TESTIMONY OF

GEORGE J. TERWILLIGER III, ESQ.

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

HEARING ON

THE FOREIGN CORRUPT PRACTICES ACT

JUNE 14, 2011

Testimony of
George J. Terwilliger III, Esq.
Partner, White & Case LLP

Before the

House Judiciary Committee
Subcommittee on Crime, Terrorism and Homeland Security
Hearing on
The Foreign Corrupt Practices Act
Tuesday, June 14, 2011

Mr. Chairman, Ranking Member, and Members of the Subcommittee, thank you for the opportunity to discuss reforms to the Foreign Corrupt Practices Act, commonly referred to as the FCPA.

At the outset, please allow me to put my further remarks in context. I favor the fair enforcement of sensible anti-corruption statutes because corrupt markets cannot be free markets. In international commerce specifically, a level playing field is essential to free market competition and I believe American businesses are well positioned to succeed in free and fair competition.

Today, I endeavor to bring to our discussion the benefit of my experience of fifteen years in the Department of Justice, including the privilege of serving as Deputy Attorney General, United States Attorney and front-line federal prosecutor, as well as experience since in my work as head of the global White Collar Practice at White & Case LLP, where I have advised US, foreign and multinational clients on FCPA and other enforcement matters.

Considerations for Reform of the FCPA

Over the past several years the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have put renewed vigor into the enforcement of the FCPA and that has resulted in compliance with this and similar statutes being a matter of major concern to US and multinational companies. Indeed, it is widely reported that US and foreign companies spend millions on FCPA and related compliance efforts, including internal investigations and cooperation with government investigations.[1] Penalties in enforcement actions cost even more. In 2010 alone, US enforcement authorities collected $1.8 billion in FCPA-related fines, penalties and disgorged profits.

[1] For example, Avon Products reported in its quarterly filing in February that the company spent $59 million in 2009 and $96 million in 2010 on "professional and related fees associated with [its] FCPA investigation and compliance reviews." Avon Products, 10-K filing, Feb. 24, 2011. Other examples include Siemens AG which spent approximately $850 million in legal and accounting fees during the course of a 2 year investigation and Daimler AG which spent approximately $500 million in legal and accounting fees during the course of a 5 year investigation. Michael Kendall & Paul Thompson, *Managing the Budget of an International White-Collar Investigation*, Corporate Counsel, August 17, 2010.

The DOJ and the SEC have stepped up enforcement by adding dedicated FCPA resources, by conducting industry-wide investigative sweeps and utilizing aggressive investigative techniques typically reserved for non-white collar crimes.

These authorities are realizing the enforcement goal of driving companies into far greater compliance with this law than has ever before been achieved. However, the combination of greatly stepped up enforcement combined with uncertainty of the precise legal parameters of conduct subject to the requirements and proscriptions of this statute carries a hidden cost as well. That hidden effect is the cost imposed on our economic growth when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of jobs and the ability of US companies to compete with companies that do not have to concern themselves with the uncertainties of the terms and requirements of the FCPA.

I and my practice group colleagues guide companies through comprehensive FCPA risk-assessments and counsel companies seeking to create or improve robust anti-corruption compliance policies and programs. We also advise companies on FCPA matters in the context of contemplated or ongoing business transactions and projects. I am able to draw on this personal experience and confidently convey to the Subcommittee that there is in fact a hidden cost born of the uncertainties attached to FCPA compliance risk. In calculating the risk arising from FCPA compliance obligations against the benefits of a given business venture, uncertainties exist as to the requirements of the FCPA and its interpretation and application by enforcement authorities. When faced with that uncertainty, companies sometimes forgo deals they could otherwise do, take a pass on contemplated projects or withdraw from ongoing projects or ventures. Companies making such decisions are not doing so because they are generally risk-averse. They are doing so by the simple reasoning that the risk of non-compliance, as defined by the statute and those charged with its enforcement, cannot be calculated with sufficient certainty. This is not merely the result of consideration of monetary risk, even though the cost of an FCPA investigation that results in no penalties can be great. Companies must also account for the risk to reputation that can arise from the mere suggestion or investigation of FCPA compliance issues. The uncertainties which occasion these hidden costs to our economy are grounded in both the terms of the statute and the parameters of its enforcement.

Uncertainty as to the FCPA's terms has existed since the law was enacted in 1977. Two prior amendments to the statute have tried to remedy some of that uncertainty, but have simply not, in my judgment, done enough. Because there are few occasions for challenges in adversarial judicial proceedings to the DOJ's interpretation of the FCPA, federal prosecutors have broad discretion to interpret and apply its terms. The result is that today what might loosely be called "prosecutorial common law" more defines the terms of the statute than do the terms of the law as established by Congress.

Thus, I commend consideration of legislative reform that can help to clarify ambiguity in the statute and its application. Others, both here today and in other fora, have suggested terms of the statute that would benefit from further definition and/or clarification. I would add to those suggestions these further considerations.

First, a reform I believe worthy of consideration is providing by statute a post-closing period of repose for companies involved in acquisitions during which they would be shielded from FCPA enforcement while undertaking review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues discovered as a result of that review. Providing that an acquiring company would have a period of time from the date of acquisition to conduct a thorough risk assessment, remediate existing misconduct and impose its compliance policy upon the acquired company is consistent with the core objectives of FCPA enforcement and presents no hazard to the fundamental objectives of the statute itself.

Second, a statutory safe-harbor provision in the law could provide companies that strive for anti-corruption compliance with increased certainty that their efforts will provide them with some level of protection from FCPA liability. Such a provision could shield from criminal liability companies that operate demonstrably robust compliance programs and that self-report the misconduct in question that arises despite their best efforts. It makes no sense to me to engage in criminal prosecution of a company that operates a state of the art compliance program and that investigates, corrects and self-reports non-compliant circumstances that do arise. I think many if not most prosecutors would agree with me on that proposition and have so concluded in the context of enforcement decisions, at least in some cases. But doubt as to the precise benefits of voluntary disclosure under existing enforcement policy produces uncertainties. Such uncertainty could be replaced with a bright line providing that companies acting responsibly on the terms which I have outlined would have a safe harbor from criminal liability even where a violation arose despite their best efforts.

Providing for greater certainty in the terms of the statute and its enforcement promotes good corporate compliance practices and that helps secure further the statute's objectives to promote corruption free markets. It has the added benefit of helping to allow business decisions to be grounded more in business terms rather than legal risk analysis.

The following provides additional detail as to these suggestions.

Successor Liability Reform

The first proposed reform balances the regulatory interest of eliminating market-distorting corrupt practices with the national interest in promoting business growth and prosperity.

One of the biggest challenges of the FCPA to American business arises in the context of mergers and acquisitions of or involving foreign business operations. This issue takes on even greater importance today as we can easily recognize that growth at home—and the jobs that come with it—is in part dependent on US companies being able to globalize their operations in significant measure through overseas acquisitions and mergers. However, the enforcement environment today can deter not just foreign business transactions where there are indications that FCPA non-compliant practices may lurk, but also may deter potentially beneficial and profitable opportunities where that risk cannot be determined by usual pre-acquisition due diligence.

While pre-acquisition anti-corruption due diligence is necessary to help identify instances of misconduct that might expose a US acquirer to successor liability, the extent of such examination is in most instances limited by the terms of the deal and/or law. Because of those limitations, companies may walk away from potential acquisitions not because of an identifiable corruption issue, but because they were not able to determine with certainty that no FCPA issues existed. Under current law, an acquiring company becomes liable after the date of acquisition for unlawful payments made by the target company thereafter. The DOJ has also pursued FCPA enforcement actions based on a successor liability theory for payments arising prior to acquisition.[2]

I believe an amendment to the FCPA is worthy of consideration that would provide that if in a defined period after an acquisition closes, a company conducts a detailed compliance assessment of the acquired company's operations, promptly discloses to the government and remediates any non-compliant conduct uncovered, the acquiring company would be immune from penalty for FCPA violations occurring in the acquired operations during or prior to that period.[3] This would both incentivize and allow an acquiring company the opportunity to uncover issues not identified during pre-acquisition due diligence and to quickly and fully integrate the acquired entity into its compliance program. A post-acquisition period of repose would, by providing both an incentive to and a means for US companies to uncover and resolve FCPA issues, represent a reasoned approach to application of FCPA standards in the context of international transactions.

---

[2] For example, two foreign subsidiaries of Alliance One, an American company, settled FCPA charges as successors in liability for pre-merger conduct. Alliance One was formed with the merger of Dimon Incorporated and Standard Commercial Corporation in 2005. Alliance One settled charges based on conduct occurring between 2000 and 2004 paying a total of $9.45 million in criminal penalties. DOJ Press Release, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials, August 6, 2010, *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

[3] This is not foreign to enforcement policy, based at least on the DOJ's own framework articulated in a 2008 opinion procedure release and more recently in a deferred prosecution agreement with Johnson & Johnson. In 2008, an US company, submitted an opinion procedure release request regarding a potential acquisition. Opinion Procedure Release, No. 08-02 (June 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf. The acquiring company had limited ability to conduct meaningful pre-acquisition FCPA due diligence because of legal restrictions on disclosures during the bidding process. In response to its request, the DOJ agreed to delay action for 180 days against the company for possible FCPA violations resulting from the acquisition, contingent upon a rigorous post-closing plan requiring FCPA due diligence and disclosure. Under the DOJ's "post-closing plan," that company was obligated to retain external counsel and third-party consultants to conduct due diligence; complete high-risk due diligence within 90 days, medium-risk due diligence within 120 days, and low-risk due diligence within 180 days; institute its own Code of Business Conduct with anti-corruption policies and procedures; and disclose any violations.

More recently, the DOJ provided a slightly less rigid framework for acquisition due diligence in a deferred prosecution agreement with Johnson & Johnson. The deferred prosecution agreement requires pre-acquisition due diligence, but notes that "[w]here such anticorruption due diligence is not practicable prior to acquisition of a new business for reasons beyond J&J's control, or due to any applicable law, rule, or regulation, J&J will conduct FCPA and anticorruption due diligence subsequent to acquisition and report to the Department." Johnson & Johnson, Deferred Prosecution Agreement, Attachment D, dated January 14, 2011 (filed April 8, 2011).

Further, the DOJ mandated that Johnson & Johnson take the following steps: institute its anti-corruption policies and procedures as quickly as possible and in any event less than one year post-closing; train directors, officers, employees, third-parties and joint venture partners on anti-corruption laws and the company's policies and procedures; and conduct an FCPA-specific audit of the newly acquired company within 18 months of acquisition.

Although the DOJ limits the terms of its opinion procedure release and deferred prosecution agreement to only the company party to a decision, these statements from the DOJ can provide useful guidance to Congress when crafting an effective due diligence waiting period. The DOJ, itself, has drafted and endorsed these terms.

Self-Reporting Safe Harbor

Companies have gone to great efforts to conduct risk assessments, develop and implement compliance policies, and monitor compliance efforts. Both US and foreign companies have heeded the advice of anti-corruption compliance experts, designated anti-corruption compliance personnel and generally enjoy support for these efforts from their senior managers, audit committees and boards of directors. Despite these time and cost intensive efforts, companies have to consider that they are still vulnerable to the same potential penalties as though they had taken no such actions at all.

Federal enforcement authorities have consistently encouraged, if not as a practical matter demanded, that as to the FCPA companies voluntarily conduct internal investigations, disclose potential violations and cooperate with government investigations. The government has consistently said and in practice provided some benefit to companies that take such steps. However, companies considering those steps, especially self-reporting, have to face uncertain benefits of voluntary disclosure and the uncertain reaction of the DOJ to disclosed misconduct.[4]

A presumption against criminal prosecution where companies operate robust compliance programs and voluntarily report their own misconduct would balance the interests of companies and enforcement agencies. I am not advocating amnesty for self-reporting. The government could still impose penalties, but the threat of criminal enforcement would be eliminated and standards can be adopted to produce more certainty as to reductions in penalties where companies self-report. Enforcement authorities would likely see an increase in the number of companies voluntarily disclosing and instituting remedial measures in a transparent manner and government resources would be conserved by avoiding expenditures on companies which, by

---

[4] Corporate compliance efforts are being further threatened by the new SEC whistleblower bounty program, part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). US companies have expended significant time, resource and funds to develop robust internal reporting systems to identify and remediate misconduct. Under the new whistleblower program, a whistleblower may circumvent internal reporting channels and go directly to the SEC to report misconduct. Whistleblowers stand to receive a windfall with little incentive to report such conduct internally. This is compounded by advertisements by plaintiff's attorneys luring individuals to blow the whistle on their employer with the promise of "substantial compensation, potentially millions of dollars." http://www.foreign-corrupt-practices-act.org/ (visited June 9, 2011). After urging by US companies, the US Chamber of Commerce, and other business advocacy groups to protect the internal reporting mechanisms vital to effective compliance programs, the SEC adopted final rules which, I respectfully submit, do not do enough to mitigate the threat to US companies' compliance efforts occasioned by reporting encouraged under the whistleblower program. For example, the SEC final rules do not require whistleblowers to first report their information through internal compliance channels, even where proven and effective internal reporting systems exist. This omission by the SEC stands at odds with other policy and statutory guidance, including within Sarbanes-Oxley, that encourages effective internal compliance reporting structures and even penalizes the absence of such structures.

Another matter meriting consideration in this context, if not independent congressional review and monitoring, are the recent reports that the SEC is using "risk metrics" and analytics to target potential areas of misconduct. While there are not yet sufficient facts available about this enforcement policy from which to draw definitive judgments, these reports suggest that SEC investigations of companies are being undertaken where there is not even preliminary evidence or facts of record to suggest that a violation of law may have occurred. If that is the case, this will only add greatly to the uncertainties that currently attach to the business assessment of FCPA enforcement risk. Moreover, responding to such general inquiries could cost companies significant expenditures where there is no credible evidence to suggest a violation exists. While American businesses are struggling to regain a competitive edge in this bleak economic environment, regulators should not forestall growth of US businesses in international markets based on a statistical calculation of potential non-compliance with the FCPA.

their remedial conduct, demonstrate that they do not pose a significant corruption threat. Likewise, companies that have best-in-class compliance programs would be able to engage in business operations without the lingering specter of unquantifiable FCPA compliance risk.

In addition to addressing these two potential reforms, I would also like to comment on other provisions in the existing statute that deserve consideration for clarification.

Additional Considerations for Statutory Clarification

Clarification of the Definition of a "Foreign Official"

The language of the FCPA prohibits improper payments to foreign officials. The term "foreign officials" means "any officer or employee of a foreign government or any department, agency, or ***instrumentality*** thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[5] As with other provisions of the FCPA, the DOJ and SEC have adopted a broad interpretation of this provision.

Recent challenges to the definition of "foreign official" have highlighted ambiguity in the relevant terms of the FCPA. Of primary concern is whether and under what circumstances a state-owned enterprise is an "instrumentality" which brings its employees within the definition of "foreign official." The DOJ has construed the term "instrumentality" broadly to include state-owned enterprises. This interpretation went unchallenged for many years until several individual defendants and one company challenged the definition in two cases in the Central District of California and a pending challenge in the Southern District of Texas.[6] The case-by-case analysis

[5] 15 U.S.C. § 78dd-1, et seq.

[6] Lindsey Manufacturing and its executives challenged the government's position that employees of a Mexican state-owned utility were foreign officials under the FCPA. United States v. Noriega, et al., No. 10-1031 (C.D. Cal. April 20, 2011). Judge Howard A. Matz ultimately concluded that employees of the state-owned enterprise may be foreign officials under the FCPA. Judge Matz provided a list of characteristics that may make a state-owned enterprise an instrumentality: "the enterprise provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction; the key officers and directors of the enterprise are, or are appointed by, government officials; the enterprise is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park; the enterprise is vested with and exercises exclusive or controlling power to administer its designated functions; the enterprise is widely perceived and understood to be performing official (i.e., governmental) functions." United States v. Noriega, et al., No. 10-1031, at 9 (C.D. Cal. April 20, 2011).

In a similar challenge, former employees of Control Components, Inc. filed a motion to dismiss arguing that various state-owned enterprises to which improper payments were allegedly made were not instrumentalities. United States v. Carson et al., Case No. 09-00077 (C.D. Cal. May 18, 2011). Judge James V. Selna denied the defendants' motion. Judge Selna listed several characteristics to consider: "the foreign state's characterization of the enterprise and its employees; the foreign state's degree of control over the enterprise; the purpose of the enterprise's activities; the enterprise's obligations and privileges under the foreign state's law, including whether the enterprise exercises exclusive or controlling power to administer its designated functions; the circumstances surrounding the enterprise's creation; and the foreign state's extent of ownership of the enterprise, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans). Such factors are not exclusive, and no single factor is dispositive." United States v. Carson et al., Case No. 09-00077, at 5 (C.D. Cal. May 18, 2011).

While these legal challenges are helpful to highlight the uncertainty that individuals and companies face, these decisions fail to provide a workable framework.

of this question produces unnecessary uncertainty as to what entities need to be subject to companies' stepped up scrutiny for purposes of FCPA compliance.

While there is no theoretical reason to eliminate from a comprehensive anti-corruption statutory scheme any bribes, ambiguity in the terms of the FCPA, which has limited anti-bribery provisions, as to which recipients may be within its proscriptions results in uncertainty in risk analysis of circumstances where that may be a crucial determination. This has very practical implications. Gifts or other benefits that may be customarily provided in a commercial context and given without a corrupt intent, may nonetheless fall under the FCPA's jurisdiction if the recipients are employed by an enterprise whose ownership may be traced to a foreign state, no matter how attenuated from the government such enterprise may be.

Clarification on Facilitation Payments

Despite having been part of the FCPA since its enactment and clarified in the 1988 amendments, permissible facilitating payments are still very much a mystery for many companies. The facilitating payments exception exists in theory, but not in practice, because there are no well-defined parameters in the law as to what falls within the exception. The FCPA lists several illustrative examples of facilitating payments for routine government action, such as obtaining permits, licenses, or other official documents and processing governmental papers. But where is the line drawn between permissible facilitation and bribe? With the DOJ's expansive interpretation of the FCPA's prohibition, many companies which discover what appear to be benign facilitating payments can be left wringing their hands with uncertainty as to whether the practice violates the law. It is commonly understood that facilitating payments are relatively modest payments. But again, there is no guidance in the statute as to what is a modest payment. Due to the heightened sensitivity and concern regarding anti-corruption compliance, companies are struggling to understand whether the actions of a single or few employees would be legal or could incur significant penalties for the company and potential jail time for individuals. This uncertainty in the law merits consideration of clarification.

Conclusion

In the interest of both the fair administration of the law and in promoting the growth of American business, and the jobs such growth can engender, Congress should consider amending the FCPA to provide increased clarity in the law and certainty in its application for those companies that endeavor to comply with its dictates. Developments in the business environment and FCPA enforcement policy counsel that Congress should evaluate its statutory approach to addressing corruption concerns and balance the need to free markets of corrupting influence with the equally important objective of providing clarity as to what is required and what is prohibited by this statute. Thankfully, the business community is generally rejecting corrupt business practices in favor of free and fair markets and is making ongoing investments designed to promote those objectives. This commitment to compliance and ethical business conduct should be recognized and encouraged by providing stability and predictability for US businesses working to conform their operations to the requirements of the FCPA.

As Judge Selna stated, "mere monetary investment in a business enterprise by the government may not be sufficient to transform that enterprise into a governmental instrumentality." Id. at 7. But what is sufficient?

Again, I thank the Chairman and Members of the Subcommittee and I look forward to answering any questions that the Subcommittee may have.