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THE FOREIGN CORRUPT PRACTICES ACT: An Empirical Examination of Enforcement Trends

September 2012

Preliminary Policy Report



Searle Civil Justice Institute

**THE FOREIGN CORRUPT PRACTICES ACT:
AN EMPIRICAL EXAMINATION OF ENFORCEMENT TRENDS**

PRELIMINARY REPORT

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SEARLE CIVIL JUSTICE INSTITUTE

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EXECUTIVE SUMMARY

Background

In the 1970s, congressional investigations revealed that many U.S. firms were making direct and indirect payments to foreign government officials to obtain business. Concerns about these activities culminated in December 1977 with the passage of the Foreign Corrupt Practices Act (FCPA),¹ making the U.S. the first country to prohibit payments to foreign government officials to secure a business advantage.

For most of the FCPA's existence, enforcement actions were rare. In recent years, however, the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) (collectively, "the Agencies") have markedly increased their enforcement of the FCPA.

Not surprisingly, the increase in FCPA enforcement activity has sparked a vibrant legal and policy debate. Because nearly all FCPA cases settle, a lack of judicial scrutiny of the Agencies' legal theories has caused some to worry that enforcement is no longer moored to congressional intent. Some interest groups have pressed Congress to reform the FCPA, leading to congressional hearings.

Searle Civil Justice Institute Task Force on the Foreign Corrupt Practices Act

To examine more closely the recent trends in FCPA enforcement activity, including potential causal factors and economic consequences, the SCJI created the Foreign Corrupt Practices Act Task Force (Task Force). This Preliminary Report is the first phase of a larger project aimed at providing empirical analysis to policymakers, judges, academics, and agency officials as they consider reforms to the FCPA and enforcement policies. The research conducted for this Preliminary Report was directed at two efforts:

1. Data collection on FCPA enforcement actions and outcomes since its inception; and
2. Identifying trends and potential drivers of changes in the nature and scope of FCPA enforcement.

¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o.).

Data and Methodology

This Preliminary Report provides a descriptive analysis of FCPA enforcement over time and examines the extent to which the character of FCPA enforcement has changed over time. Its focus is on the impact of FCPA enforcement on businesses. Accordingly, the unit of analysis is an FCPA enforcement action that implicates a specific firm, involving a specific course of conduct. The data include actions against individual officers or employees in instances where the Agencies did not charge the firm itself with an FCPA violation, because such actions are likely to have economic consequences for the firm involved. On the other hand, to avoid over-counting, FCPA actions related to wholly owned subsidiaries that have no separate economic identity are grouped together as part of the same enforcement action.²

Key Findings

- **FCPA enforcement has increased markedly in recent years.**

- Beginning in the early 2000s, there has been a pronounced upward trend in the number of FCPA actions brought by the Agencies.

From the FCPA's passage through 2004, the DOJ and SEC initiated 55 cases. From 2005-2011, the Agencies initiated 113 cases.³

- Financial penalties paid by businesses also have risen significantly in recent years.

The average inflation-adjusted corporate penalty from 1978-2004 was \$5.4 million, compared to \$60 million from 2005-2011, a more than ten-fold increase.⁴

² For example, the separate DOJ and SEC enforcement actions that concerned the same underlying conduct against Siemens AG, Siemens Argentina, and Siemens Bangladesh (as well as related individual enforcement actions) are counted as one enforcement action.

³ Some cases in the sample are related to the same underlying conduct, although they affect multiple distinct economic entities. For example, 17 cases come from the "Africa Sting," in which FBI agents posed as Gabonese government officials to solicit bribes. 21 cases involve the Iraqi oil-for-food corruption scandal, and 8 of those cases involve FCPA bribery conduct in addition to the oil-for-food scandal.

⁴ Median penalties are substantially lower than average penalties for both periods, suggesting that the averages are heavily influenced by large penalties at the upper end of the distribution. The relative difference in median penalties between the two periods, however, is similar to that for averages (\$0.2 million for 1978-2004, and \$7.8 million for 2005-2011), which indicates that outliers are not driving the difference in averages.

- Enforcement against individuals has been on the rise too.

From 1978-2004, the Agencies charged 136 people. From 2005-2011 the Agencies charged 145 people. This increase, however, may be an artifact of increased FCPA enforcement generally, rather than evidence of an increased focus on individuals.⁵

- **Commentators have focused on the Fifth Circuit’s ruling in *United States v. Kay*,⁶ and the uncertainty surrounding the scope of the term “foreign official,”⁷ as key drivers of increased FCPA enforcement. The character of recent enforcement is consistent with these explanations.**

- The percentage of cases involving payments for a benefit other than government procurement contracts has almost doubled since 2004.

Consistent with the ruling in Kay expanding the potential scope of FCPA enforcement, the percentage of cases involving payments to secure an economic advantage other than direct government business has risen from 24 percent during the 1978-2004 period, to 43 percent from 2005-2011 (54 percent excluding Africa Sting cases).⁸

- The percentage of FCPA cases involving payments to non-traditional government officials also has almost doubled since 2004.

Actions involving non-traditional government actors (e.g., employees of state-owned enterprises) comprise 31 percent of cases from 1978-2004, but 55 percent of cases from 2005-2011 (66 percent excluding Africa Sting cases).

⁵ Enforcement *rates* against individuals, for example, have declined in recent years: from 1978-2004, the Agencies charged at least one individual in 80 percent of their cases, compared with only 48 percent of their cases from 2005-2011. Further, the Agencies charged an average of about 3 individuals per case from 1978-2004, compared to an average of about 1 person per case from 2005-2011.

⁶ 738 F.3d 738, 749 (5th Cir. 2004).

⁷ The lack of clarity in the term “foreign official” derives from its definition including officers, employees, and persons acting on behalf of “government instrumentalities.” Because the FCPA does not define “instrumentality,” and its meaning has not been subject to judicial interpretation, the scope of “instrumentality,” and thus “foreign official,” remains unclear.

⁸ Enforcement actions that do not involve government procurement can involve, for example, obtaining a foreign license, permit or certification, or seeking a favorable business environment.

- **The percentage of cases involving foreign firms has risen sharply since the early 2000s.**

From 1978-2004, 15 percent of FCPA actions involved foreign firms, compared to 29 percent from 2005-2011. One likely explanatory factor behind this rise is the 1998 Amendments to the FCPA, which gave the Agencies greater jurisdiction over non-U.S. entities.

- **In late 2004, the DOJ began using deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to resolve corporate FCPA actions. Some have argued that the availability of these settlement vehicles may encourage the DOJ to pursue more cases than it otherwise would, thus contributing to the rise in FCPA enforcement.**

Coinciding with the overall rise in FCPA enforcement, since 2004, the DOJ has resolved 75 percent of all corporate FCPA actions with either a DPA or an NPA. Given the available data, however, it is unclear whether DPAs and NPAs are merely substitute legal resolution mechanisms for actions that would have been brought, or alternatively, whether their use has contributed to the increase in FCPA enforcement.

- **FCPA actions often concern business conduct in countries that are relatively more corrupt as measured by the Transparency International corruption index.**
- **The data do not suggest that U.S. involvement in foreign markets, as measured by real U.S. exports and real U.S. foreign aid, is a key driver of enhanced FCPA enforcement.**
- **The composition of industries, as well as the mix between public and private companies, subject to FCPA enforcement actions appears relatively constant over time.**

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THE FOREIGN CORRUPT PRACTICES ACT: AN EMPIRICAL EXAMINATION OF ENFORCEMENT TRENDS

PRELIMINARY REPORT

I. INTRODUCTION

In the 1970s, congressional investigations discovered that many U.S. firms were making direct and indirect payments to foreign government officials to obtain business, often concealing these payments from investors and auditors. Contemporaneous investigations surrounding the Watergate scandal revealed that many corporations maintained slush funds to curry favor with foreign and domestic political officials. Concerns about these activities culminated in December 1977 with the passage of the Foreign Corrupt Practices Act (FCPA).¹

Since the FCPA was enacted, the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) (the Agencies)—which jointly enforce the FCPA—have brought 168 bribery-related actions.² Through most of its history, FCPA enforcement was rare. The early 2000s, however, began an upward trend in the number of cases pursued by the Agencies, which increased markedly around 2005 and continues to present day.

The increase in FCPA enforcement activity has sparked a vibrant legal and policy debate. Because nearly all FCPA cases settle, the lack of judicial scrutiny of the Agencies' legal theories has caused some to worry that enforcement is no longer moored to congressional intent. Some interest groups have pressed Congress to reform the FCPA, while others oppose reform, believing that current FCPA enforcement is appropriate.

Commentators have posited several possible explanations for the rise in Agency enforcement of the FCPA. For example, in 2004, the Fifth Circuit held in *United States v. Kay* that the “obtaining or retaining business” element of the FCPA may not require payments be made with respect to the acquisition or retention of government contracts.³ By expanding the potential scope of enforcement, some contend that the *Kay* ruling has energized the Agencies to pursue more cases involving conduct relating to customs duties, taxes, licenses, permits, or other means

¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o.).

² See Section III.A., *infra*, for more information on the Task Force's methodology in classifying FCPA actions.

³ 738 F. 3d 738, 749 (5th Cir. 2004).

that assist in generally conducting business in a foreign country.⁴ Several commentators additionally have argued that the enforcement Agencies have taken advantage of the fact that the FCPA does not define foreign government “instrumentality”—on which the definition of “foreign official” depends—to expand the reach of the FCPA to non-traditional government officials, such as employees of state-owned enterprises.

Also beginning in 2004, the DOJ began to resolve FCPA cases with non-prosecution agreements (NPAs) and deferred-prosecution agreements (DPAs). Since then, the DOJ has resolved the vast majority of all corporate FCPA enforcement actions with one of these settlement vehicles. The use of NPAs and DPAs gives corporations an alternative to litigation or pleading guilty to a criminal charge, making it less likely that the DOJ will be held to its burden of proof in court. In this manner, the use of NPAs and DPAs may encourage the DOJ to advance more aggressive enforcement theories, including liberal definitions of “foreign official” and “obtain and retain business.”

A deep literature exists on both the influence of corruption on economic development and the current FCPA enforcement regime.⁵ Further, some organizations and web sites routinely publish and analyze enforcement data.⁶ To date, however, there is little empirical evidence or analysis of how the character of FCPA enforcement activity has changed over time, or on its impact on companies subject to enforcement actions.⁷

⁴ See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA L. REV. 489, 540 (2011); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 393-94 (2010).

⁵ For surveys on research on corruption, see Arvind K. Jain, *Corruption: A Review*, 15 J. ECON. SURV., 71–121 (2001) and Jakob Svensson, *Eight Questions about Corruption*, 3 J. OF ECON. PERSP. 19, 20 (2005). For examples of legal analyses of the FCPA, see Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practice Act Enters A New Era*, 43 U. TOL. L. REV. 99 (2011); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781 (2011); Westbrook, *supra* note 4, at 489; Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271-75 (1998).

⁶ See e.g., FCPA Professor, <http://www.fcpaprofessor.com> (last visited Sept. 5, 2012); Sherman & Sterling LLP, <http://fcpa.shearman.com/> (last visited Sept. 5, 2012); Trace Compendium, <https://www.traceinternational2.org/compendium/> (last visited Sept. 5, 2012).

⁷ As an exception, Karpoff *et. al* examine the costs imposed on firms that are targeted for FCPA bribery-related enforcement actions. See Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Impact of Anti-Bribery Enforcement Actions on Targeted Firms*, University of Washington, Texas A&M University, and American University Working Paper (Feb. 28, 2012). Several other studies examine how bribery, or its revelation, effect firm operations. For example: Smith, Stettler, and Beedles examine the effects on firms that voluntarily disclosed the existence of slush funds during an SEC amnesty period in 1977. David B. Smith et al., *An Investigation of the Information Content of Foreign Sensitive Payment Disclosures*, 6 J. ACCT. & ECON. 153, 154 (1984). See also Cheung, Rau, & Stouraitis, *Which Firms Benefit from Bribes, and by How Much? Evidence from Corruption Cases Worldwide*, Hong Kong Baptist University and University of Cambridge Working Paper (Nov. 2011) (examining how the use of bribes affects firm value); Fan, Rui, and Zhao; Joseph P.H. Fan, Oliver Meng Rui, & Mengxin Zhao, *Public Governance and Corporate Finance: Evidence from Corruption Cases*, 36 J. OF COMP. ECON. 343-364 (2008) (showing that the revelation of bribery affects firm leverage in China); Chang-Tai Hsieh

To examine more closely the recent trends in FCPA enforcement activity, including potential causal factors and economic consequences, the Searle Civil Justice Institute (SCJI) created the Foreign Corrupt Practices Act Task Force (Task Force). This Preliminary Report is the first phase of a larger project aimed at providing empirical analysis to policymakers, judges, academics, and agency officials as they consider reforms to the FCPA and enforcement policies.

The Task Force gathered data on FCPA enforcement actions involving foreign bribery, focusing on the firm as the unit of analysis. This Preliminary Report provides a descriptive analysis of FCPA enforcement actions over time. In an attempt to identify possible factors contributing to the recent increase in FCPA enforcement, it also examines the extent to which the nature of FCPA actions has changed over time. In future phases of this project the Task Force plans to examine the economic impact of FCPA enforcement on companies and will attempt to provide a more rigorous empirical examination of the explanatory factors driving FCPA enforcement.

The remainder of this Preliminary Report is structured as follows. Section II provides background on the FCPA and the policy debates prompted by the recent increase in FCPA enforcement. Section III explains data and methods. Section IV examines FCPA enforcement trends over time; and Section V concludes.

& Enrico Moretti, *Did Iraq Cheat the United Nations? Underpricing, Bribes, and the Oil for Food Program*. 121 QUART. J. OF ECON. 1211-48 (2006) (examining how the United Nations' oil-for-food program affected the price of Iraqi oil).

II. BACKGROUND

A. The Foreign Corrupt Practices Act

In the mid-1970s, Congress held numerous hearings in the aftermath of news of questionable corporate payments to a variety of foreign government recipients. For instance, in 1971 Lockheed Corporation admitted to regulators that it had paid millions of dollars to officials in several countries to obtain business, including payments to the former Japanese Prime Minister to assist in selling jets to a Japanese airline. These revelations led to congressional investigations, which in turn discovered that many U.S. firms were making direct or indirect payments to foreign government officials to obtain business, often concealing these payments from investors and auditors. Contemporaneous investigations surrounding the Watergate scandal revealed that many corporations maintained slush funds to curry favor with foreign and domestic political officials. These concerns led Congress to amend the Securities Exchange Act with the FCPA, making the U.S. the first country in the world to pass a law that prohibits payments to foreign government officials to secure a business advantage.

Congress has since amended the FCPA twice. Soon after passage of the FCPA—during a time of economic recession—questions were raised about whether the FCPA was harmful to U.S. business. The Carter administration sent a report to Congress that identified the FCPA as discouraging exports; the Government Accountability Office released a report detailing how the FCPA was riddled with complicating ambiguities and shortcomings; and the incoming Reagan administration recommended decriminalizing conduct subject to the FCPA.⁸ Beginning in 1980, Congress sought to amend the FCPA—a process that took eight years. During this time, various bills (either stand alone bills or specific titles and sections of omnibus export or trade bills) were introduced in the 96th, 97th, 98th, 99th, and 100th Congresses (1980–1988). In 1988, Congress finally amended the FCPA.⁹ Principal amendments included the creation of an express facilitating-payment exception, the creation of certain affirmative defenses, and a revised knowledge standard applicable to payments made to “foreign officials” indirectly through third parties such as agents.

Congress amended the FCPA again a decade later. In December 1997, the U.S. signed the Organization for Economic Cooperation and Development (“OECD”)

⁸ See Interagency Export Disincentives Task Force, *Report on Export Disincentives*, Feb. 1980, available at <http://shelf1.library.cmu.edu/cgi-bin/tiff2pdf/heinz/box00123/fld00009/bdl0007/doc0001/heinz.pdf> (last visited Sept. 5, 2012); U.S. Government Accountability Office, *Impact of Foreign Corrupt Practices Act on U.S. Business*, Report to the Congress, Mar. 4, 1981, available at <http://archive.gao.gov/d46t13/114503.pdf> (last visited Sept. 5, 2012); Editorial, *Turning Back: Undoing Watergate Reforms*, TIME, June 1, 1981, available at <http://www.time.com/time/magazine/article/0,9171,954791,00.html> (last visited Sept. 5, 2012). See also, Wallace L. Timmeny, SEC Enforcement of the Foreign Corrupt Practices Act, 2 LOY. L.A. INT’L & COMP. L. REV. 25 (1979), available at <http://digitalcommons.lmu.edu/ilr/vol2/iss1/3> (last visited Sept. 5, 2012).

⁹ Title V of the Omnibus Trade Act (Public Law 100-418).

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. To implement certain portions of the Convention, Congress amended the FCPA in 1998.¹⁰ Principal amendments included the creation of a new statutory provision applicable to certain foreign companies and foreign nationals, and expanded nationality jurisdiction as to U.S. companies and citizens.

1. Key Provisions

The FCPA has two main provisions: anti-bribery; and books and records and internal controls.

a. Anti-Bribery Provisions

i. *General Prohibitions*

As a general matter, the anti-bribery provisions prohibit the corrupt payment of money or “anything of value” to a “foreign official” to “obtain or retain business.”¹¹

Anything of Value. “Anything of value” includes more than cash payments. FCPA enforcement actions have been based on “things of value” provided directly or indirectly to a foreign official including: gifts such as cars and jewelry; excessive travel and entertainment expenses; educational or executive training expenses; promises of future employment; and shares or dividends of a company.¹²

Foreign Official. The FCPA defines “foreign official,” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or

¹⁰ The International Anti-Bribery and Fair Competition Act of 1998 (Pub.L. 105-366, 112 Stat. 3302 (signed November 10, 1998)).

¹¹ 15 U.S.C. § 78dd-2(i)(1) *et seq.* (1998). The anti-bribery provisions apply to “issuers,” “domestic concerns,” and “persons” other than “issuers or “domestic concerns.” An “issuer” is generally a company (U.S. or foreign) that has a class of securities traded on a U.S. market or an entity that is otherwise required to file reports with the SEC. An “issuer” can also include a company that has American Depositary Receipts traded on a U.S. exchange. A “domestic concern” is generally any business form (e.g., private corporations, limited liability companies, partnerships, sole proprietorships) with a principal place of business in the U.S. or organized under U.S. law. A “domestic concern” also includes “any individual who is a citizen, national, or resident of the U.S.”

As to U.S. “issuers” and “domestic concerns,” the FCPA contains both territorial jurisdiction and nationality jurisdiction. Nationality jurisdiction means that the FCPA’s anti-bribery provisions will apply even if the conduct at issue has no U.S. nexus. Thus, as to U.S. “issuers” and “domestic concerns,” the FCPA’s anti-bribery provisions have extraterritorial jurisdiction meaning that the FCPA can be violated if an improper payment scheme is devised and executed entirely outside of the U.S. A “person” other than an “issuer” or “domestic concern” can generally include foreign non-“issuer” companies and foreign nationals. The anti-bribery provisions will apply to such a “person” who “while in the territory of the U.S. . . . [uses] the mails or any means or instrumentality of interstate commerce” in furtherance of a improper payment scheme.

¹² 15 U.S.C. § 78dd-2(a)(1) (1998).

instrumentality, or for or on behalf of any such public international organization.”¹³ Thus, “foreign official” includes traditional foreign government leaders as well as employees of various foreign government departments and agencies such as tax officials, customs officials, and others tasked with issuing foreign government licenses, permits, certifications, etc.¹⁴

The FCPA does not define “instrumentality,” but the Agencies maintain that state-owned or state-controlled enterprises (SOEs) in foreign countries can be “instrumentalities” of foreign governments such that all SOE employees are “foreign officials” under the FCPA. The Agencies have taken this position in certain actions even when the foreign government is a minority investor in the enterprise, and when the enterprise has publicly traded stock, does business outside of its own borders, employs non-nationals, or has other attributes of a commercial business.¹⁵

In recent challenges to this enforcement theory, some courts have concluded that the question of whether SOEs qualify as “instrumentalities” of a foreign government under the FCPA is a question of fact that depends on a number of factors. These factors may include the following: the foreign state’s characterization of the entity and its employees; the foreign state’s degree of control over the entity; the purpose of the entity’s activities; the entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions; the circumstances surrounding the entity’s creation; and the foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).¹⁶ At present, no court of appeals has ruled on the meaning of “foreign official.”

Obtain or Retain Business. Under the FCPA, the illicit payments to the foreign official must be for the purpose of “obtaining or retaining business.” This term clearly includes payments to a “foreign official” to secure a specific contract or business opportunity, and in some circumstances also includes payments that secure a competitive advantage in obtaining or retaining business in the marketplace generally. The exact scope of the “obtaining or retaining business” element, however, remains unclear.

To date, the Fifth Circuit is the only appellate court to address the scope of this term. In *United States v. Kay*, the court was presented with an issue of first impression—whether payments to foreign officials to avoid paying customs duties and to lower sales taxes could satisfy the “obtaining or retaining business” element.¹⁷ The

¹³ 15 U.S.C. § 78dd-2(h)(2)(A) (1998).

¹⁴ *Id.*

¹⁵ See, e.g. *United States v. Carson*, No. 09-77, 2011 WL 5101701 (C.D. Cal. May 18, 2011) (holding that where the weight of the factors permit the conclusion that the SOE is an instrumentality, employees of a SOE would qualify as “foreign officials” under the FCPA); *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1109 (C.D. Cal. 2011) (same).

¹⁶ *Id.*

¹⁷ 359 F.3d 738 (5th Cir. 2004).

court concluded that the FCPA's "obtaining or retaining" business element was ambiguous, and after reviewing the legislative history, it held that Congress intended the FCPA to prohibit a range of payments wider than those that directly influence the acquisition or retention of a specific contract.¹⁸ The court ultimately held that payments to a foreign official to lower taxes and customs duties *could* provide an unfair advantage to the payer over competitors and thereby assist the payer in obtaining and retaining business.¹⁹

The court, however, did not hold that all payments outside the context of directly securing a contract violate the FCPA. Rather, it explained that the government must show "that the bribery was intended to produce an effect . . . that would 'assist in obtaining or retaining business.'"²⁰ The Fifth Circuit recognized that not all payments that reduce costs (e.g., through lower taxes or customs duties) lead to more business, and thus violate the FCPA.²¹ The court explained:

[i]f the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting in obtaining or retaining business would be unnecessary, and thus surplusage – a conclusion that we are forbidden to reach.²²

ii. *Exceptions and Defenses*

The anti-bribery provisions also contain one exception and two affirmative defenses:

- The anti-bribery provisions "shall not apply to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine government action by a foreign official."²³ The FCPA's legislative history states that the law was "deliberately cast in terms which differentiate between [corrupt payments] and facilitating payments" and that the FCPA would not "reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or

¹⁸ *Id.* at 755-56.

¹⁹ *Id.* at 756.

²⁰ *Id.*

²¹ *Id.* at 760 ("There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure the profitability of some start-up venture.").

²² *Id.* at 760. Although the court concluded that the government must show the required nexus between the payments to the foreign official and the obtaining or retaining of business, it ultimately held that failure to allege the specific facts to demonstrate this nexus was not fatal to the government because this "business nexus" element does not go to the "core criminality of the FCPA." See *id.* at 761.

²³ 15 U.S.C. § 78dd-3(b) (1998).

clerical nature.”²⁴ Congress recognized that such payments “may be reprehensible in the United States” but “that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.”²⁵

- The first affirmative defense is for the payment of “anything of value . . . lawful under the written laws and regulations” of the foreign official’s country.
- The second is if the payment of “anything of value” “was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”²⁶

iii. *Third-party Provisions*

The anti-bribery provisions prohibit not only direct payments to a “foreign official” to “obtain or retain business,” but also payments to “any person” (such as a third party) “while knowing that all or a portion of such money or thing of value” will be provided to a “foreign official.”²⁷ The so-called third-party payment provisions state that “a person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or a result if (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.” The anti-bribery provisions further state: “When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”²⁸

b. Books-and-Records and Internal Controls Provisions

The corporate payments discovered in the mid-1970s were often recorded in separate books and records or otherwise misreported. Thus, Congress—at the SEC’s urging—included books-and-records and internal control provisions in the FCPA. The books and records provisions require that issuers “make and keep books, records, and accounts, which, in reasonable detail . . . accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”²⁹ The FCPA defines

²⁴ H.R. Rep. No. 95-640 (1977), *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (last visited Sept. 5, 2012).

²⁵ *Id.*

²⁶ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

²⁷ 15 U.S.C. § 78dd-1(a)(3) (1998).

²⁸ *Id.*

²⁹ 15 U.S.C. § 78m(b)(2)(A).

“reasonable detail” as a level that “would satisfy prudent officials in the conduct of their own affairs.”³⁰

The internal controls provisions require that issuers “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that,” among other things: “transactions are executed in accordance with management’s general or specific authorization;” “access to assets is permitted only in accordance with management’s general or specific authorization;” and “transactions are recorded as necessary to permit a preparation of financial statements in conformity with generally accepted accounting principles . . . and to maintain accountability for assets.”³¹

As evident from the above description, the FCPA’s books and records and internal control provisions are generic and can be implicated in purely domestic scenarios that have nothing to do with payments to “foreign officials” to “obtain or retain business.” Because payments to a “foreign official” to “obtain or retain business” are frequently concealed or otherwise improperly recorded on a company’s books and records (such as “miscellaneous expenses,” “cost of good sold” etc.), the books and records provision also can be implicated in a typical FCPA foreign bribery scenario.³²

When improper payments are made, the Agencies will generally assert that the internal control provisions were also violated under the theory that the payments would have been detected and never paid if the company had proper internal controls (such as effective FCPA compliance policies, adequate supervision and control of foreign managers or third-party agents, sufficient checks and balances for spending corporate money, etc.).

The FCPA specifically states that “where an issuer . . . holds 50% or less of the voting power with respect to a domestic or foreign firm [the books and records and internal control provisions] require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [the above stated provisions.]”³³ This provision further provides that “such circumstances include the relative degree of the issuer’s ownership of the domestic or foreign firm and the laws and practices governing the

³⁰ 15 U.S.C. § 78m(b)(7). The term “reasonable detail” in this context means “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”

³¹ 15 U.S.C. § 78m(b)(2).

³² See, e.g., SEC v. Magyar Telekom Plc., Case No. 11 civ 9646 (S.D.N.Y. Dec. 20, 2011). See also Lay-Person’s Guide to FCPA, *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Sept. 5, 2012); Danforth Newcomb, *The Foreign Corrupt Practices Act: FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, 1814 Practising Law Institute Corporate Law and Practice Course Handbook Series 119 (2010) (discussing *Magyar Telekom* investigation).

³³ 15 U.S.C. § 78m(b)(6) (1997).

business operations of the country in which such firm is located. An issuer that demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of [the books-and-records and internal control provisions].”

2. Enforcement

The FCPA has dual enforcers—the DOJ and the SEC.³⁴ The DOJ is the sole agency responsible for criminal enforcement of the anti-bribery provisions and willful violations of the books and records and internal control provisions. The DOJ has jurisdiction over “issuers,” “domestic concerns,” and “persons” other than “issuers” and “domestic concerns” as those terms are described above.

Unlike other areas of criminal law, DOJ’s enforcement of the FCPA is highly centralized. Per DOJ policy, “no investigation or prosecution of cases involving alleged violations of the anti-bribery provisions of the Foreign Corrupt Practices Act . . . or of related violations of the FCPA’s record keeping provisions . . . shall be instituted without the express authorization of the Criminal Division.”³⁵

Although the FCPA does provide criminal and civil fine and penalty amounts, these amounts are often of little importance in arriving at actual amounts assessed in FCPA enforcement actions. Under the Alternative Fines Act, an FCPA criminal violation can result in a fine up to twice the benefit the payor sought to obtain through the improper payment. The U.S. Sentencing Guidelines, moreover, are used to calculate an advisory penalty range. Factors under the Guidelines that can affect a criminal fine include: the number of employees in the organization; whether high-level personnel were involved in or condoned the conduct; prior criminal history; whether the organization had a pre-existing compliance and ethics program; voluntary disclosure; cooperation; and acceptance of responsibility.³⁶

The SEC has only civil law enforcement authority, but accordingly enjoys a lower burden of proof than the DOJ does in criminal enforcement of the FCPA. The SEC has jurisdiction over “issuers” (and its employees and agents) and can bring civil charges for violations of the anti-bribery provisions and the books-and-records and internal control provisions. In recent years, the SEC also has pursued enforcement actions against non-issuers for violating the FCPA on the theory that the defendant,

³⁴ Courts have held that the FCPA provides no private right of action. See *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990).

³⁵ U.S. Dep’t of Justice, United States Attorney’s Manual § 9-47.00 (1997).

³⁶ Cooperation can lead to increased probability of a company being charged in an FCPA action, but also contributes to substantially lower (34.7%) monetary penalties. See Rebecca Files, Gerald S. Martin, & Stephanie J. Rasmussen, *The Monetary Benefit of Cooperation in Regulatory Enforcement Actions for Financial Misrepresentation* (Feb. 29, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026282 (last visited Sept. 5, 2012).

while acting as an agent of an issuer, violated the FCPA and/or aided or abetted issuer violations.³⁷

The SEC enforces the FCPA through either civil complaints filed in a federal court or administrative proceedings. The SEC is empowered to seek a variety of sanctions in an enforcement action such as monetary penalties, disgorgement of ill-gotten gains, pre-judgment interest, an injunction, or a cease and desist order prohibiting current and future violations. In addition to fines and penalties, firms subject to FCPA scrutiny also incur pre- and post-enforcement action professional fees and expenses. Often times, these expenses greatly exceed the announced fine or penalty.³⁸

In instances where the DOJ and SEC both have jurisdiction over a particular matter, it is common for both agencies to be involved in the same core enforcement action and for the Agencies to announce the resolution of their respective enforcement actions at the same time.

The DOJ uses three vehicles to resolve most corporate FCPA enforcement actions: non-prosecution agreements (NPAs); deferred prosecution agreements (DPAs); and plea agreements.³⁹ An NPA is a privately negotiated agreement

³⁷ See, e.g., Complaint at 2-3, 10, SEC v. Snamprogetti, No. 4:10-cv-2414 (S.D. Tex. July 7, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-119.pdf> (last visited Sept. 5, 2012); Complaint at 1-3, SEC v. Panalpina, Inc., No. 21727 (S.D. Tex. Nov. 4, 2010), available at <http://www.sec.gov/litigation/complaints/2010/comp21727.pdf> (last visited Sept. 5, 2012).

³⁸ There are several examples of exorbitant internal investigation costs excluding fines. See Nathan Vardi, *The Bribery Racket*, FORBES, May 28, 2010, available at http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket_2.html (last visited Sept. 5, 2012) for multiple instances of high-cost investigations and an explanation of the market for accounting and legal services relating to the self-reporting context. See also Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1001-1005 (2010) (discussing the costs associated with FCPA compliance); Peter J. Henning, *The Mounting Costs of Internal Investigations*, NY TIMES, Mar. 3, 2012, available at <http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/> (last visited Sept. 5, 2012) (Avon Products spent nearly \$250 million over three years on its internal investigations and compliance measures.). Siemens AG reportedly spent approximately \$1 billion in fees, not including fines, relating to its FCPA investigations, while automaker Daimler incurred costs of \$500 million. *Id.* See also Team, Inc., Current Report (Form 8-K) (Jan. 5, 2010), available at http://b2i.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingConvPDF1?SessionID=I_I9HlqseZMBo-9&ID=6970121 (last visited Sept. 5, 2012) (Team, Inc. reported in its 8-K filing with the SEC that total professional costs involving one internal investigation totaled \$3.0 million.); Weatherford Int'l Ltd., Annual Report Pursuant to Section 13 and 15(d), 90 (Mar. 15, 2012), available at http://phx.corporate-ir.net/phoenix.zhtml?c=77782&p=irol-secLtd&secCat01.3_rs=41&secCat01.3_rc=10&control_selectgroup=0 (last visited Sept. 5, 2012) (Weatherford Int'l Ltd. stated in its annual report that it had incurred costs of \$123 million for "legal and professional fees in connection with complying with and conducting" the on-going investigations relating to FCPA violations.).

³⁹ DOJ has increasingly used NPAs and DPAs to settle corporate criminal matters. See GOVERNMENT ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 14-15 (Dec.

between the DOJ and the company under which the DOJ agrees not to prosecute the company if it acknowledges responsibility for the conduct at issue and agrees to a host of compliance undertakings. NPAs are not filed with the court.⁴⁰ A DPA is filed with a court and has the same appearance as a criminal indictment or information, but the DOJ agrees to defer prosecution of the company if the company acknowledges responsibility for the conduct at issue and agrees to a host of compliance measures. After the relevant time period, the DOJ dismisses the criminal charges filed, but never prosecuted.⁴¹ In a plea agreement, the defendant corporation pleads guilty to the allegations in the criminal indictment and settles the charges by paying a penalty and agreeing to compliance and monitoring provisions.

The SEC typically resolves corporate FCPA cases through consent decrees in which the defendant does not admit to any wrongdoing, but agrees only to settle the charges by paying a civil penalty and adopting compliance measures. The SEC received the authority to enter into NPAs and DPAs in 2011, and has settled one case in this manner.⁴²

Individuals facing FCPA scrutiny, particularly criminal exposure, may be more likely than business organizations to put the enforcement Agencies to their burden of proof at trial.⁴³ Nonetheless, the vast majority of individual FCPA enforcement actions also settle. The end result is often a general lack of judicial scrutiny of the Agencies' FCPA enforcement theories.

3. Possible Explanation for Recent Enforcement Trends

From its enactment in 1977 through the mid 2000s, FCPA enforcement was rare. Beginning in the mid 2000s, however, enforcement has increased in both number of actions and the level of corporate fines. Several possible reasons may account for the recent increase in FCPA enforcement:

- *International Economic Integration.* The FCPA's anti-bribery provisions are most logically implicated when doing business in international markets. Thus, as more companies (large and small and across a variety of industry sectors) have moved into international markets during the past decade, it may not be surprising to see FCPA enforcement increase during this period. Further, many

2009); see also Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

⁴⁰ See Letter from Edward N. Siskel, Associate Deputy General Counsel, Office of the Deputy Attorney General to GAO at 2 (Dec. 15, 2009).

⁴¹ See GAO, *supra* note 39, at 12.

⁴² Press Release, Securities and Exchange Commission, SEC Charges Former Fannie Mae and Freddie Mac Executives with Securities Fraud (Dec. 16, 2011), *available at* <http://www.sec.gov/news/press/2011/2011-267.htm> (last visited Sept. 5, 2012).

⁴³ See Edvard Pettersson, *Foreign Bribery Defendants May Fight More as Cases Falter*, Bloomberg News, Jan. 12, 2012, <http://www.bloomberg.com/news/2012-01-12/foreign-bribery-defendants-may-fight-more-as-prosecutors-falter.html> (last visited Sept. 5, 2012).

companies subject to the FCPA's jurisdiction are increasingly doing business in developing countries where corruption is generally viewed as playing a larger part in business than in developed countries.

- *Sarbanes-Oxley*. The passage of the Sarbanes-Oxley Act (SOX) in 2002 may have also impacted FCPA enforcement. Section 404 of SOX requires issuers to assess and report on the effectiveness of its internal controls over financial reporting. As a general matter, this requirement has caused issuers more actively to investigate questionable transactions—particularly those associated with foreign subsidiaries whose books and records are consolidated with the issuers for purposes of financial reporting.
- *Expanded Jurisdiction*. In 1998, Congress amended the FCPA to create a new statutory provision applicable to certain foreign companies and foreign nationals, and expanded nationality jurisdiction over U.S. companies and citizens. One may expect to see more FCPA actions since the 1998 amendments as more conduct is now subject to DOJ and SEC jurisdiction.
- *Iraq Oil-For-Food Program*. The Iraq oil-for-food program (IOFFP) is responsible for a number of recent FCPA enforcement actions. In 2005, a report named 2,253 companies that allegedly had made illegal kickback payments to the Iraqi government under the IOFFP, which served as a “ready-made list of FCPA investigations.”⁴⁴
- *NPAs and DPAs*. Because NPAs and DPAs make it easier for a firm to resolve FCPA claims, it reduces the probability that the Agencies will be put to their burden of proof before a court, and consequently may increase their willingness to bring cases in the first place.⁴⁵ As a former high-ranking DOJ FCPA enforcement official stated, if the DOJ “only had the option of bringing a criminal charge or declining to bring a case [as opposed to the third option of using an

⁴⁴ See Indep. Inquiry Comm. into the United Nations Oil-for-Food Programme, Manipulation of the Oil-for-Food Programme by the Iraqi Regime 1 (2005), available at <http://www.iic-offfp.org/documents/IIC%20Final%CCCC20Report%2027Oct2005.pdf> (last visited Sept. 5, 2012).

⁴⁵ Relatedly, officers may have incentives to enter their companies into NPAs and DPAs to avoid facing individual FCPA charges. Stated DOJ policy, however, appears to belie this contention. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., to U.S. Attorneys, *Regarding Principles of Federal Prosecutions of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf (last visited Sept. 5, 2012); Memorandum from Paul J. McNulty, Deputy Attorney Gen., to U.S. Attorneys, *Regarding Principles of Federal Prosecutions of Business Organizations* 18 (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (last visited Sept. 5, 2012) (“[P]rosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees). See also Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 95-96 (2006); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 331 (2007) (the use of DPAs and NPAs has “sharpen[ed] the focus on individual liability.”).

NPA or DPA], [the DOJ] would certainly bring fewer cases.”⁴⁶ To the extent that the availability of NPAs and DPAs to settle cases makes the Agencies more likely to bring actions, moreover, it may also create incentives to pursue actions that rely on very broad readings of the FCPA.⁴⁷ The same former official noted that a “danger” with NPAs and DPAs “is that it is tempting . . . to seek to resolve cases through DPAs or NPAs that don’t actually constitute violations of the law.”⁴⁸

- *United States v. Kay*. The ruling in *United States v. Kay* approved an expansive interpretation of the “obtain or retain business” element of FCPA liability. This development may have increased the range of conduct that the Agencies are willing to challenge under the FCPA.
- *National Security Concerns*. It is possible that the war on terror has led to increased government scrutiny of various foreign transactions.⁴⁹ Indeed, some DOJ and Department of Homeland Security officials have drawn a direct connection between corruption and U.S. national security interests.⁵⁰

Other factors also may contribute to increased FCPA enforcement. For example, some have argued that a general feeling that lax oversight was at least partially responsible for the financial crisis, coupled with popular resentment of bailouts for large financial institutions has created political incentives for regulators to focus on “corruption” by large multinational companies and their executives.⁵¹ Some also have cited increased enforcement agency resources, increased focus on business activity by foreign law enforcement agencies, and increased monitoring of enforcement activity by non-governmental organizations as leading to more FCPA enforcement.⁵² Finally, some have argued that the emergence of a growing private sector FCPA industry and the prominence of voluntary disclosures additionally may have contributed to the increase in FCPA enforcement.⁵³ As another former high-ranking DOJ FCPA enforcement official stated “this is good business for law firms . . .

⁴⁶ Mark Mendelsohn on the Rise of FCPA Enforcement, 24 CORP. CRIME REP. 1, 13 (September 13, 2010). Additionally, the OECD, in its Phase 3 Report of the U.S. FCPA Enforcement Program, noted “it seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S.” See OECD Phase 3 Report of the U.S. FCPA Enforcement Program, available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf> (last visited Sept. 5, 2012).

⁴⁷ Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL’Y 137, 149 (2010).

⁴⁸ Mendelsohn on the Rise of FCPA Enforcement, *supra* note 46, at 14.

⁴⁹ See Yockey, *supra* note 5, at 10-11.

⁵⁰ *Id.*

⁵¹ See Westbrook, *supra* note 5, at 520-21; 535-36.

⁵² See FCPA Professor, *supra* note 6.

⁵³ See Koehler, *supra* note 38, at 1001-05.

accounting firms . . . consulting firms, the media—and Justice Department lawyers who create the marketplace and then get [themselves] a job” in the private sector.⁵⁴

B. Legal and Policy Debates Surrounding the FCPA

The current FCPA enforcement environment has sparked a vibrant debate among policymakers, lawyers, and academics. Some argue that the use of DPAs, NPAs, and pleas to resolve most FCPA cases has resulted in a dearth of judicial scrutiny, and concomitantly has allowed the Agencies to stretch the FCPA beyond the bounds that Congress originally intended.⁵⁵ Ultimately, the argument goes, this additional prosecutorial discretion combined with the leverage of alternative settlement vehicles increases costs and uncertainty surrounding FCPA compliance for businesses.⁵⁶

For example, firms incur direct costs to comply with Agency FCPA enforcement theories articulated in enforcement actions, even if the firm is never subject to an FCPA inquiry. Further, due to concern over successor liability, firms may limit foreign acquisition activity or otherwise engage in over-extensive due diligence investigations of potential acquisition targets.⁵⁷ Uncertainty over the FCPA also may deter businesses from engaging in otherwise profitable foreign business transactions that potentially could give rise to liability based on the Agencies’ aggressive enforcement theories.⁵⁸ Finally, some have also argued that a lack of clarity in the FCPA has resulted in misallocation of finite compliance resources and the loss of legitimate business opportunities and activities, thereby placing U.S. companies at a competitive disadvantage.⁵⁹ Firms of course must bear costs to comply with laws passed by Congress, but not to avoid liability for conduct that Congress never intended to make illegal.

⁵⁴ Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business And Enriches Insiders*, FORBES, May 24, 2010, available at <http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html> (last visited Sept. 5, 2012).

⁵⁵ See Koehler, *supra* note 4, at 410; Koehler, *supra* note 5, at 108; Westbrook, *supra* note 5, at 522; Yockey, *supra* note 5, at 25.

⁵⁶ See Koehler, *The Façade of FCPA Enforcement*, *supra* note 38.

⁵⁷ New York City Bar Report, *The FCPA and Its Impact on International Business Transactions* 9 (Dec. 2011). The fact that firms that are subject to the FCPA have to be concerned about liability for non-U.S. firms that they may acquire also may make U.S. firms less competitive in bidding to acquire foreign assets. *Id.*

⁵⁸ See Yockey, *supra* note 5, at 34; Westbrook, *supra* note 5, at 498.

⁵⁹ See Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* 6, U.S. Chamber Institute for Legal Reform (2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf (last visited Sept. 5, 2012).

Adding to a long list of FCPA reform proponents,⁶⁰ in 2010 the U.S. Chamber of Commerce's Institute for Legal Reform released a white paper urging five specific FCPA reforms:⁶¹ (1) adding a compliance defense;⁶² (2) limiting a company's liability for the prior action of a company it has acquired; (3) adding a "willfulness" requirement for corporate criminal liability;⁶³ (4) limiting a company's liability for acts of a subsidiary;⁶⁴ and (5) clarifying the definition of a "foreign official." These proposals became the focal point for two congressional hearings in 2010 and 2011.⁶⁵

Other groups have argued that such reform proposals are unnecessary, and would only serve to weaken an effective FCPA.⁶⁶ For example, the Open Society Foundation argues that the Agencies' enforcement posture represents a careful and balanced approach to fighting corruption, and that claims of excessive FCPA enforcement are greatly exaggerated.⁶⁷ With respect to specific reform proposals, the Open Society Foundations argues that: (1) corporate compliance is already taken into account by the Agencies in resolving enforcement actions; (2) as applied by courts, the relevant standards for criminal liability for persons and corporations under the FCPA are essentially the same; (3) limiting the potential of liability for subsidiary actions would reduce parent corporations' incentives to ensure FCPA compliance; (4) limiting the potential liability for acquired assets may allow companies to escape liability through restructuring; and (5) legislative clarification of "foreign official" would compromise effective FCPA enforcement given the varied nature of government structures throughout the world.⁶⁸

Against this backdrop, the Agencies have opposed any reform proposals that

⁶⁰ See, e.g., Stanley Sporkin, *Origins of the FCPA*, ABA National Institute on the FCPA, Oct. 16, 2006; James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1234 (2007); Koehler, *supra* note 5.

⁶¹ See Chamber of Commerce, *supra* note 59, at 6. Several commentators have been calling for FCPA reform along similar dimensions.

⁶² Modeled after similar compliance defenses in the United Kingdom and Italy, this reform proposal would provide an affirmative defense to FCPA liability if a company can show that the agents or employees involved in the conduct circumvented a reasonable compliance program. See *supra* note 59, at 11-13.

⁶³ This reform proposal would hold the corporation to the same level of *mens rea* as the individuals for whom they are liable. It also would prevent criminal liability for improper acts of subsidiaries of which the corporation has no knowledge.

⁶⁴ This reform would clarify that a parent company cannot be exposed to potential FCPA anti-bribery liability in instances where it neither directed, authorized, nor had any knowledge of the improper payments.

⁶⁵ *Examining Enforcement of the Foreign Corrupt Practices Act*, Hearing Before the Subcommittee on Crime and Drugs of the Committee on the Judiciary of the U.S. Senate; S. HRG. 111-1005 (Nov. 30, 2010); *Foreign Corrupt Practices Act*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives (June 14, 2011).

⁶⁶ David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* 12-15 (Open Society Foundations 2011).

⁶⁷ *Id.*

⁶⁸ *Id.*

would weaken the FCPA.⁶⁹ The DOJ, however, announced that it hoped to issue new guidance on the FCPA's criminal and civil enforcement provisions in 2012.⁷⁰ Further, although Congress is yet to consider overarching FCPA reform legislation, there have been legislative proposals in recent years that could potentially impact FCPA enforcement in discrete ways.⁷¹

⁶⁹ See Assistant Attorney General Lanny A. Breuer, Remarks at 26th National Conference on the Foreign Corrupt Practices Act, Washington, D.C. (Nov. 8, 2011).

⁷⁰ *Id.* A recent report by the Wall Street Journal suggests that this guidance could come as soon as October 2012. See C.M. Matthews, *FCPA Guidance to Be Released by October*, Wall Street Journal Blogs, <http://blogs.wsj.com/corruption-currents/2012/08/29/fcpa-guidance-to-be-released-by-october/>, Aug. 29, 2012 (last visited Sept. 5, 2012).

⁷¹ See, e.g., Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, § 929(a), 929P, 1504 (2010); H.R.3513, “To require at least 10 percent of certain transportation funding to be made available for small business concerns owned and controlled by socially and economically disadvantaged individuals” (Introduced by Rep. Corinne Brown) (2011); H.R.5366, “Overseas Contractor Reform Act” (Introduced by Rep. Peter Welch) (2010).

III. DATA AND METHODS

A. Data

This Preliminary Report focuses on FCPA actions that involved some allegations of foreign bribery or similar conduct.⁷² The Task Force chose to focus on bribery-related enforcement activity because the public debate surrounding FCPA enforcement and FCPA reform has centered primarily on the anti-bribery provisions. Although the vast majority of the actions in the sample involved charges against a firm for violating FCPA's anti-bribery provisions, some involve only violations of the books-and-records and internal control provisions. These cases are included, however, because it is clear from the relevant documents that the underlying conduct involved foreign bribery.⁷³

The unit of analysis for this report is an FCPA enforcement action that implicates a specific firm, involving a specific course of conduct. An FCPA enforcement action is defined as the sequence of announcements and Agency releases associated with a particular firm's involvement in conduct alleged to have violated the FCPA. This methodology—described in more detail below—allows the Task Force to document the impact of FCPA enforcement on businesses.

Each separate economic entity is categorized as a firm. Enforcement actions related to wholly owned subsidiaries that have no separate economic identity are grouped together as part of the same enforcement action. The separate DOJ and SEC enforcement actions against Siemens AG, Siemens Bangladesh, and Siemens Argentina (as well as related individual enforcement actions), for example, are counted as one action. Related entities are counted separately if they have separately publicly traded securities and maintain a separate set of accounting books. FCPA actions against Fiat SpA and its majority-owned Dutch subsidiary CNH Global NV, for example, are counted separately because both Fiat and CNH have publicly traded U.S. registered American Depositary Receipts (ADRs).⁷⁴ Similarly, although both Magyar Telekom plc and its parent company, Deutsche Telekom AG, both were

⁷² For instance, the charges brought against Enron for its financial fraud included violations of the books and records and internal control provisions of the FCPA. Since these charges did not involve foreign bribes, however, the Enron financial fraud is not included in our sample.

⁷³ For example, many of the Iraqi Oil-For-Food cases do not involve allegations of bribery of a specific foreign official. Rather, the target firms made alleged kickback payments directly to the Iraqi government. See notes 79-80, *infra*, and accompanying text.

⁷⁴ Separating companies in this manner effects counting related to only three actions: (Fiat/CNH; General Electric/Amersham/Ionics; and Deutsche Telekom/Magyar Telekom), and results in four additional actions compared to combining the actions into one observation. It should be noted also that there are additional rationales for counting these cases as distinct actions: Fiat and CNH engaged in different incidents of bribery; General Electric had not acquired Amersham or Ionics at the time the bribery in question occurred; and Deutsche Telekom was charged only with a violation of the FCPA's books-and-records provisions, and DOJ entered into separate settlement vehicles with each company – Magyar entered into a DPA, and Deutsche Telekom entered into an NPA.

named for conduct related to the same incidence of alleged bribery misconduct. This incident is treated as two separate enforcement actions, as each firm is a separate economic unit with ADRs publicly traded in U.S. markets. Finally, each distinct firm implicated in the same court case is counted separately.

As the focus is the economic impact on business entities, actions against employees or officers accrue to a firm even if there are no underlying charges against the company. For example, the recent African sting cases involved charges against 22 individuals affiliated with 16 separate companies, but no separate company charges. These cases count as 16 separate FCPA enforcement actions in the data set—one for each firm associated with a charged individual. One could exclude cases in which the Agencies did not charge a company with an FCPA violation, but this approach risks understating the true economic impact of Agency actions.⁷⁵ Charges against employees and officers can carry negative economic consequences for the affiliated firms, for example, if shareholders attribute the charges to the firm or if the firm must incur significant ongoing FCPA compliance costs as a result.⁷⁶

The Task Force identified enforcement actions by searching for specific references to the bribery provisions of the FCPA (e.g. sections 78dd-1 through 78dd-3 and 30A) using the Lexis-Nexis FEDSEC:SECREL library and the PACER database. The Task Force also searched for the terms “bribery,” “Foreign Corrupt Practices Act,” and “FCPA,” and reviewed all the proceedings to determine if the enforcement action included the existence of illegal payments to foreign officials. Finally, the Task Force gathered information surrounding FCPA actions directly from DOJ staff, the DOJ and SEC websites, press releases issued by target firms, and information from the Trace Compendium and the Shearman & Sterling FCPA Digest. The data have been compiled manually and vetted to minimize the potential for error.

The resulting sample consists of all enforcement actions against firms initiated by the SEC and DOJ from 1978 through 2011 for alleged instances of foreign bribery under the Foreign Corrupt Practices Act of 1977. The final sample consists of 168 enforcement actions.⁷⁷ For each FCPA enforcement action, the Task Force collected the following information:

⁷⁵ There are 31 actions in the sample in which the Agencies charged only an individual.

⁷⁶ This methodology is essential to the second phase of this research project: measuring separately the economic effects on distinct publicly traded entities. The Task Force plans to measure the extent of these effects in Phase II of this project.

⁷⁷ Our preliminary sample contained 180 cases, but we eliminated three actions brought by private plaintiffs, who ultimately were found not to have standing under the FCPA. Because these cases established that there is no private right of action under the FCPA, this Report focuses only on agency enforcement. We eliminated another case after it was determined that the case had been brought under pre-FCPA laws. Finally, we eliminated six cases, because although we found mention of an Agency investigation in some sources, we were unable to find any official documentation that the Agencies filed a case. Some of the FCPA enforcement actions in the sample also involve other charges, including insider trading, civil and criminal fraud, racketeering, and tax evasion.

- enforcement agency involved;
- type of entity targeted (public/private, and domestic firm/foreign firm/individual);
- specific FCPA provisions invoked during the enforcement action,
- years enforcement action was ongoing;
- industry of the targeted firm;
- firm size;
- countries where the alleged bribe occurred;
- amount of alleged bribes paid and the expected benefit from those alleged bribes (when these amounts can be determined from DOJ and SEC documents);⁷⁸ and
- outcome of the enforcement action, including disposition and penalties paid.

B. Methodology

The empirical section of this Preliminary Report examines trends in FCPA enforcement over time. It not only presents changes in the number of FCPA enforcement actions from 1978–2011, but also analyzes changes in the character of FCPA actions and in explanatory variables that may be related to FCPA enforcement trends. The data are presented in figures and tables in Section IV and the Appendix.

Some caveats regarding the interpretation of the data presented are in order. First, the data are limited to information available in public documents. To the extent that actual filed FCPA charges are not indicated in official documentation, this Preliminary Report may underestimate the true number of FCPA cases. This potential issue is most likely for FCPA actions in the 1980s and early 1990s, before online posting of such information became commonplace. Further, this Report does not capture investigations that were begun, but never led to charges, or ongoing investigations, although both of these Agency actions are likely to have economic impacts on firms.

Second, alternative, and equally valid, methods for counting FCPA cases will lead to different results than those presented in this report. For example, one could count separately each DOJ and SEC filing against a firm, and its wholly owned subsidiaries, employees, and other related third parties. Although focusing on an Agency filing as the unit of analysis has the benefit of being a purely objective measure, it also is likely to overstate agency activity and alleged illegal conduct because the DOJ and SEC often bring complementary cases against related respondents for the same underlying conduct. Alternatively, one could count as one action all the cases brought by the DOJ or SEC for similar conduct over a similar time

⁷⁸ The amount of the alleged illegal payment is often in the charging documents. Pecuniary gain can often be estimated by disgorgement. Estimates of sales influenced can be calculated using net margin and sales information from public databases. Because the relevant information is not always reported and because net margin and sales information is not available for private companies, we lack this information for every case.

frame. Under this methodology, for example, the African sting cases would count as only one FCPA enforcement action. This methodology accurately captures instances of specific conduct that draws Agency action. By compressing Agency cases against distinct firms into single FCPA actions, however, this methodology is not well suited to capture the full economic impact of FCPA enforcement on distinct business entities, the focus of this report and future work of the Task Force.

Third, as with most data collections, some element of subjectivity arises in classification. As discussed in Section III.A., some actions that do not involve anti-bribery charges, but nonetheless clearly involve foreign bribery, are included. For example, many of the IOFFP cases do not involve allegations of bribery of a specific foreign official. Rather, the target firms made alleged kickback payments directly to the Iraqi government. Although paying kickbacks directly to a foreign government does not technically fall under the FCPA's anti-bribery provisions, the Task Force has chosen to include these cases for three reasons: the public firms involved agreed to settle FCPA books and records and internal control charges premised on the above alleged conduct;⁷⁹ the relevant conduct involved alleged payments to obtain or retain government business; and these cases are likely to affect the targeted firms in ways similar to a typical FCPA action.⁸⁰

Finally, it is important to note that this descriptive analysis does not claim to identify causal relationships. Isolating causation requires, among other things, consideration of additional variables and suitable controls for other potential explanatory factors. Nonetheless, the basic descriptive analysis presented in this report provides a guide with which to identify potential areas of interest and importance for future, more rigorous studies.

⁷⁹ Bayoil (USA), Inc., was not charged with books and records and internal control violations because it is a private company, and thus not covered by these FCPA provisions. Because Bayoil agreed to settle fraud charges with DOJ for the same conduct engaged in by public firms involved in the oil-for-food scandal, we include it in the dataset.

⁸⁰ There are 13 actions in our data set that include only oil-for-food charges. Eight additional actions include FCPA bribery charges in addition to charges related to the oil-for-food program.

IV. DESCRIPTIVE ANALYSIS OF FCPA ENFORCEMENT TRENDS

A. FCPA Enforcement Actions Over Time

The SEC and DOJ brought 168 FCPA enforcement actions from 1978 to 2011.⁸¹ Figure 1 shows enforcement activity by year in which the charging agency made its first court or administrative filing or the existence of a settlement agreement was publicly announced. Enforcement activity has increased in the last decade, with a steeper upward trend beginning around 2005. In the first 27 years of the FCPA, the Agencies brought 55 cases, or an average of about two per year. Since 2005, the Agencies pursued 113 enforcement actions, an increase to an average of approximately 16 actions per year.

FIGURE 1
FCPA ENFORCEMENT ACTIONS: 1978–2011
N = 168

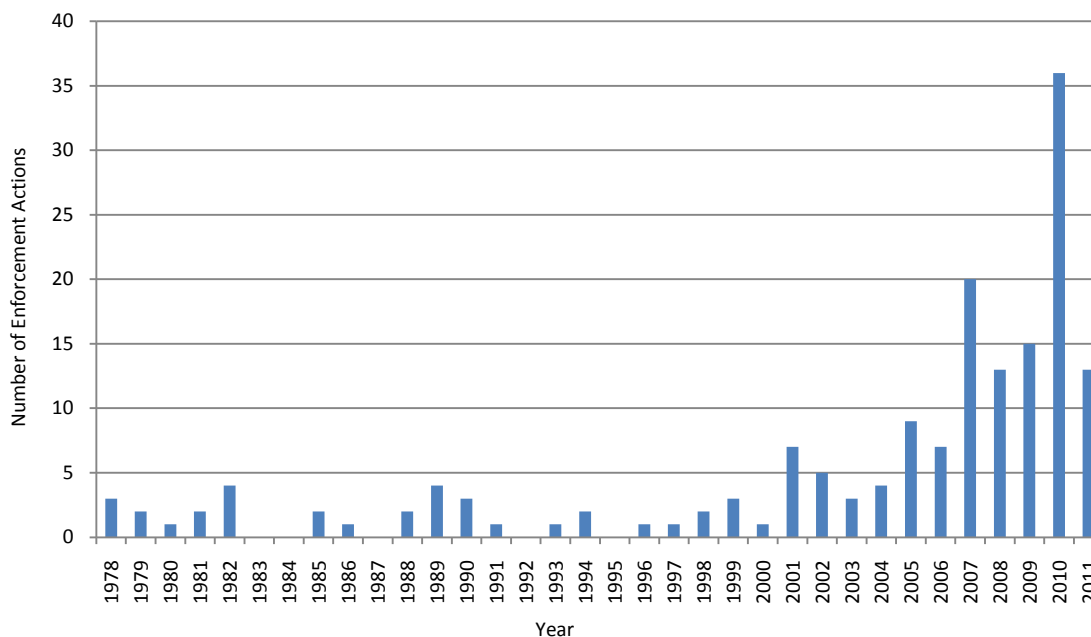


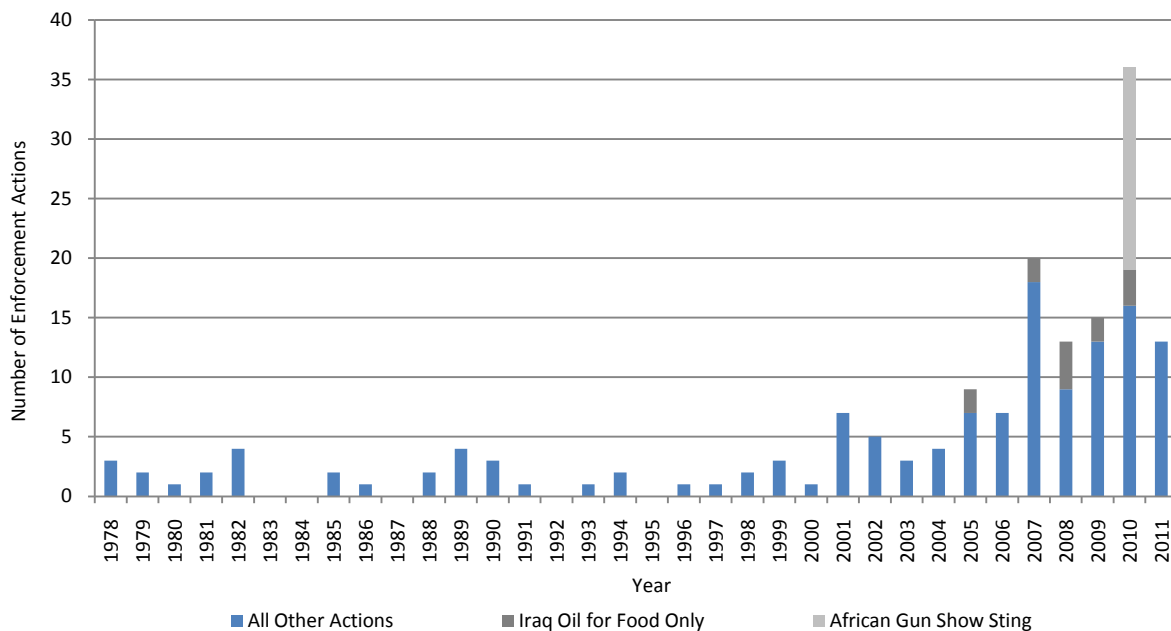
Figure 2 replicates the time series in Figure 1, but reports two categories of recent cases separately to consider the potential impact of unique enforcement actions on overall trends. First, charges related only to the IOFFP are segregated. These cases represent 13 percent of FCPA enforcement actions between 2005 and 2010. Also segregated are charges from the so-called African sting involving FBI agents posing as Gabonese officials to solicit bribes from various individuals in the weapons industry. The DOJ charged 22 individuals (from 17 distinct companies) in

⁸¹ Though the FCPA was passed in 1977, enforcement actions against firms engaging in alleged foreign bribery began prior to passage of the FCPA, but under separate statutes.

this action, but this case was a manufactured sting operation that did not involve actual payments to real foreign government officials. Further, although two individual defendants pled guilty to sting conduct and another defendant plead guilty to sting conduct plus additional conduct involving the Republic of Georgia, the DOJ ultimately dropped the charges against the remaining 19 defendants after dismissal of certain substantive charges against numerous defendants, outright acquittals of three defendants, and mistrials as to the remaining charges against the remaining defendants in the first two (of four) trials. These cases represent 47 percent of FCPA enforcement actions in 2010.

Although these particular actions account for a non-trivial share of post-2005 cases (as seen in Figure 2), they alone are insufficient to account for the marked upward trend in FCPA enforcement activity.

FIGURE 2
FCPA ENFORCEMENT ACTIONS: IRAQ OIL-FOR-FOOD &
AFRICAN GUN SHOW STING
N = 168



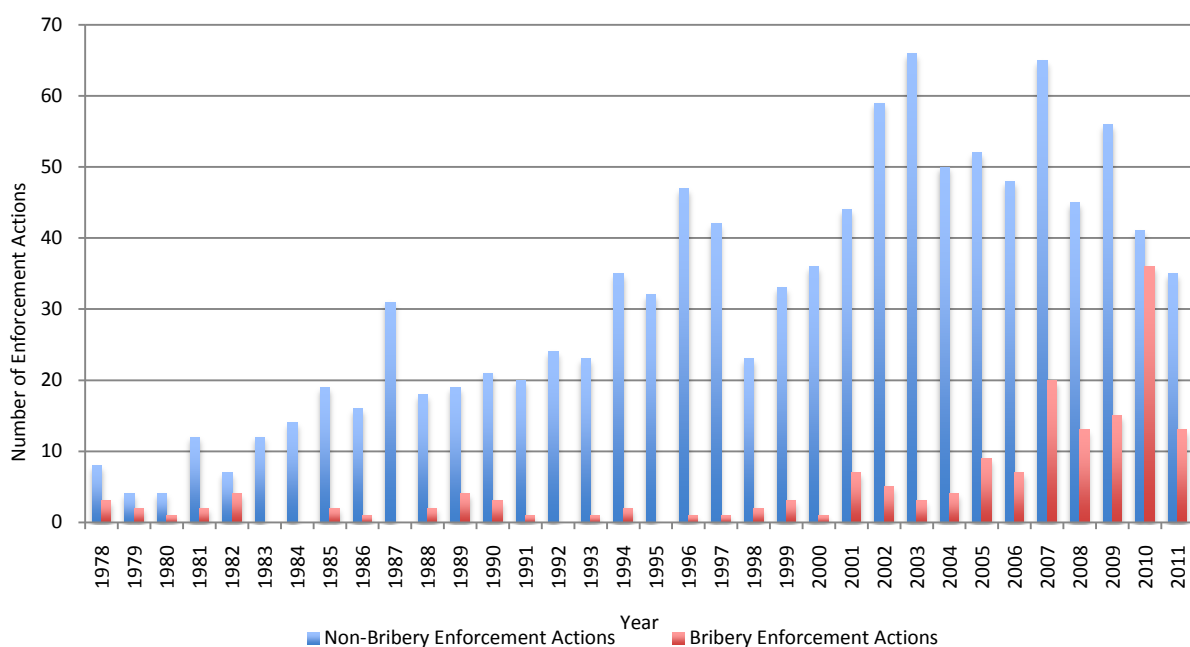
This report focuses on FCPA enforcement related to alleged instances of bribery of foreign officials. As discussed in Section II, however, the Act also contains provisions that require issuers to keep and maintain accurate books and records and maintain sufficient internal controls.⁸² The Agencies have used these “accounting” provisions to charge firms for financial misrepresentation or other violative conduct that has nothing to do with illicit foreign payments to foreign officials. Indeed, the

⁸² See *supra* note 30, and accompanying text.

number of these non-bribery cases is six times greater than cases involving alleged bribery of a foreign official (1,061 vs. 168).

In Figure 3, these cases are used as a benchmark for general DOJ and SEC enforcement activity with which to compare FCPA bribery enforcement actions. The non-bribery FCPA cases appear to be increasing steadily since the FCPA's inception. FCPA enforcement actions, on the other hand, have grown only in the last decade, suggesting that the recent uptick in FCPA bribery enforcement actions is not related to an underlying trend in increased Agency enforcement activity.

FIGURE 3
ALL ENFORCEMENT ACTIONS INVOLVING THE FCPA
(N=1,229)



FCPA enforcement actions often involve related and coordinated enforcement actions by the DOJ for criminal FCPA violations (whether anti-bribery violations or books-and-records and internal control violations) and the SEC for civil FCPA violations (whether anti-bribery violations or books-and-records and internal control violations). The overlap, however, between DOJ's and SEC's FCPA enforcement programs is not complete. As a general matter, the SEC has jurisdiction only over "issuers" (companies—domestic and foreign—with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over privately held companies.

As a general matter, the DOJ has criminal jurisdiction over "issuers," "domestic concerns," (i.e. any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involves conduct "while in the territory of the U.S." Because the DOJ

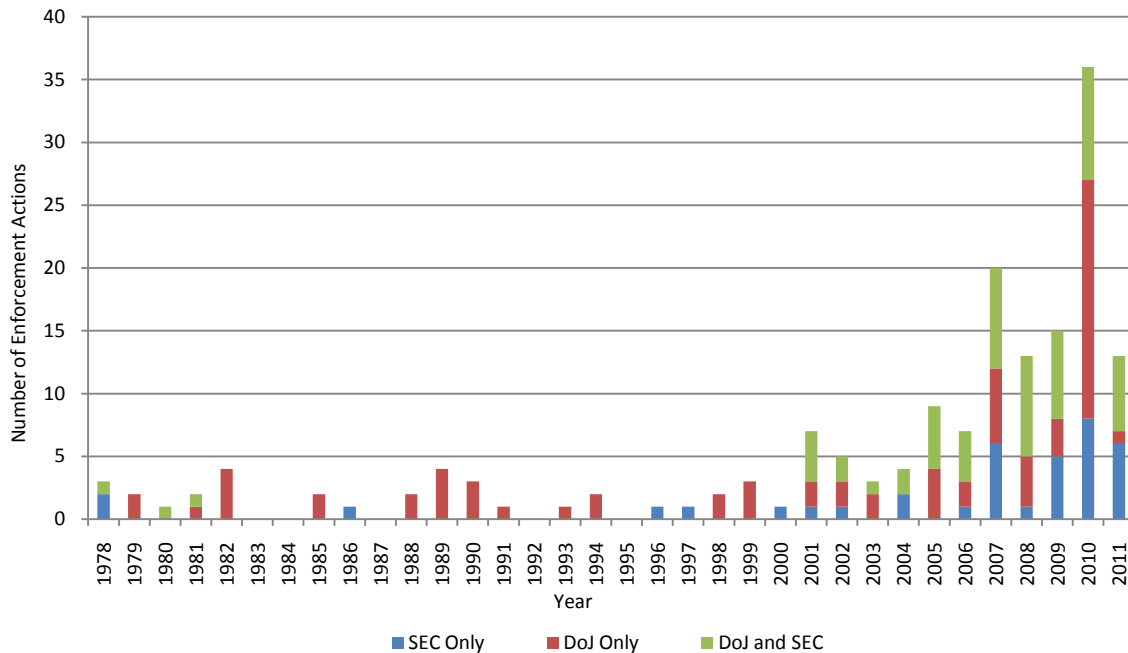
must satisfy a higher burden of proof in a criminal prosecution, and given the DOJ's prosecutorial discretion, certain FCPA enforcement actions include only an SEC component. The DOJ has stated, for example, that it has declined to bring charges when, among other things, a single employee was involved in the improper payments at issue, or when the improper payments at issue involved minimal funds compared to the overall business revenues.⁸³

Figure 4 shows enforcement action by agency. The SEC and the DOJ acted unilaterally in 22 percent and 43 percent of enforcement actions, respectively. The Agencies pursued the same firm (or entities or persons affiliated with the same firm) for the same conduct in the remaining enforcement actions. The recent increase in FCPA actions appears to be accompanied by a large increase in joint enforcement activity, which was largely absent prior to 2002. Of course, because the DOJ's jurisdiction is broader than the SEC's, unilateral DOJ action does not necessarily reflect a decision by the SEC to forego enforcement action. Indeed, 68 percent of the cases in which only the DOJ acted involved private firms, over which the SEC has no jurisdiction.⁸⁴

⁸³ U.S. Dep't. of Justice Office of Legislative Affairs, Letter to Rep. Sandy Adams, (August 3, 2011) (discussing DOJ United States' Attorney Manual guidelines on FCPA prosecutions).

⁸⁴ For example, all but two of the defendants in the Africa sting cases were from private firms, and thus not under the SEC's jurisdiction. This fact causes the "DOJ Only" numbers for 2010 to be unusually high.

FIGURE 4
FCPA ENFORCEMENT ACTIONS BY ENFORCEMENT AGENCY
N=168



B. FCPA Penalties Over Time

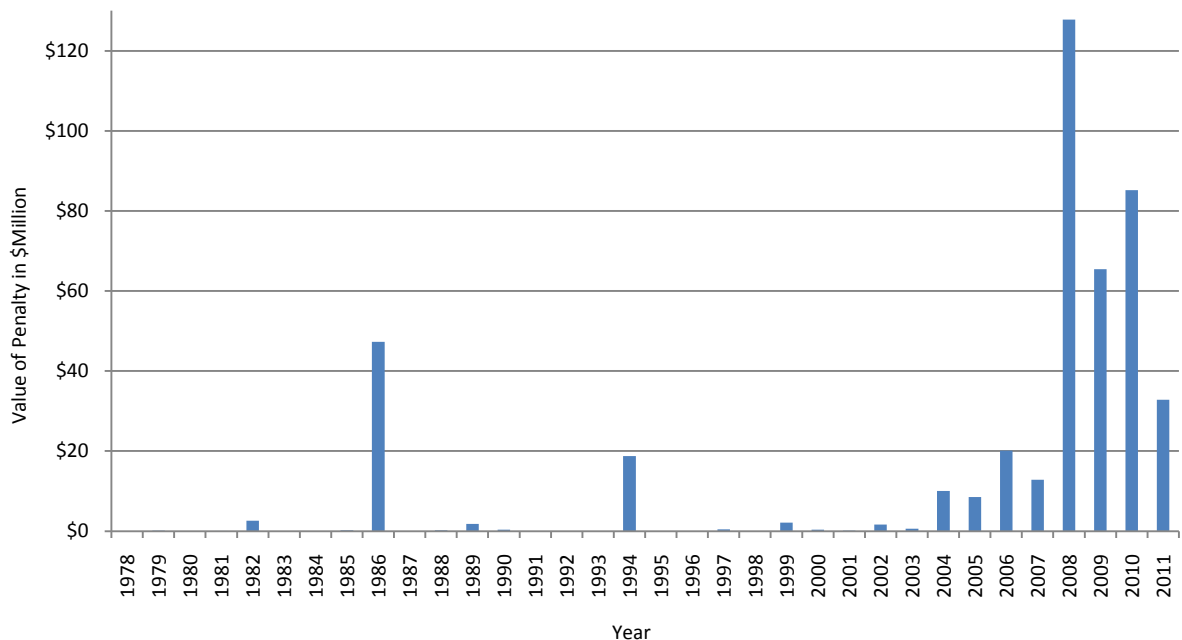
In the sample, 126 actions involved at least one firm paying a monetary penalty, which includes fines, disgorgement, and civil forfeiture. Figure 5 shows real average monetary penalties (in 2010 dollars) by enforcement action over time. Because scaling issues distort small penalties when presented graphically, Table 1A presents mean and median real monetary penalties per enforcement action in years in which at least one firm was charged with an FCPA violation.⁸⁵

Consistent with the Agencies adopting a more active enforcement posture in recent years, penalties clearly have increased since 2005: the mean (median) penalty rose from \$5.4 million (\$0.2 million) in the 1978–2004 period to \$60.2 million (\$7.8 million) in 2005–2011. That the median real penalties are substantially lower than the

⁸⁵ Penalty amounts in Section III.B. exclude observations that include securities fraud or antitrust counts. Because it is impossible from the documents to separately identify the portion of the penalty due to FCPA violations, and because penalties for securities and criminal antitrust violations tend to be large, including these observations is likely to inflate the average penalty. Further, we include penalties paid to non-U.S. authorities, as the U.S. authorities appear to reduce penalties when a respondent has paid fines to a foreign authority for the same conduct. See *In Re Aon Corporation* (2011), U.S. Dept. of Justice Website, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aon.html> (last visited Sept. 5, 2012). This occurs in 12 actions in our database. Exclusion of foreign penalties reduces the 2005–2011 average corporate penalty to \$48.1 million.

averages in both periods reflects the fact that significant outliers at the high end of penalties are driving the averages.⁸⁶ Nonetheless, the relative difference in medians between periods is similar to that for means (mean real penalties grew more than eleven-fold and median real penalties are 41 times larger), which suggests that the substantial difference in mean penalties between periods is not a function of outliers in the data.⁸⁷

FIGURE 5
AVERAGE CORPORATE PENALTY (IN 2010 DOLLARS)
N= 126



⁸⁶ The standard deviations for real penalties are 22.22 for the 1978-2004 period, and 722.15 for the 2005-2011 period.

⁸⁷ It is possible that the upward trend in corporate penalties is related to congressional acts in 1984 (The Fine Act) and 1987 (The Criminal Fines Improvement Act), and the adoption of the Federal Sentencing Guidelines in 1991, which increased corporate penalties. See Mark A. Cohen et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. LAW & ECON. 393 (1999) (finding evidence that the advent of the Guidelines is associated with higher average corporate fines). The rapid increase in corporate penalties also coincides with the Supreme Court's decision in *Booker v. Washington*, 452 U.S. 220 (2005), which reduced the Guidelines' constraint on criminal sentencing by federal judges. Because virtually all corporate penalties are the result of plea agreements or NPAs/DPAs, rather than judicial sentencing, it is unclear how this decision may affect FCPA corporate fines.

TABLE 1A
CORPORATE PENALTIES BY ENFORCEMENT ACTION

	Number of Enforcement Actions	Average Penalty (millions of 2010 dollars)	Median Penalty (millions of 2010 dollars)
1978–2004	41	5.41	0.19
2005–2011	85	60.22	7.79
1978	1	0.00	0
1979	1	0.15	0.15
1980	1	0.00	0
1981	1	0.01	0.91
1982	4	2.57	1.11
1985	2	0.23	0.23
1986	1	47.26	47.26
1988	2	0.24	0.24
1989	3	1.20	0.90
1990	3	0.13	0
1993	1	0.00	0
1994	2	18.72	18.72
1997	1	0.42	0.42
1998	1	6.58	3.29
1999	3	0.64	0.60
2000	1	0.39	0.39
2001	5	0.03	0
2002	2	1.65	1.65
2003	2	43.39	0.61
2004	4	5.55	1.39
2005	6	8.11	3.60
2006	4	47.83	20.09
2007	16	117.71	4.67
2008	12	60.59	8.26
2009	14	16.59	2.61
2010	20	78.98	14.84
2011	13	35.11	8.93

Notes: The unit of analysis is one enforcement action, which may include subsidiary firms charged with an FCPA violation, but were not assessed with a penalty; firms charged with securities fraud and actions in which only individuals were charged are excluded from penalty calculations.

Because SEC or DOJ releases often refer to multiple charges against related firms, Table 1B presents data on the average fine using the firm—as opposed to the enforcement action—as the unit of analysis. Penalties are most often levied against the corporate parent, even though the Agencies will charge each responsible corporate entity separately.⁸⁸ As a result, almost half of all firms charged do not pay

⁸⁸ For example, the FCPA enforcement action Daimler AG resulting in Daimler paying a \$189 million fine to settle charges. Its subsidiaries, Daimler-Chrysler Automotiv Russia, Daimler-Chrysler China, were charged, but paid no fines. Similarly, in the Siemens action, the corporate parent, Siemens AG paid \$1.8 billion (to both U.S. and German authorities). The DOJ also charged its subsidiaries,

any penalties, causing average penalties to be about half as much in both periods on a per-charge basis: \$35 million for 2005–2011 and \$2.7 million for 1978–2004. Focusing on only those charges that result in a penalty shows that average penalties are similar to those reported in Table 1A: \$64 million for 2005–2011 vs. \$5 million for 1978–2004.

TABLE 1B
CORPORATE PENALTIES BY FIRM

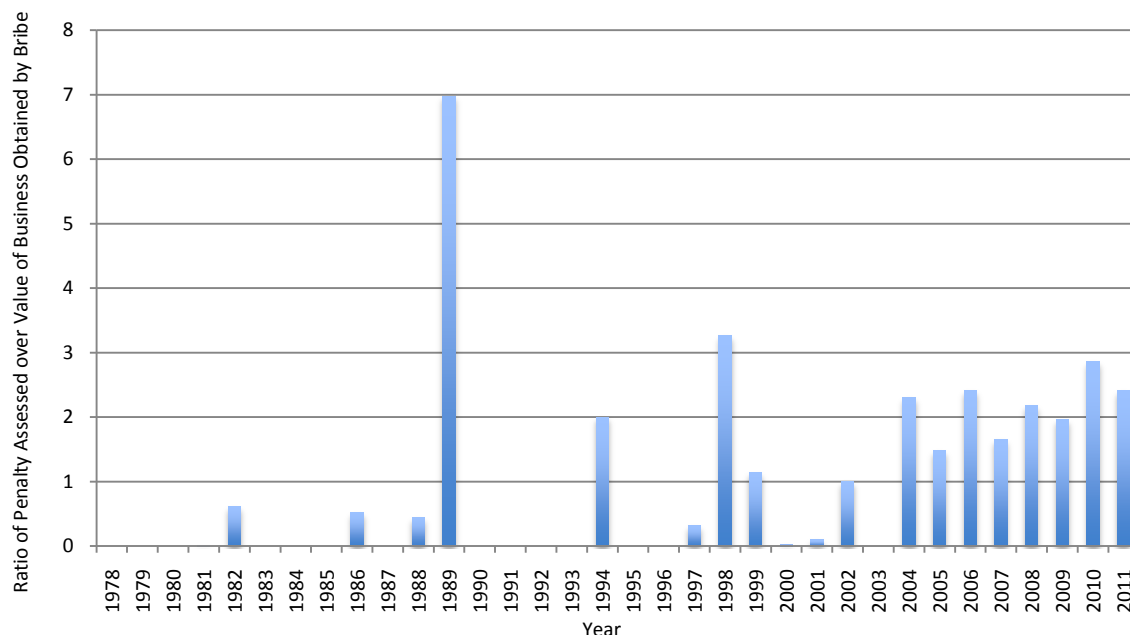
	Average Penalty of All Firms (millions of 2010 dollars)	Number of Firms Charged w/Penalties > 0	Percentage of Firms Charged w/Penalties > 0	Average Penalty of Firms w/Penalties > 0 (millions of 2010 dollars)	Median Penalty of Firms w/Penalties > 0 (millions of 2010 dollars)
1978–2004	2.72	28	57%	4.77	0.48
2005–2011	34.95	81	55%	64.25	8.93
1979	0.15	1	100%	0.15	0.15
1981	0.01	1	100%	0.01	0.01
1982	2.57	4	100%	2.57	1.11
1985	0.16	2	67%	0.23	0.23
1986	47.26	1	100%	47.26	47.26
1988	0.24	2	100%	0.24	0.24
1989	0.90	2	50%	1.80	1.80
1990	0.20	1	50%	0.40	0.40
1994	18.72	2	100%	18.72	18.72
1997	0.42	1	100%	0.42	0.42
1999	1.70	4	80%	2.12	0.96
2000	0.39	1	100%	0.39	0.39
2001	0.02	1	14%	0.13	0.13
2002	0.82	2	50%	1.65	1.65
2003	0.30	1	50%	0.61	0.61
2004	4.00	2	40%	10.01	10.01
2005	3.27	5	38%	8.50	2.20
2006	10.04	2	50%	20.09	20.09
2007	6.94	13	54%	12.81	5.05
2008	66.0	12	41%	148.5	3.74
2009	42.34	11	65%	65.43	3.13
2010	43.55	23	50%	85.20	21.23
2011	26.14	15	75%	32.79	10

Notes: The unit of analysis is an agency filing against a corporate entity; firms charged with securities fraud and actions in which only individuals were charged are excluded from penalty calculations.

Siemens Bangladesh, Siemens Argentina, and Siemens Venezuela, with Siemens Bangladesh paying a \$3.1 million fine, and the others paying nothing.

Figure 6 normalizes the monetary penalties by the value of the business allegedly obtained through the improper conduct.⁸⁹ Even when normalized, there is a pronounced upward trend in monetary penalties beginning in 2004.

FIGURE 6
AVERAGE RATIO OF CORPORATE PENALTY TO VALUE OF BUSINESS OBTAINED
N= 94



In some FCPA enforcement actions the Agencies (DOJ or SEC or both) charge individuals within a firm involved in the alleged illegal conduct with FCPA violations. Table 2 shows average individual penalties for the periods 1978–2004 and 2005–2011.⁹⁰ The Agencies charged 281 individuals with violations of the FCPA’s anti-bribery provisions since its inception, resulting in 89 fines and 48 prison sentences. The majority (52 percent) of individual charges have occurred since 2005.

This increase in individual charges may be an artifact of the increased volume of FCPA cases rather than a reflection of a more aggressive enforcement posture against individuals. The percentage of enforcement actions that result in individual charges has fallen over time: from 1978–2004, the Agencies charged individuals in 44 of the 55 corporate enforcement actions they brought (80 percent); from 2005–2011,

⁸⁹ Because we have information on the value of business allegedly obtained only in instances where it is discernable from the charging documents, the sample comprises only 94 actions.

⁹⁰ We count individuals charged with either substantive FCPA anti-bribery violations or conspiracy to violate the FCPA’s anti-bribery provisions. Counting non-FCPA charged co-conspirators who instead were charged with mail or wire fraud (i.e., those individuals who were named as part of an FCPA conspiracy in complaint, but not themselves charged with FCPA violations) increases the count to 292. Inclusion of these individuals also has a negligible effect on average penalty calculations.

the Agencies charged individuals in only 54 of their 113 corporate actions (48 percent). Further, the average rate of individual charges per corporate action has fallen slightly: from 1978–2004, the Agencies charged an average of 2.5 people per action; from 2005–2011, the Agencies charged just 1.3 people per action on average. This average likely masks the fact that most enforcement actions do not include individual charges. For example, since 2005 over one-third of DOJ’s criminal charges against individuals are related to just three core instances of conduct: Africa sting (22); Haiti Telco (8); and Control Components (8).⁹¹

TABLE 2
INDIVIDUAL PENALTIES

Period	Individuals Charged	Individuals Fined (% of charged)	Average Fine (Millions of 2010 dollars)	Individuals Sentenced to Prison (% of charged)	Average Prison Sentence (Months)
1978–2004	136	37 (27%)	13.4	14 (10%)	24
2005–2011	145	52 (36%)	.80	34 (23%)	34

Notes: Individuals charged counted in the year in which the Agencies filed charging documents; Average Fine calculated as total fines ultimately paid by individuals divided by the number of individuals who were fined; Average Prison Sentence was calculated as total prison sentences for a given year (in months) divided by the number of individuals who received prison sentences; individuals charged with securities fraud excluded from average fine and prison sentence calculations.

Overall, recent average individual penalties do not appear significantly more severe than they used to be.⁹² Indeed, average real individual monetary penalties were much higher from 1978–2004 than 2005–2011 (\$13 million vs. \$0.8 million).⁹³ Prison sentences are about ten months longer on average in the 2005–2011 period (34 months vs. 24 months), although less than one-third of individuals charged with an FCPA violation face any prison time.⁹⁴

⁹¹ See Mike Koehler, FCPA Professor Blog, Individual DOJ Prosecutions by the Numbers (Sept. 20, 2011), *available at* <http://www.fcpaprofessor.com/individual-doj-prosecutions-by-the-numbers> (last visited Sept. 5, 2012).

⁹² We calculate all average individual penalties (financial, prison, and probation) without individuals who were also sentenced for fraud in the same proceeding to avoid artificially inflating the reported averages.

⁹³ The large 1978-2004 average is driven by two outlier penalties: Orin E. Atkins, (Ashland Oil), received a \$91.1 million penalty (measured in 2010 dollars) in 1986,; and Jeffrey Tesler (KBR) received an \$88 million penalty (measured in 2010 dollars) in 2004. Removing the outliers from the sample reduces the 1978-2004 average to \$6.43 million, still eight times larger than the 2005-2011 average.

⁹⁴ Removing the prison sentence handed down to William Jefferson for conspiracy to violate the FCPA (and other federal laws), which is now under appeal, reduces the average 2005-2011 prison sentence to 30 months.

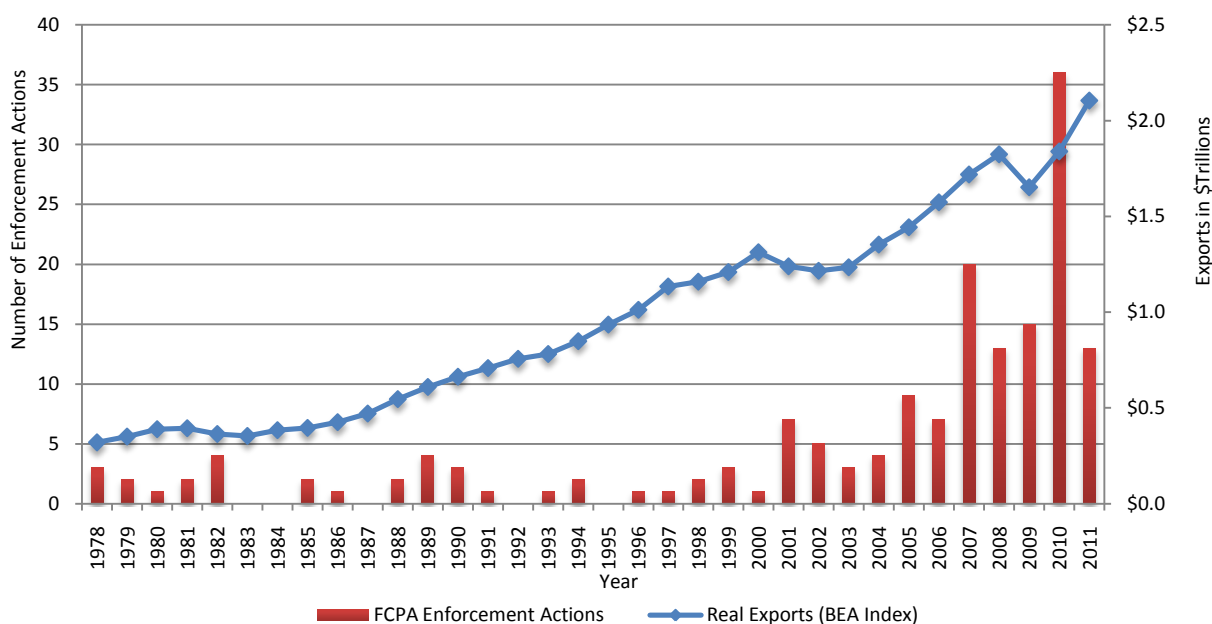
C. External Factors and FCPA Enforcement Patterns

In addition to increased Agency vigor, external factors also may account for the increase in FCPA enforcement.

For instance, firms subject to the FCPA are engaging in more foreign commerce and consequently face more situations that could implicate the FCPA.⁹⁵ Accordingly, it is possible neither the propensity of companies to pay bribes nor the enforcement agencies' propensity to pursue FCPA conduct has changed. Rather, the observed increase in FCPA enforcement could be an artifact of increasing global involvement of companies subject to the FCPA.

Figure 7 plots FCPA enforcement activity by year against the real value of U.S. exports, which serves as a proxy for U.S. economic integration with the rest of the world. By contrast with FCPA enforcement actions, which remained flat until the early 2000s, exports have increased steadily since the early 1980s (with declines during recession years).⁹⁶

FIGURE 7
FCPA ENFORCEMENT ACTIONS AND REAL U.S. EXPORTS (2010 DOLLARS)
N=168

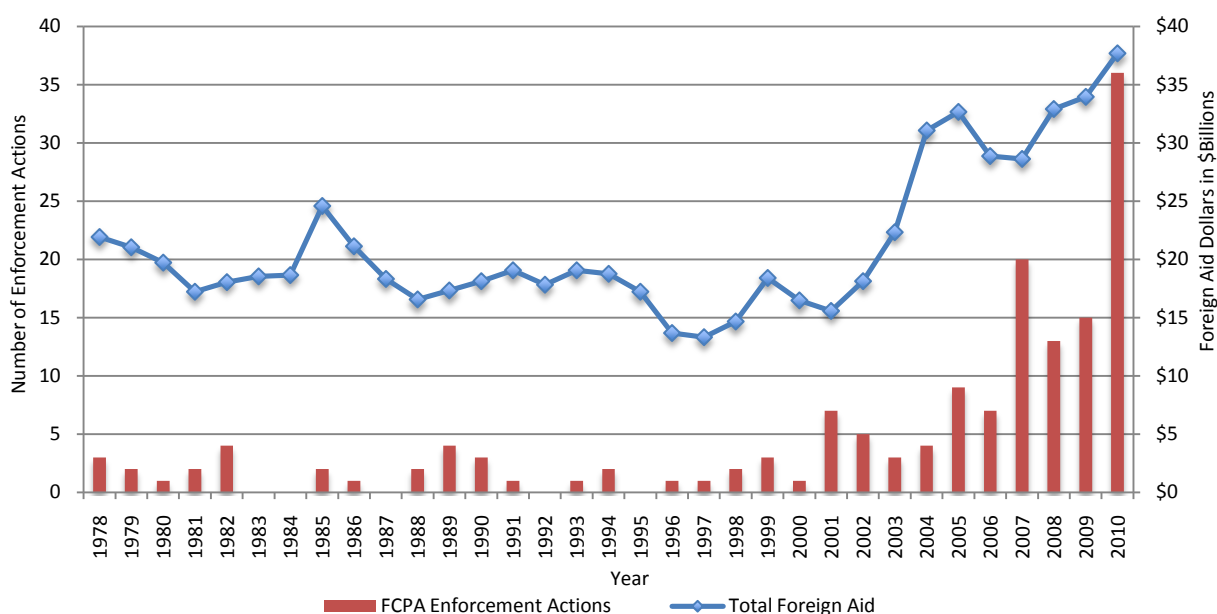


⁹⁵ Although the FCPA clearly applies to foreign firms, from 2005-2011 almost 70 percent of FCPA actions were brought against U.S. firms. See Table 3, *supra*.

⁹⁶ Once exports are detrended, the correlation between real exports and FCPA actions over time is only .33.

U.S. foreign aid payments may be another proxy for U.S. economic integration with the rest of the world. Moreover, placing U.S. aid under the control of foreign governments may create more opportunities for conduct that could implicate the FCPA. Figure 8 plots enforcement actions by year against real economic foreign aid payments, in billions of 2010 dollars.⁹⁷ There does appear to be an upward trend in the foreign aid payments in the early 2000s, which roughly coincides with the timing of increased FCPA enforcement.⁹⁸ This evidence, however, does not demonstrate a causal relationship, but merely a correlation between the two variables.

FIGURE 8
FCPA ENFORCEMENT ACTIONS AND REAL U.S. ECONOMIC FOREIGN AID
(2009 DOLLARS)
N= 155



It stands to reason that FCPA violations are likely to be more prevalent in countries with higher rates of perceived corruption. To examine this hypothesis, Figure 9 shows the number of FCPA enforcement actions by country in which the alleged conduct occurred, and Figure 10 presents the 2010 measure of corruption for each country as measured by Trace International's Corruption Perception index.⁹⁹ Higher levels of corruption are indicated by darker shades. Although not a perfect mapping, there do appear to be more FCPA enforcement actions in countries that

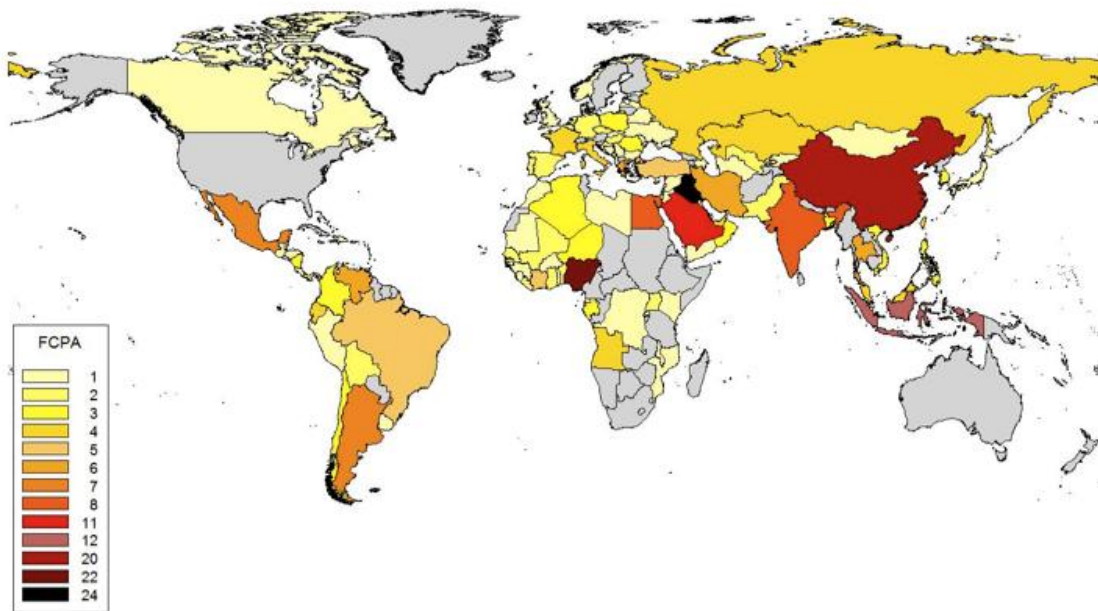
⁹⁷ The data in Figure 8 go through 2010, the last year for which U.S. foreign aid data is available.

⁹⁸ The correlation between FCPA actions and detrended foreign aid is .63

⁹⁹ Because the map in Figure 10 represents all FCPA enforcement actions, the 2010 corruption index is necessarily an imprecise proxy for corruption prior to 2010. However, assuming that changes in corruption occur gradually over time, and because two-thirds of FCPA enforcement actions have been brought since 2005, the 2010 data in Figure 9 is likely a close proxy for corruption for most FCPA actions. The Appendix provides the data underlying Figures 9 and 10.

score higher on the corruption index.¹⁰⁰ Note, however, that both Iraq and Gabon appear to be the source of significant FCPA violations in Figure 9 due largely to IOFFP enforcement actions in the case of Iraq and Africa sting cases in the case of Gabon.¹⁰¹

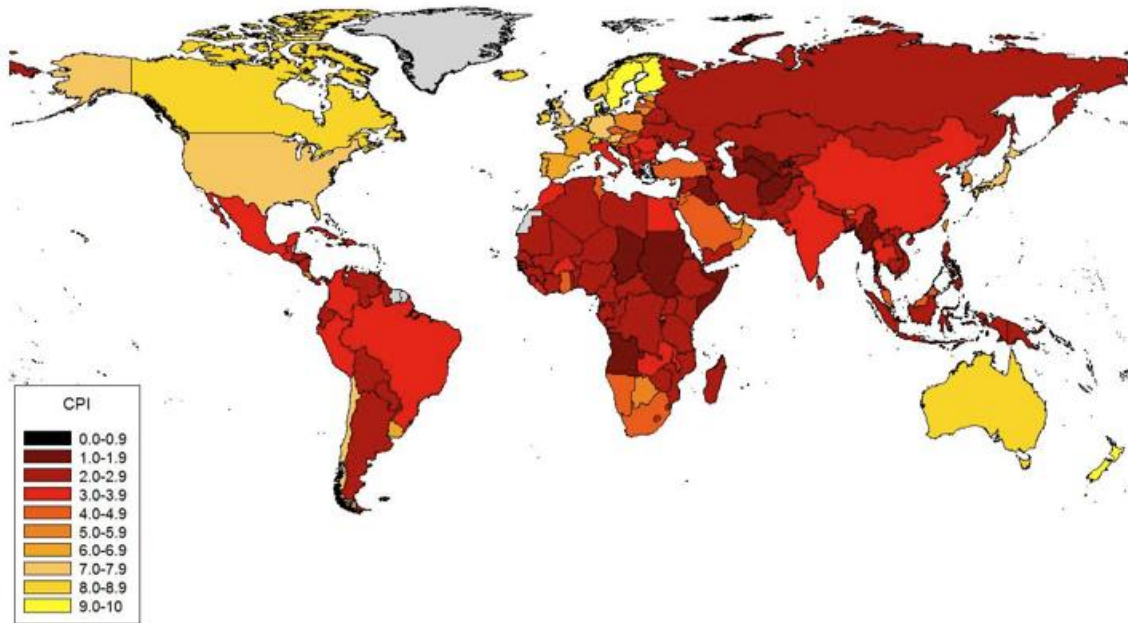
FIGURE 9
FCPA ENFORCEMENT ACTIONS BY COUNTRY



¹⁰⁰ The correlation between the corruption index and FCPA action is -0.24 .

¹⁰¹ When Africa sting and Oil-for-Food cases are removed from the sample, the correlation between the corruption index and FCPA actions is -0.21 .

FIGURE 10
CORRUPTION INDEX BY COUNTRY



D. FCPA Enforcement Actions by Company and Individual Type

Figures 11 and 12 examine the extent to which enforcement patterns across industries have changed between the 1978–2004 and 2005–2011 periods. Industries are categorized based on Trace International’s industry categorization criteria:¹⁰²

- aerospace/defense/security;
- engineering/construction/transportation/communications;
- manufacturing/other services;
- technology/software;
- extractive industries;
- other.

The data suggest that increased enforcement is not associated with particular industries, with the breakdown in enforcement across industries remaining relatively stable over both periods. In both periods, for example, extractive industries comprise the largest share of enforcement activity: 33 percent from 1978–2004 and 28 percent from 2005–2011. Although there is a slight increase in the share of enforcement in

¹⁰² <https://secure.traceinternational.org>. As explained in Part III, we categorize actions involving only individuals (e.g., Africa sting cases) as actions against the firms with which the individuals are affiliated.

the aerospace/defense/security sector for the 2005–2011 time period (19 percent to 22 percent), it appears to be primarily attributable to the Africa gun show sting cases. Further, the distribution of FCPA enforcement actions across industries will also be affected by the relative size of industries. Without accounting for changes in the relative sizes of industries, therefore, these data should not be interpreted as changes in the rate of FCPA targeting.

FIGURE 11
FCPA ENFORCEMENT ACTIONS BY INDUSTRY: 1978–2004
N = 55

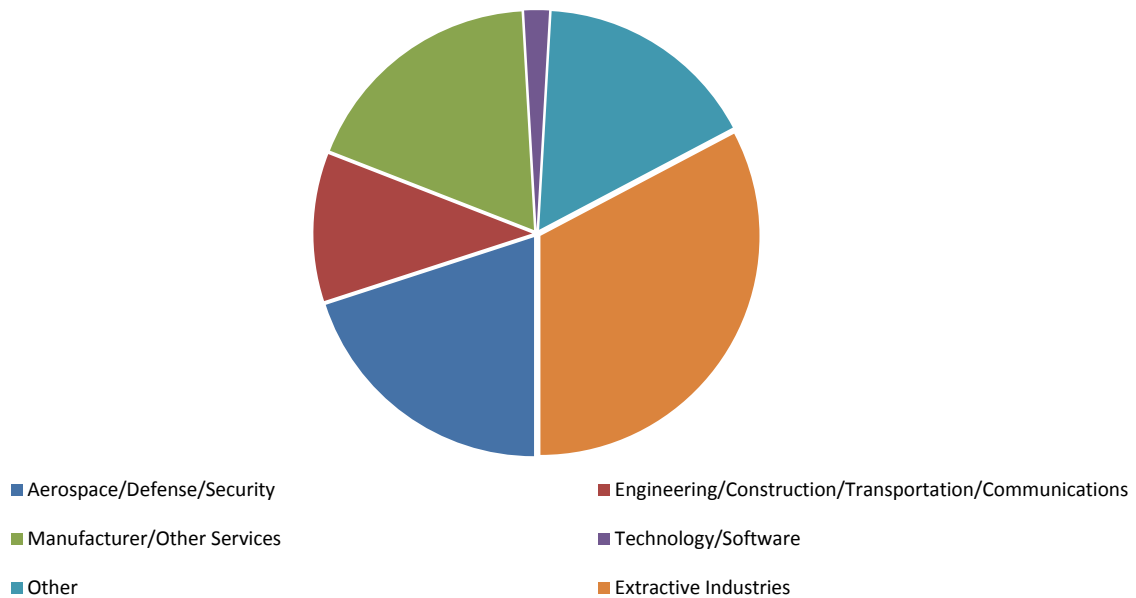
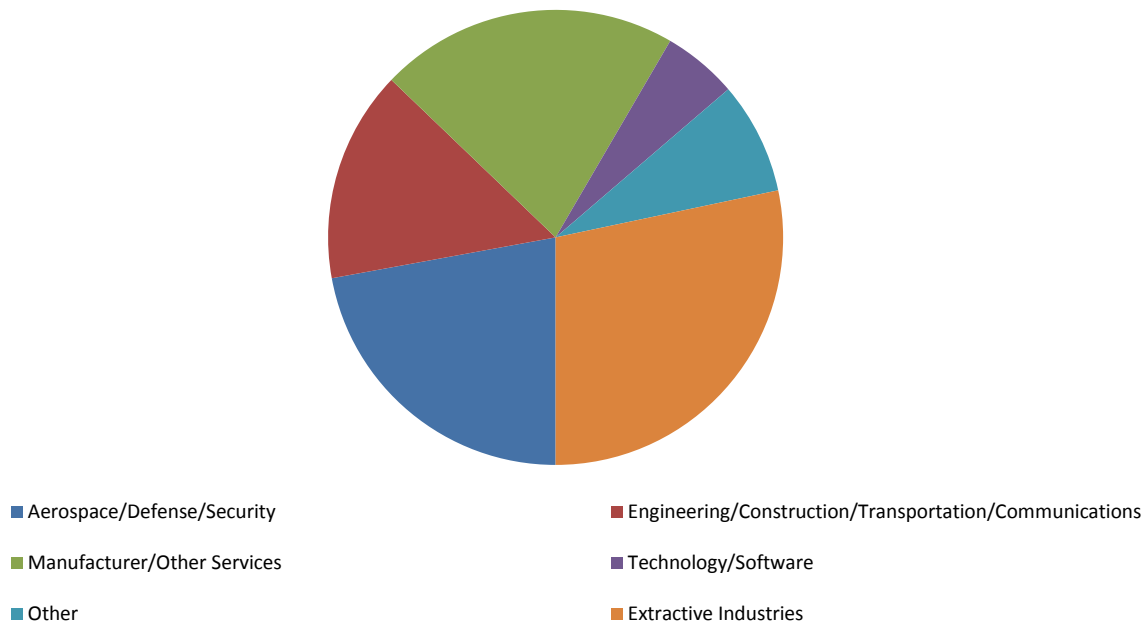


FIGURE 12
FCPA ENFORCEMENT ACTIONS BY INDUSTRY: 2005–JUNE 2011
N = 113



As detailed above in Section II, foreign firms (both issuers and non-issuers) and foreign nationals can be subject to the FCPA's jurisdiction in certain circumstances. To examine whether recent enforcement activity is associated with an increase in FCPA actions against foreign firms, Figure 13 segregates cases involving a foreign national or a firm headquartered abroad from those concerning domestic parties only. It shows an increasing trend of enforcement against foreign firms or nationals over the past decade. Given its timing, this trend is likely due in some part to the 1998 amendments that increased the Agencies' jurisdiction over foreign firms.

FIGURE 13
FCPA ENFORCEMENT ACTIONS BY TARGET NATIONALITY
N = 168

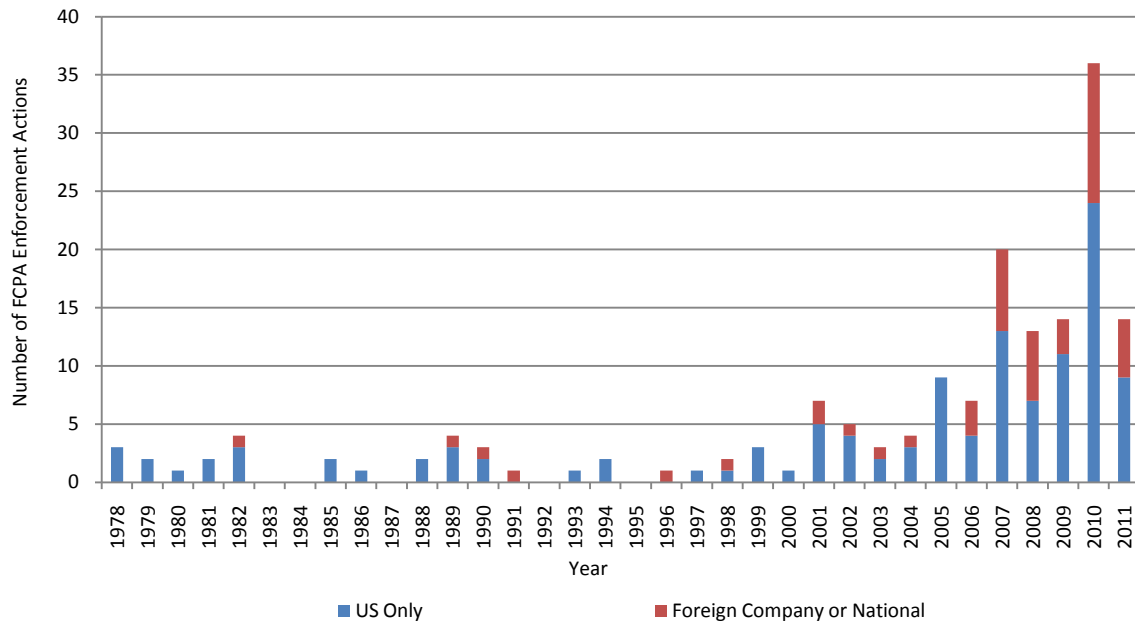


Table 3, moreover, shows that as a percentage of FCPA actions, those against foreign respondents have increased from 20 to 32 percent (34 percent excluding Africa sting cases, the inclusion of which may artificially depress the number of non-U.S. firms). Focusing only on instances where the ultimate corporate entity was foreign shows the same pattern of an increasingly large share of cases involving foreign respondents: rising from 15 percent of actions in the 1978–2004 to 29 percent during the 2005–2011 period (31 percent excluding Africa sting cases).

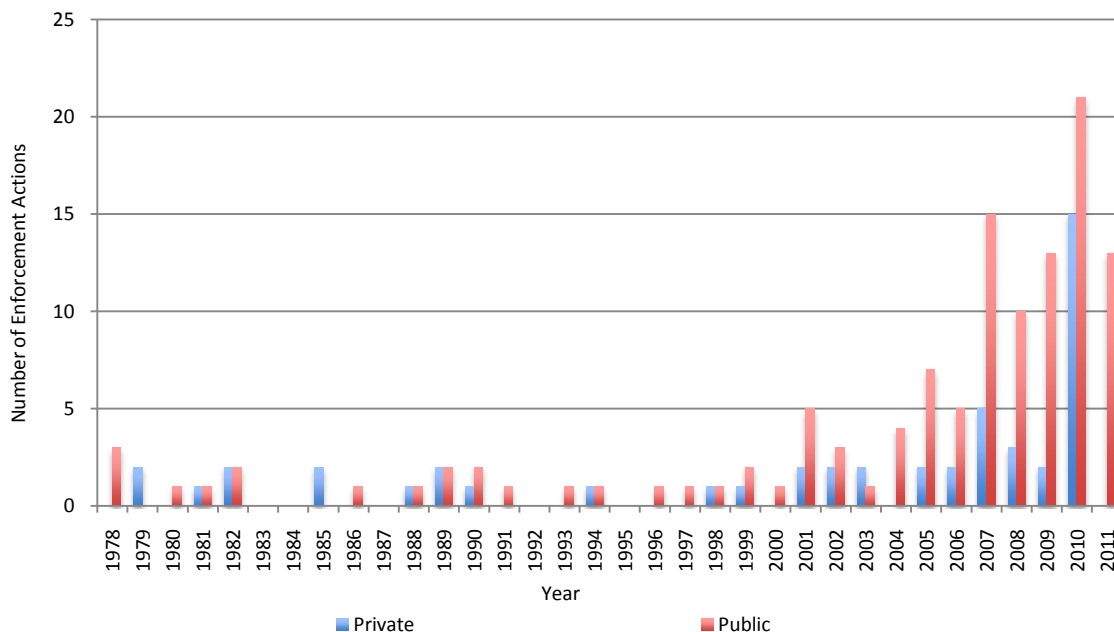
TABLE 3
FCPA ACTIONS BY NATIONALITY OF RESPONDENT

Respondent Type	Period		
	1978–2004	2005–2011	2005–2011 (without Africa sting)
Foreign Respondent / Foreign Firm	20% / 15%	32% / 29%	34% / 31%
Public Firm	64%	76%	87%

Notes: N = 168. Foreign Respondent percentage calculated as percent of FCPA actions in which any related party is non-U.S.; Foreign Firm percentage calculated as percent of FCPA actions in which the ultimate economic entity serving as the unit of analysis is non-U.S.

Figure 14 examines the relative share of enforcement actions involving public and private firms. There were more actions involving public than private firms, and the upward trend in enforcement over the past decade is more pronounced for public than private firms. Since 2005, the percentage of FCPA enforcement actions involving public firms has increased slightly, from 64 to 76 percent (87 percent excluding Africa sting cases). These results, however, may reflect the fact that a larger share of multinational firms is public rather than private. Without knowing how the relative share of public and private firms has changed over time, one cannot conclude whether the increased share of FCPA actions against public firms reflects increased likelihood of allegedly illegal behavior among private firms or increased public firm targeting by the Agencies.

FIGURE 14
FCPA ENFORCEMENT ACTIONS BY FIRM OWNERSHIP
N=168



E. Type of Bribes

Figure 15 shows the average constant dollar value of alleged bribes over time (to the extent discernable from the charging documents). Because such information is lacking for every action, the sample is reduced to 154. Although the sample contains an outlier in 1996, the data do not reveal any clear trend in bribe amounts. Figure 16 classifies the value of alleged bribes over the entire sample. Almost half were between \$10,000 and \$1 million.

FIGURE 15
REAL AVERAGE VALUE OF BRIBE (2010 DOLLARS)
N= 154

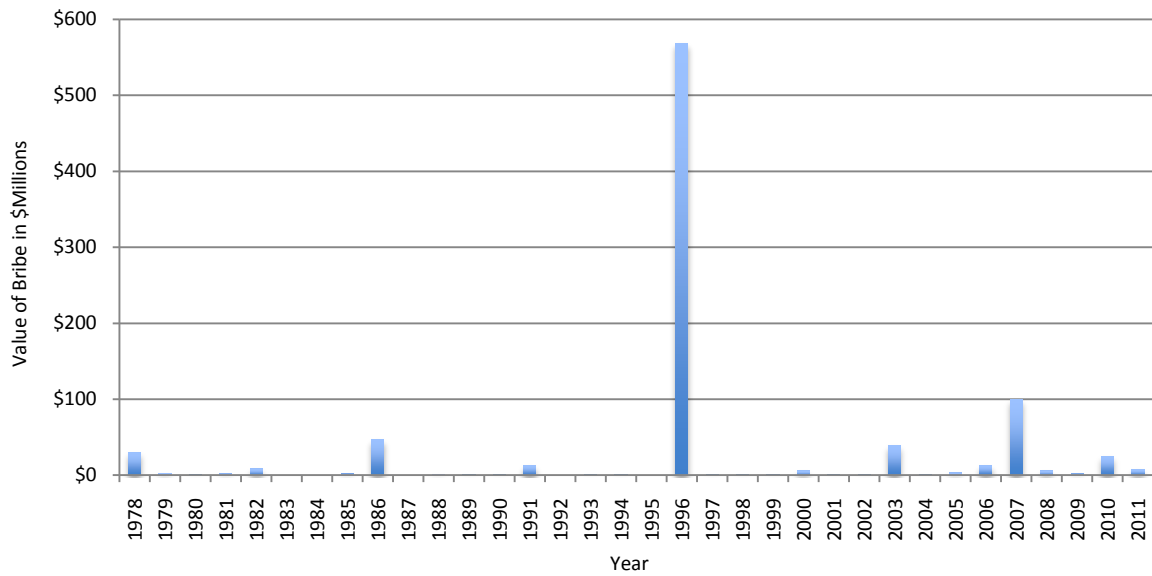
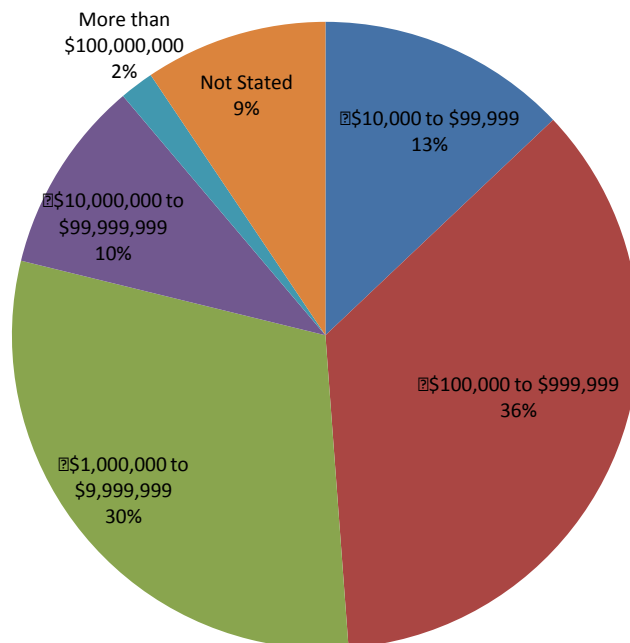


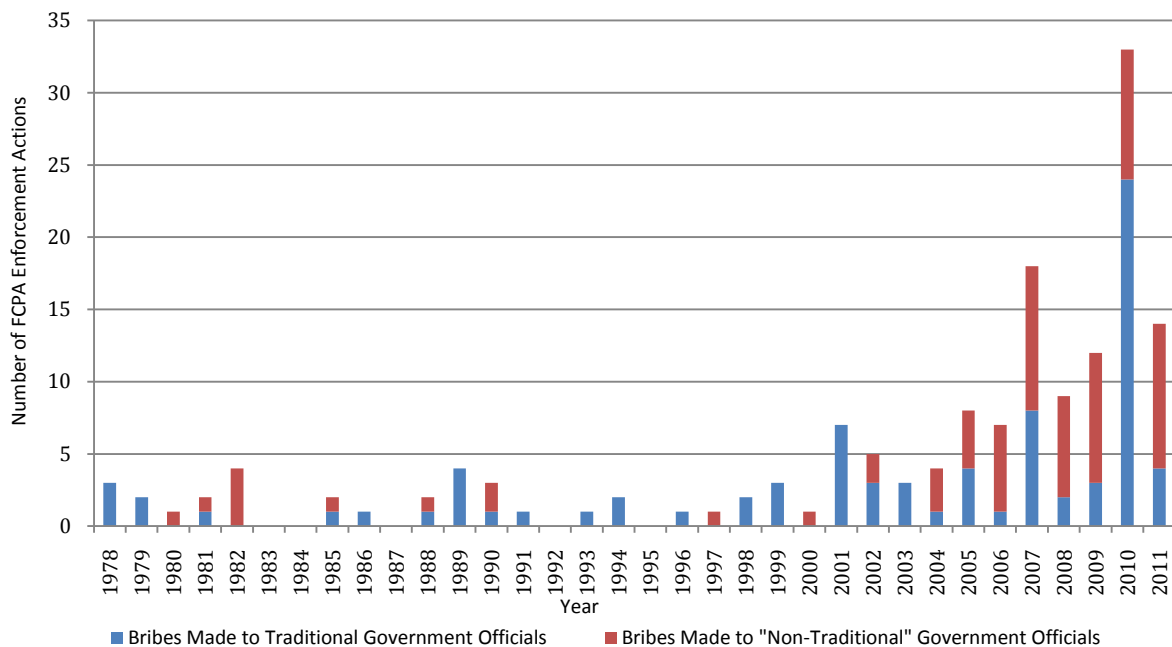
FIGURE 16
DISTRIBUTION OF VALUE OF BRIBE
N=168



As discussed in Section II, several commentators have argued that the enforcement Agencies have employed an increasingly broad interpretation of “foreign official,” bringing payments made to non-traditional government officials under the FCPA. Further, some have argued that as a result of *Kay*, the Agencies have been increasingly targeting payments that do not involve government procurement, but rather involve payments to ease regulatory burdens, such as taxes or customs duties, or to obtain or retain foreign-government-issued licenses, permits or certifications¹⁰³

Figures 17 and 18 separately show actions over time involving bribes to “non-traditional” government officials, and those involving business other than government procurement. Consistent with the commentary, these figures suggest that cases involving non-traditional government figures and business other than government procurement have increased as a percentage of total FCPA actions in recent years.

FIGURE 17
FCPA ENFORCEMENT ACTIONS INVOLVING "NON-TRADITIONAL" GOVERNMENT
OFFICIALS
N = 168



¹⁰³ See note 15, *supra*, and accompanying text.

FIGURE 18
FCPA ENFORCEMENT ACTIONS INVOLVING BUSINESS
OTHER THAN GOVERNMENT PROCUREMENT
N = 168

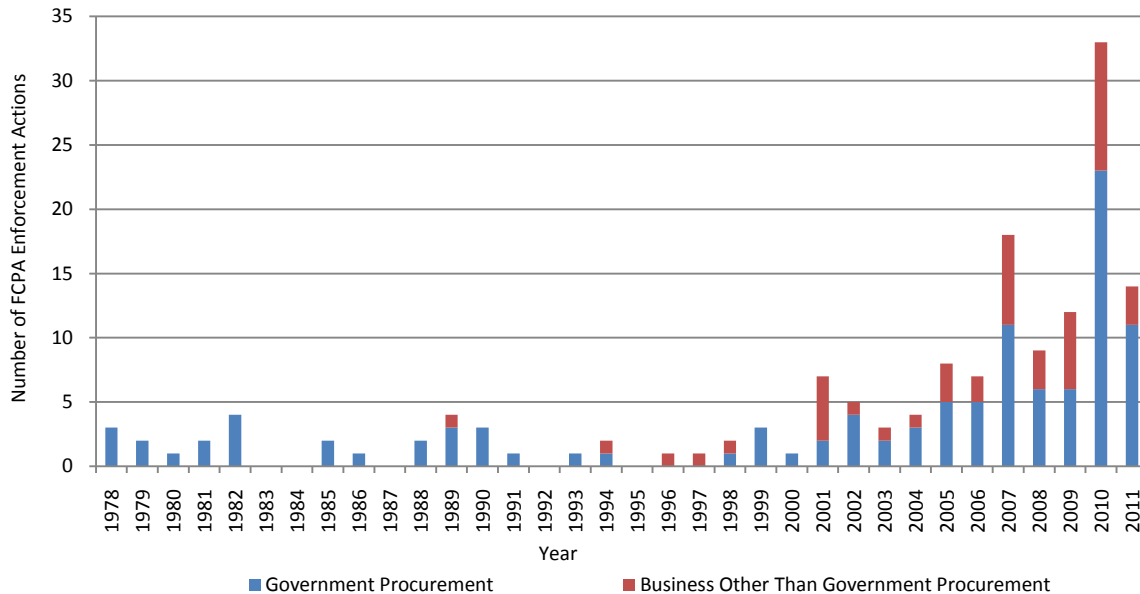


Table 4 compiles the percentage of cases involving non-traditional government agents and business other than government procurement for the 1978–2004 and 2005–2011 periods. These data suggest a substantial shift in enforcement patterns, as bribes to non-traditional officials comprise only 31 percent of cases from 1978–2004 but increase to 55 percent of cases from 2005–2011. Further, consistent with the view that the Fifth Circuit’s decision in *Kay* would lead to an increase in non-government procurement cases, the data reveal that cases not involving government procurement have increased to 43 percent from 24 percent in the pre-*Kay* period. Excluding the Africa Sting cases (which involved phony foreign government officials and government procurement) from the data renders these trends in expansive FCPA enforcement even more apparent. Column 3 shows that the percentage of cases from 2005–2011 involving non-traditional officials and non-government procurement rises to 66 and 54 percent, respectively, when the Africa Sting cases are left out of the sample.

TABLE 4
FCPA ACTIONS INVOLVING NON-TRADITIONAL GOVERNMENT OFFICIALS
AND NON-GOVERNMENT PROCUREMENT

	Period		
	1978–2004	2005–2011	2005–2001 (without Africa sting)
Non-Traditional Government Officials	31%	55%	66%
Non-Government Procurement	24%	43%	54%

Notes: N=168. Iraqi Oil-for-Food cases are removed from this sample because they did not technically involve government officials or government procurement.

F. Resolution of FCPA Enforcement Actions

Since 2004, the DOJ has used NPAs and DPAs to settle FCPA enforcement actions. In 2011, the SEC announced that it would begin using such alternative resolution vehicles, but to date the SEC has used such alternative resolution vehicles (a DPA) only once. As noted in Section I, NPAs and DPAs may increase incentives for DOJ to bring FCPA cases. The data presented in Table 5 show that the rapid rise in FCPA action has occurred in tandem with DOJ's increasing use of these vehicles to settle cases; from 2004–2011, DOJ has used NPAs or DPAs to resolve 51 matters, or 75 percent of all corporate FCPA matters.

TABLE 5
DOJ CORPORATE FCPA ACTIONS RESOLVED BY NPAs AND DPAs: 2004–2011

Year	FCPA Actions Resolved with NPA/DPA	Percentage of FCPA Actions Settled using NPA/DPA	Total DOJ NPA/DPA
2004	1	50%	9
2005	2	50%	15
2006	2	66.7%	24
2007	11	100%	41
2008	7	77.8%	29
2009	4	57.1%	21
2010	14	77.8%	37
2011	10	83.3%	28
Total	51	74.6%	204

Notes: Unit of analysis is a firm. Actions may be resolved with more than one NPA or DPA when subsidiaries are charged as well; denominator for percentage of actions settled is DOJ corporate FCPA filings in a given year; data for NPAs and DPAs compiled from the DOJ website, Sherman & Sterling LLP, <http://fcpa.shearman.com/>, and Brandon L. Garrett & Jon Ashley, Federal Organizational Prosecution Agreements, University of Virginia School of Law, available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

It is possible that the increasing use of NPAs and DPAs has allowed prosecutors to pursue more corporate FCPA actions than they otherwise would, thus contributing to the rise in FCPA enforcement. In light of the cluster of potential causal

factors behind the rise of FCPA actions, however, it is important to note that the current data do not allow us to determine if NPAs and DPAs are merely substitute legal resolution mechanisms (i.e., substitutes for plea agreements or litigation) for actions that would have been brought regardless the ability to use NPAs and DPAs, or alternatively, if the use of NPAs and DPAs actually increased the number of FCPA actions.

The increase in the use of NPAs and DPAs to resolve FCPA matters appears to be part of a broader trend within DOJ to resolve a wide array of corporate criminal matters with these vehicles. The last column of Table 5, for example, shows that DOJ frequently has employed NPAs and DPAs to resolve corporate matters since 2004.¹⁰⁴ Further, according to data from the Government Accountability Office, from October 2003 to October 2009, the Criminal Division entered into NPAs or DPAs in 54 percent of its cases. As of October 2009, moreover, the fraud section of the Criminal Division, which handles FCPA cases, had entered into the majority of NPAs and DPAs (63%).¹⁰⁵

Another concern with respect to NPAs and DPAs is that corporate officers may agree to enter their companies into these agreements to avoid individual criminal liability for FCPA violations. Stated DOJ policy appears to imply that it would not pass on an individual prosecution if a corporation agrees to an NPA/DPA.¹⁰⁶ Indeed, NPAs and DPAs can require the waiver of corporate attorney-client privilege and an agreement to help DOJ pursue individual prosecution.¹⁰⁷

¹⁰⁴ GAO Rep., *supra* note 39, at 16 (the Criminal Division prosecuted 38 cases and entered into NPAs/DPAs in 44 cases from Oct. 2003-Oct. 2009). In comparison with cases pursued by the Criminal Division, which handles all FCPA cases, individual U.S. Attorney offices and other components of the Department of Justice pursued significantly more (nearly 18 times as many) prosecutions than resolutions through NPAs and DPAs. *Id.*

¹⁰⁵ Other sections and divisions had entered into NPAs/DPAs as well, including the Antitrust Division, the Environmental and Natural Resources Division, the Tax Division, and National Security Division, as well as the Enron Task Force and Asset Forfeiture and Money Laundering section of the Fraud Division. GAO Rep., *supra* note 39, at 35. See also Brandon L. Garrett & Jon Ashley, Federal Organizational Prosecution Agreements, University of Virginia School of Law, *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last visited Sept. 5, 2012).

¹⁰⁶ See Letter from Edward N. Siskel, Associate Deputy General Counsel, Office of the Deputy Attorney General to GAO at 2 (Dec. 15, 2009) (“prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals, and corporate cooperation has proved to be invaluable in a variety of corporate and financial fraud cases against individual defendants”); Memorandum from Larry D. Thompson, Deputy Attorney Gen., to U.S. Attorneys, *Regarding Principles of Federal Prosecutions of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/ctf/business_organizations.pdf (last visited Sept. 5, 2012); Memorandum from Paul J. McNulty, Deputy Attorney Gen., to U.S. Attorneys, *Regarding Principles of Federal Prosecutions of Business Organizations* 18 (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (last visited Sept. 5, 2012) (“[P]rosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees”).

¹⁰⁷ See Siskel Letter, *supra* note 106, at 2 (“DPAs and NPAs require companies to cooperate with the government in obtaining evidence necessary to prosecute individuals and other corporation who have engaged in misconduct, including culpable corporate executives and employees.”). See also Lisa Kern

Nonetheless, the data show that matters resolved with NPAs and DPAs are less likely to be associated with individual prosecution. There are an average of 0.6 individuals charged in matters where the corporate entities enters into NPAs or DPAs, compared with 1.9 individuals charged in matters that involve a corporate guilty plea or litigation. Further, individuals are charged in only 45 percent of cases resolved with an NPA or DPA, compared with 55 percent of cases that do not involve an NPA or DPA. It is important to note that these simple differences in average individual prosecution rates do not prove any causal link between NPAs/DPAs and individual criminal prosecutions.

V. CONCLUSION

The data appear to confirm the perception that FCPA enforcement has been on the rise. From 2005 to 2011, the SEC and DOJ brought almost twice as many actions as they had during all prior years of FCPA enforcement. Further, average corporate penalties have increased substantially.

The analysis presented in this Preliminary Report is descriptive and should not be interpreted as implying any causal relationships. The character of recent FCPA enforcement activity, however, is suggestive of an association with the Fifth Circuit's 2004 ruling in *United States v. Kay*, the vague definition of "foreign official," and U.S. Agencies' expanded FCPA jurisdiction over foreign nationals and corporations. Since 2004, cases involving business other than government procurement, non-traditional government officials, and foreign nationals/corporations have risen markedly as a proportion of all FCPA cases.

The increase in FCPA actions also coincides with the passage of Sarbanes-Oxley and the DOJ's increasing willingness to settle FCPA corporate cases using NPAs and DPAs. We lack data, however, on the extent to which FCPA actions arise from information discovered due to SOX's reporting requirements. Further, because the DOJ only began to use NPAs and DPAs to resolve FCPA actions in late 2004, there is no "pre-active enforcement period" to employ as a baseline. Accordingly, it is impossible to draw any inference regarding the extent to which these settlement devices played a role in the increased FCPA enforcement activity.

The data do not suggest that U.S. economic integration with the rest of the world, as measured by real U.S. exports and U.S. foreign aid, is a key driver of FCPA enforcement. This finding is consistent with statements from the DOJ and SEC that the increase in FCPA enforcement is by design, and not merely an artifact of increased U.S. involvement in foreign markets.

Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 331 (2007) (the use of DPAs and NPAs has "sharpen[ed] the focus on individual liability.").

The basic descriptive analysis presented in this Preliminary Report should provide a guide with which to identify potential areas of interest for more focused study. Future phases of this project intend to examine the economic impact of FCPA enforcement on companies and will attempt to provide a more rigorous empirical examination of the causal factors behind FCPA enforcement.

APPENDIX
FCPA ENFORCEMENT ACTIONS BY COUNTRY

	FCPA Enforcement Actions	2010 Transparency International Corruption Perception Index
Nigeria	29	2.4
Iraq	26	1.5
China	25	3.5
Gabon	18	2.8
Mexico	15	3.1
Indonesia	14	2.8
Brazil	10	3.7
India	10	3.3
Kazakhstan	10	2.9
Saudi Arabia	10	4.7
Argentina	9	2.9
Venezuela	8	2.0
Egypt	7	3.1
Thailand	7	3.5
Angola	6	1.9
Greece	6	3.5
Russia	6	2.1
Côte d'Ivoire	5	2.2
Ecuador	5	2.5
Malaysia	5	4.4
South Korea	5	5.4
Azerbaijan	4	2.4
Colombia	4	3.5
France	4	6.8
United Arab Emirates	4	6.3
Uzbekistan	4	1.6
Vietnam	4	2.7
Bangladesh	3	2.4
Germany	3	7.9
Iran	3	2.2
Italy	3	3.9
Liberia	3	3.3
Nicaragua	3	2.5
Pakistan	3	2.3
Panama	3	3.6
Poland	3	5.3
Qatar	3	7.7
Romania	3	3.7
Taiwan	3	5.8
Turkey	3	4.4
Turkmenistan	3	1.6
United Kingdom	3	7.6
Algeria	2	2.9
Bahrain	2	4.9

Bolivia	2	2.8
Canada	2	8.9
Chile	2	7.2
Costa Rica	2	5.3
Dominican Republic	2	3.0
Ghana	2	4.1
Haiti	2	2.2
Honduras	2	2.4
Hungary	2	4.7
Israel	2	6.1
Kenya	2	2.1
Luxembourg	2	8.5
Middle East	2	3.9
Netherlands	2	8.8
Niger	2	2.6
Oman	2	5.3
Philippines	2	2.4
Singapore	2	9.3
Spain	2	6.1
Trinidad and Tobago	2	3.6
Uganda	2	2.5
Africa	1	2.9
Antigua	1	7.6
Belgium	1	7.1
Benin	1	2.8
Bosnia	1	3.2
Brunei	1	5.5
Bulgaria	1	3.6
Cook Islands	1	9.3
Croatia	1	4.1
Czech Republic	1	4.6
Democratic Republic of Congo	1	2.0
Eastern Europe	1	3.8
Equatorial Guinea	1	1.9
Ethiopia	1	2.7
Europe	1	5.8
Guatemala	1	3.2
Jamaica	1	3.3
Japan	1	7.8
Kuwait	1	4.5
Kyrgyzstan	1	2.0
Latvia	1	4.3
Libya	1	2.2
Malawi	1	3.4
Mali	1	2.7
Mongolia	1	2.7
Montenegro	1	3.7
Morocco	1	3.4
Mozambique	1	2.7

Norway	1	8.6
Peru	1	3.5
Portugal	1	6.0
Rwanda	1	4.0
Senegal	1	2.9
Serbia	1	3.5
Turks and Caicos Islands	1	7.6
Uruguay	1	6.9
Yemen	1	2.2

Note: Corruption index from Trace International Corruption Perception Index for 2010.

