidance on "warning signs/red flags" in dealing with agents to include:

> Business in a country known for bribery problems;
>
> Request for payment in cash;
>
> Request for payment in third-country/non-local currency;
>
> Request that other third parties and intermediaries, who would perform similar functions as the agent, be retained;
>
> Request for payment to someone other than agent;
>
> Request for unreasonable compensation in light of services promised or rendered;
>
> Request for reimbursement of expenses with incomplete documentation; and
>
> Be aware of possible direct or indirect associations between agent and foreign officials (*e.g.*, payment to consultant who is married to a foreign official could be viewed as indirect benefit to foreign official).[175]

The Financial Industry Regulatory Authority ("FINRA"), another agency that has oversight of financial institutions, fined Morgan Stanley $13 million for failures in oversight (controls) of its sales force.[176] Months later, FINRA fined JP Morgan Chase ("JPMC") another $2.8 million for controls failures related to comingling of customer funds.[177]

Absence of due diligence by JPMC also led to multiple enforcement actions against it in connection with anti-money laundering related to the looting of the Malaysian Sovereign Wealth Fund, including by the DOJ, SEC, Monetary Authority of Singapore, and Swiss Financial Market Supervisory Authority (FINMA).[178] FINMA focused both on JMPC's failure to secure complete customer and fund information (know your customer, source of funds and source of wealth in play) and its failure to document its actions.[179]

Due diligence has also matured to include considering Transparency International's Corruption Perceptions Index.[180] Indeed, a recent article in the FCPA

175. *Good Practice Guidelines on Conducting Third-Party Due Diligence*, WORLD ECONOMIC FORUM (2013), http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf.

176. Richard L. Cassin, *FINRA Penalizes Morgan Stanley $13 Million for Failing to Supervise Salespeople*, FCPA BLOG (Sept. 27, 2017, 2:08 AM), http://www.fcpablog.com/blog/2017/9/27/finra-penalizes-morgan-stanley-13-million-for-failing-to-sup.html.

177. Jonathan Stempel, *JPMorgan Pays $2.8 Million Fine Over Improper Safeguards for Customers*, REUTERS (Dec. 27, 2017, 10:09 AM), https://www.reuters.com/article/us-jpmorgan-finra/jpmorgan-pays-2-8-million-fine-over-improper-safeguards-for-customers-idUSKBN1EL19W.

178. Richard L. Cassin, *Swiss Regulator: JPMorgan Chase 'Seriously Breached' AML Laws With 1MDB*, FCPA BLOG (Dec. 21, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/12/21/swiss-regulator-jpmorgan-chase-seriously-breached-aml-laws-w.html.

179. *Id.*

180. *Corruption Perceptions Index*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi (last visited Apr. 17, 2019).

Blog noted that the U.S. issuers had cited the Index in 120 SEC filings in the last three years alone.[181]

Due diligence in connection with revenues tainted by human rights violations has become a reputational best practice for U.S. companies[182] and the law in the UK.[183] As a matter of guidance, consider the following:

> Once a company is aware that it is doing business with an individual or entity that is committing Gross Human Rights Abuses—for example, by accidentally profiting from the abuse—it should consider taking immediate preventative action, including terminating its relationship with the abusive party. While this may create contractual issues, the potential penalties and complications from the assets being frozen during the trial, as we discussed earlier, will likely outweigh them, not to mention the potential reputational damage.[184]

Self-reporting (as opposed to publicity through sensationalism) and compensation are also in play.[185]

Diligence in hiring practices may no longer depend on the vague criminal propensity inquiry as the SEC cracked down on businesses offering coveted internships and permanent employment to relatives of officials with discretion over the award of business to the companies in the so-called "princeling" cases. To date, the SEC secured FCPA settlements of $264 million with JP Morgan,[186] $14.8 million from BNY Mellon,[187] and $7.5 million from Qualcomm.[188] In 2018, Credit Suisse settled with the SEC for a staggering $76.7 million.[189] Other "princeling" actions are expected as both Citigroup and HSBC confirmed the SEC "princeling" investigations in 2017.[190]

181. Richard L. Cassin, *TI's Corruption Perceptions Index Plays Role in SEC Risk Warnings*, FCPA BLOG (Dec. 18, 2017, 8:08 AM), http://www.fcpablog.com/blog/2017/12/18/tis-corruption-perceptions-index-plays-role-in-sec-risk-warn.html.

182. Richard J. Rogers & Sasho Todorov, *Practice Note: Dealing with Allegations of Gross Human Rights Abuse*, FCPA BLOG (Sept. 12, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/9/12/practice-note-dealing-with-allegations-of-gross-human-rights.html [hereinafter *Practice Note*].

183. Modern Slavery Act 2015, c. 30, § 54 (Eng.); *see also* Criminal Finances Act 2017, c. 22 (Eng.).

184. Richard J. Rogers & Sasho Todorov, *Rogers and Todorov: New UK Law Creates Liability for Gross Human Rights Abuses*, FCPA BLOG (July 26, 2017, 8:18 AM), http://www.fcpablog.com/blog/2017/7/26/rogers-and-todorov-new-uk-law-creates-liability-for-gross-hu.html.

185. *See Practice Note*, *supra* note 182.

186. Press Release, SEC, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016).

187. The Bank of New York Mellon Corp., Exchange Act Release No. 75720, 2015 WL 4911514 (Aug. 18, 2015); *see also* Richard L. Cassin, *How to Hire a Princeling: Six Rules Anyone Can Follow*, FCPA BLOG (Aug. 24, 2015, 9:18 AM), http://www.fcpablog.com/blog/2015/8/24/how-to-hire-a-princeling-six-rules-anyone-can-follow.html.

188. Press Release, SEC, SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business (Mar. 1, 2016); *see also* Reuters, *Qualcomm Fined for Hiring Relatives of Chinese Officials*, FORTUNE (Mar. 1, 2016), http://www.fortune.com/2016/03/01/qualcomm-fined-hiring-relatives-of-chinese-officials.

189. Richard L. Cassin, *Credit Suisse Settles 'Princeling Program' FCPA Offenses for $76.7 Million*, FCPA BLOG (July 5, 2018, 10:58 AM), http://www.fcpablog.com/blog/2018/7/5/credit-suisse-settles-princeling-program-fcpa-offenses-for-7.html.

190. Laure He, *HSBC Under SEC Probe for 'Princeling' Hiring in Asia; Shares Suffer After Worse-Than-Expected Earning*, SOUTH CHINA MORNING POST (Feb. 22, 2016, 11:34 AM), https://www.scmp.com/busi-

No discussion of this approach is possible without mention of the challenges posed by the U.S. system of designating certain countries and people as off limits to U.S. business of all types. This means not just banks but everyone, U.S. businesses and U.S. persons, doing business outside the U.S. These regimes are administered by the Office of Foreign Asset Control ("OFAC").[191] In June 2017, insurance giant AIG was fined $149,000 for 555 instances of insuring shipments to barred countries Cuba, Iran, and Sudan.[192] Another recent example involved OFAC fining Cartier's parent company for shipping to a barred company in Hong Kong.[193] Though arguably about lapses in controls in both instances, the controls relate to knowing the country and person involved in each transaction to ensure compliance.[194]

No discussion of risk-based due diligence is complete, however, without acknowledgement that the legal privacy regimes in the E.U., P.R.C., and elsewhere in Asia and Latin America are barriers to the level of due diligence expected of U.S. issuers in doing business outside our borders (and arguably inconsistent with state and federal privacy regimes as well). This challenge was brought to sharp focus when the husband and wife owner/operator of ChinaWhys diligence service were arrested, jailed, and convicted for their violation of P.R.C. privacy laws while carrying out due diligence on behalf of GSK.[195] The couple subsequently sued GSK, but the suit was dismissed.[196]

VII. THE PARABLE OF THE JAKARTA CAB RIDE

As this Article is meant to capture four decades of FCPA "wisdom," it is only fitting to end the Article with some core lessons from the field on the subject of training. After many years of delivering FCPA training outside the U.S., I learned to modify the standard discussion in three ways:

ness/companies/article/1915178/hsbc-under-sec-probe-princeling-hiring-asia-shares-suffer-after; *see also* Richard L. Cassin, *Feds Investigate Citigroup for 'Princeling' Hiring Practices*, FCPA BLOG (Feb. 27, 2017, 7:08 AM), http://www.fcpablog.com/blog/2017/2/27/feds-investigate-citigroup-for-princeling-hiring-practices.html.

191. *About*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx (last visited Apr. 17, 2019).

192. Richard L. Cassin, *AIG Fined for Insuring, Iran, Sudan, Cuba Shipments*, FCPA BLOG (June 29, 2017, 8:28 AM), http://www.fcpablog.com/blog/2017/6/29/aig-fined-for-insuring-iran-sudan-cuba-shipments.html.

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195. Ana Swanson, *China's Chilling Crackdown on Due-Diligence Companies*, ATLANTIC (Oct. 23, 2013), http://www.theatlantic.com/china/archive/2013/10/chinas-chilling-crackdown-on-due-diligence-companies/280787/.

196. Nate Raymond, *U.S. Judge Dismisses Ex-Sleuths' Lawsuit Against GlaxoSmithKline*, REUTERS (Oct. 2, 2017, 3:23 PM), https://www.reuters.com/article/us-gsk-china-lawsuit/u-s-judge-dismisses-ex-sleuths-lawsuit-against-glaxosmithkline-idUSKCN1C72OB.

First, with the proliferation of anti-corruption laws worldwide since 1977, and the shifting demographics of world trade, referring to the FCPA as America's anti-corruption law and "public" officials rather than using the word "foreign" makes us seem slightly less imperialistic.

Second, talking about "warning signs" in Communist countries is less confusing and more culturally sensitive than the term "red flags" which have a positive, not negative, connotation there.

Third, the importance of accurate records is best described through the Parable of the Jakarta cab ride. I have done hundreds of training sessions and found audiences often forget the details of their training year-to-year but, once they hear the parable, the records do become more reliable because they remember the ending of the parable.

In 2002, a client asked that I travel to Hong Kong to provide FCPA training to its investment bank employees from all over Asia. I did the then-typical dry recitation of the Act complete with the recitation of the obligatory deterrent effect of the potential individual and corporate penalties. A young accountant timidly raised their hand in the question-and-answer session and posited the following hypothetical:

> I have a friend assigned to Indonesia. They go weekly. When they leave, if they don't put HK$10 in their passport to exit through Customs, they are diverted to an agricultural inspection line where the wait causes them to miss their plane even though they were obviously nowhere near a farm. Is including the HK$10 a violation of the FCPA?

In that moment and to this day, I came to understand the importance of talking with people about the reality of corruption at a micro level and abandoned all pretext of professorial teaching about the FCPA with the following:

> As a Washington DC attorney, I must tell you that I am here to help and that the good lawyer answer is "it depends." And I will go beyond that good lawyer answer and actually tell you what it depends upon. The FCPA has two parts and an exception that are important to this discussion. First, the exception. If the Department of Justice saw the HK$10 as a facilitating payment at the border to get an otherwise corrupt official just to do their job, it would not be a violation of the anti-bribery provisions of the FCPA. But that is not a popular exception with prosecutors so no comfort can be given. But there is more to "it depends" than a U.S. prosecutor's view of the facilitating payment exception in the Act. Indonesia has anti-corruption laws. If an anti-corruption investigator is in the booth instead of a corrupt official on a day your "friend" puts the HK$10 in the passport, you can be arrested and jailed there and the Company cannot and will not help you as a matter of governance policy. But now I must ask a question before completing the answer: when <u>you</u> get home and fill out your expense report, do you put down the HK$10 as a bribe, facilitating payment, or cab ride?

An obviously embarrassed young accountant answered—cab ride! I then congratulated them on turning a definite Indonesian crime and possible U.S. bribe

punishable by a five-year jail term into a 20-year felony for covering up the payment through false records on the books of the U.S. issuer employing the individual who asked the question.

VII. CONCLUSION

Though the FCPA may not have been needed as an anti-bribery tool when adopted, it has had a profound effect on corporate governance and ethical standards worldwide. Though a surprising number of these matters are still occurring forty years after its passage, there can be little question about the effect on day-to-day business operations, board oversight, and public reporting among U.S. issuers and companies worldwide. The lessons of due diligence on a risk-based basis have become an integral part of successful compliance operations.