IN-SOURCING CORPORATE RESPONSIBILITY FOR ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

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I. INTRODUCTION

The World Bank estimates that more than $1 trillion in bribes are paid each and every year to government officials who demand that they be given something extra simply for performing their public duties.[1] Bribery supplants the rule of law with the rule of naked will—indeed, of naked greed—and turns many countries into kleptocracies.[2] In the words of former Assistant Attorney General Lanny Breuer, "everyone—from the fruit stand owner in Tunisia, to the oil rig worker in Nigeria, to the punk rock musician in Russia—knows how pernicious corruption can be; and we in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do."[3] Former U.N. Secretary General Kofi Annan characterizes bribery as "'an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism, and other threats to human security to flourish.'"[4] Public corruption "creates gaps in government structures that organized criminal groups and terrorist networks can exploit. In short, corruption is a 'gateway crime.'"[5] The problems of government and business corruption that are addressed by the Foreign Corrupt Practices Act ("FCPA")[6] therefore cannot be overstated.

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* Former Deputy Attorney General of the United States (2001–2003). The views and opinions set forth in this article are solely those of Mr. Thompson and not of any other person or organization. I am indebted to Charles J. Cooper and Brian S. Koukoutchos of Cooper & Kirk, PLLC for their assistance on this article.

1. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 4 (2010) [hereinafter *Senate FCPA Hearing*], http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf (statement of Greg Andres, Acting Deputy Assistant Att'y Gen., Criminal Division).

2. *See* Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012) [hereinafter Breuer 2012 Address], http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.

3. *Id.* at 1; *see also id.* at 2 (discussing work and successes of DOJ's Kleptocracy Initiative in compelling corrupt foreign leaders to forfeit ill-gotten gains that are located within U.S. jurisdiction).

4. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 826–27 & n.210 (2011); *see also id.* at 783 ("Bribery blights lives, undermines democracy, and distorts markets.").

5. Breuer 2012 Address, *supra* note 2, at 2.

6. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. § 78dd-1 *et seq.* (2012)).

Compounding the problem of enforcing the FCPA is the daunting chasm between the size and complexity of global multinational corporations and the limited resources that America's enforcement agencies, the Department of Justice ("DOJ") and the Securities Exchange Commission ("SEC"), can bring to bear. The only way to level the playing field, at least a bit, is to enlist the businesses themselves in FCPA enforcement. That is, we must create an incentive structure that drives corporations to establish internal compliance programs and to root out foreign corruption within their own organizations. Only those businesses themselves have the resources to conduct the global investigations that the FCPA requires.

To accomplish this end, I believe that we need to do two things: first, we must give businesses clear and predictable guidance on what sort of compliance programs they must establish; second, we must give them powerful incentives to engage in self-investigation and self-reporting of the bribery they uncover or suspect. The incentives I suggest are two: (1) businesses must be assured that a strong compliance program and prompt and full self-disclosure will ensure that the company itself will not be subject to criminal prosecution under the FCPA, and (2) such self-disclosure will also prevent the company from being debarred from doing business with the federal government or being denied government permits or licenses necessary for the company's operations.

In this article I first review our nation's long-standing and active aversion to corporate corruption overseas, as principally embodied in the FCPA. I then explain how achievement of the FCPA's goals is undermined by the uncertainty in current federal enforcement policies and the consequent ambivalence toward self-disclosure exhibited by multinational corporations. Finally, I argue that the only realistic way to make up the shortcomings in FCPA enforcement that flow from the Justice Department's limited resources is to motivate corporations themselves to police corruption in their foreign subsidiaries by giving them a concrete incentive in the form of guaranteed immunity from corporate criminal liability, and by assuring them that the company will not be debarred from doing business with one of the largest of all potential clients—the United States government. This proposed policy of inducing corporations to be responsible for policing themselves in the public interest would be merely another instance of America's historical practice of yoking the corporation to society's plough.