TRANSCRIPT

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES 2012 NATIONAL LAWYERS CONVENTION THE FOREIGN CORRUPT PRACTICES ACT*

PANELISTS:

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JUDGE WILLIAM H. PRYOR JR.: Welcome to the Criminal Law's practice group discussion of the Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act[1] prohibits companies on U.S. exchanges from bribing foreign officials, and the Act requires those companies to maintain accurate financial records and internal accounting controls. The Act reflects the leadership of the United States in fighting corruption and upholding the rule of law abroad, but critics complain that judicial oversight of prosecutions under the Act is minimal, too aggressive enforcement leaves companies vulnerable to penalties for acts beyond their control, and expansive interpretations of the Act put American companies at a competitive disadvantage. These are hot topics. This week the Criminal Division of the Department of Justice and the Securities and Exchange Commission published a Resource Guide that provides insight into their enforcement of the Act. Some experts argue that the Act needs more reform, it needs a compliance defense,

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* This panel took place on November 16, 2012, in Washington D.C. The American Criminal Law Review thanks Mr. Christian Corrigan at the Federalist Society for offering us the transcript for publication, and we thank each of the participants for agreeing to publication. We have printed the transcript without editing, but have added citations where necessary.

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2012).

a better definition of foreign officials, and a requirement of willfulness for corporate criminal liability. This panel will explore these issues and debate whether the Act works well or requires reform. For this task, The Federalist Society, as usual, has assembled a distinguished panel of experts.

Our first speaker will be Lanny Breuer. Mr. Breuer was unanimously confirmed as Assistant Attorney General for the Criminal Division on April 20th, 2009. As head of the Criminal Division, Mr. Breuer oversees nearly 600 attorneys who prosecute federal criminal cases across the country and help develop the criminal law. He also works closely with the Nation's ninety-four U.S. Attorney's Offices in connection with the investigation and prosecution of criminal matters in their districts.

Mr. Breuer began his legal career in 1985 as an assistant district attorney in Manhattan, where he prosecuted violent crimes, such as armed robbery and gang violence, white collar crime, and other offenses. In 1989, he joined the law firm of Covington & Burling, where worked until 1997, when he joined the White House Counsel's Office as special counsel to President Clinton. Mr. Breuer returned to Covington in 1999 as co-chair of the White Collar Defense and Investigations practice group, where he specialized in white collar criminal defense and complex civil litigation. He is a fellow of the American College of Trial Lawyers, a barrister of the Edward Bennett Williams Inn of Court, and a member of the American Law Institute. Mr. Breuer received his B.A. from Columbia College in 1980 and his J.D. from Columbia Law School in 1985.

Our second speaker will be Michael Mukasey. Judge Mukasey served as the 81st Attorney General of the United States from November 2007 to January 2009. He oversaw all activities of the Department of Justice and advised on critical issues of domestic and international law. From 1988 to 2006, he served as a district judge on the United States District Court for the Southern District of New York, becoming chief judge in 2000. While on the bench, he handled numerous cases including the trial of Omar Abdel-Rahman, the so-called "Blind Sheik," and nine co-defendants convicted of a wide-ranging conspiracy that included the 1993 bombing of the World Trade Center and a later plot to blow up New York landmarks, including the Holland and Lincoln Tunnels, the United Nations, and the FBI's New York Headquarters in Lower Manhattan, and the case of José Padilla, arrested on a material witness warrant and believed to have returned to the United States to detonate a high radiation bomb and to blow up apartment buildings by sealing apartments, filling them with gas, and then detonating them.

Judge Mukasey began his career in private practice after graduating from Yale Law School in 1967, where he was a member of the Board of Editors of the *Yale Law Journal*. He served as an Assistant U.S. Attorney for the Southern District of New York in the Criminal Division from 1972 to 1976 and as chief of that office's Official Corruption Unit in 1975 and 1976. Since February 2009, Judge Mukasey has been a partner in the New York firm of Debevoise & Plimpton, where he [sic] a member of the litigation department and focuses his practice primarily on internal investigations.

Our third speaker will be Mark Mendelsohn. Mr. Mendelsohn is a partner in the Litigation Department of Paul, Weiss, Rifkind, Wharton & Garrison. He is a member of the firm's White Collar Crime, Regulatory Defense, and Securities Litigation practice groups. Before joining Paul, Weiss, Mr. Mendelsohn served as the deputy chief of the Fraud Section of the Criminal Division of the Department of Justice and is internationally acknowledged and respected as the architect and key enforcement official of the Department's modern Foreign Corrupt Practices Act Enforcement Program. He is widely known for dramatically increasing the level of sophistication of enforcement under the Act globally and for underscoring the importance of anti-corruption compliance. Before joining the Fraud Section, Mr. Mendelsohn was senior counsel in the Department's Computer Crime and Intellectual Property Section in Washington, and prior to that served for nearly six years as an Assistant U.S. Attorney in the Southern District of New York. Mr. Mendelsohn earned his B.A. from Yale in '89, his J.D. from the University of Virginia School of Law in '93, and after graduating from law school, served as a law clerk for Judge Denny Chin on the U.S. District Court for the Southern District of New York.

I'm detecting a pattern about the Southern District of New York.

[Laughter.]

Our fourth and final speaker will be George Terwilliger. Mr. Terwilliger is a partner in Morgan Lewis's litigation practice. He provides counsel in litigation, internal investigations, and enforcement proceedings, especially those involving the Department of Justice, the Securities and Exchange Commission, and other primary enforcement agencies. Mr. Terwilliger served as a presidential appointee in two administrations. He was appointed the United States Attorney by President Ronald Reagan and served as deputy attorney general, the number two official of the Department, and as Acting Attorney General in the George H.W. Bush administration. He has ten years of experience as a front-line federal prosecutor, conducting investigations, trials, and appellate proceedings.

Major cases in which Mr. Terwilliger was personally involved as a prosecutor include the BCCI International Banking scandal where he led negotiations for the government that resulted in a comprehensive criminal and civil resolution involving more than twenty-five parties in the United States and abroad. He has had leadership responsibilities in several domestic and international cases including managing the federal response to massive civil unrest in Los Angeles, working directly with the FBI in an operation to rescue federal officers held hostage in a prison takeover, and addressing, through the National Security Council and in legal proceedings, massive Haitian migration to the United States. While a front-line prosecutor, he tried scores of cases and has had lead responsibility in significant white collar crime and terrorism matters.

Each speaker will begin with opening remarks of ten to twelve minutes followed by panel discussion, and then we'll respond to questions from the audience. I will go ahead and warn those of you who haven't been to a panel that I moderate before

that Q&A will be something everyone always looks forward to, it's one of the most popular aspects of our program, but we really do want it to be Q&A. We asked the panelists to be our experts and our speakers today, and if you're saddened that you weren't invited to be a panelist, please don't invite yourself to pretend to be one.

[Laughter.]

With no further ado, I'm going to ask Mr. Breuer to come forward and begin our discussion.

LANNY A. BREUER: Well, thank you, Judge, very much. I'm really delighted to be here, delighted to be at The Federalist Society, and delighted to be with such an august panel. And as the Judge said, I, too, am very much looking forward to the questions and answers and really believe that with respect to the FCPA, our topic today, anything that is of interest to the audience at least I would be delighted to address.

I begin, though, just with sort of the foundation that I think the fight against corruption is one of the signature fights and worthy causes that we can have today. I think corruption is the reason why young people around the world often feel that their dreams are unattainable, because it doesn't matter how hard the young person works, it doesn't matter how hard he or she works at school, what matters is the power structure in that country and whether the corruption takes hold, that what really matters is who you can pay off and what you can do, and I think we see that throughout the world. We see that with a fruit merchant in Tunisia, we see that with young people and rock musicians in Russia, and we really see that taking hold, and I think the United States has a responsibility to be a leader in that effort, I think we have been a leader in that effort, and I think much of the world is following. And certainly with respect to law enforcement, we see that more and more. We've certainly seen that during my tenure the last four years, and, of course, before that when Mark headed up this effort as well.

Obviously, what happened over the last week, and I assume will be one of the issues, is that we did something that I think is really quite unprecedented in the area of the criminal law: we issued a Guide,[2] our FCPA guidance. And I really can't think of another area in the criminal law with the Department of Justice working with the Securities and Exchange Commission has been so forward leaning and trying to be so encompassing in how we look at the law and how we proceed moving forward. We are trying to be as transparent as possible. We want people to understand why we prosecute those we prosecute. How do we make charging decisions? And I think that the more we are transparent, the better it is for the public and the better it is for the Department.

The vast majority of companies in the United States, and indeed in much of the

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2. CRIM. DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA GUIDE], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

world, I think want to get it right, and what we want to do is enable them to get it right and to improve compliance, and I think the Guide will be one way to do it. Frankly, the Guide is written for both small companies that perhaps have had limited or virtually no international experience and are about to have their first foray in that area, but it's also written for multinational corporations that have subsidiaries around the world. I think the Guide debunks that we challenge you or prosecute you because you may buy someone a cup of coffee, and I think that it debunks the notion that de minimis payments are going to really run afoul of the Department's prosecutorial discretion and judgment.

But this really came about through an open dialogue, a public-private dialogue, and I think it's been a great success. We had very constructive discussions with the Chamber of Commerce, and the Chamber, of course, was represented by Judge Mukasey. And I think we heard the Chamber. We also heard NGOs. We heard business communities. And one of the examples of that is when we were conceiving of the Guide first, the whole notion of coming up with a guide was raised, and we heard it, I heard it, and made the determination that it made sense.

The next point that we were told was that you may not come out the way we really want on every issue, but what would be most helpful is if you could come up with a list of hypotheticals. Don't just simply restate a statute, come up with hypotheticals. And I think any discerning impartial reader of the Guide will say that we did just that, and that is one hundred percent a result of the dialogue that we had. Not every hypothetical that was asked for is in the Guide, of course, but many are, and are many of the most cogent issues that have been raised.

Again, it's our hope and our goal to be as responsive as we can be in that area. The Guide takes on difficult issues; it doesn't punt. It takes on issues of gifts, travel, and entertainment. It talks about facilitation payments. It talks about successor liability, a very big issue for corporations, certainly an issue the Chamber raised with me, an issue that many others raised with me as well. And I'm realistic, as we all are, that we cannot and will not satisfy everyone. There will be some who think we haven't gone far enough, there are some who think we've gone too far, but I think so far we feel pretty comfortable and confident that this unprecedented undertaking makes sense.

I look at the Guide as the continuation of a discussion, it's not the end of the discussion, it's not the beginning of the discussion, but it's the Department's good faith way of saying to the business community, to the NGO community, to the world community that we are very committed to continue the implementation, the prosecution of the FCPA. We, of course, also initiated and began a kleptocracy initiative that I'm very proud of. We do training around the world with our resident legal advisors on the issue of corruption, helping countries throughout the world, whether it's in drafting their legislation, implementing their legislation and prosecuting their cases, and you can see over the last few years that that's taken hold with new anti-bribery laws, new foreign bribery laws, or the updating of old ones.

And so I won't go too long so that we can all have a lot of time for the questions and answers, but I do want to end by saying that I do think the battle against corruption is a very worthwhile battle. It enables American companies to compete and other companies to compete based on the quality of their product, the competitiveness of the price, the drive of their workforce, and business should not be based on the fact of the ability of someone to bribe an official either locally or in a foreign land.

Thank you.

[Applause.]

MICHAEL B. MUKASEY: At the risk of turning what perhaps some people came to see as a food fight into a love fest, I want to second a lot of what Lanny said, certainly about the process. The private business community, the Chamber, and others were very concerned about some of the general language in the statute, some of the anecdotal evidence from prosecutions that were brought, and, as a result, we had a series of meetings, we sat down, expressed views on both sides, and the very fact, I think, that the Justice Department agreed to come up with a guide that helps people through the statute that indicates what is at the fringe, what is at the center, is enormously useful, and I'm particularly encouraged by the fact that he says this is the beginning, not the end.

This is the Guide, and this is two-sided, so understand that a lot of work went into this and the fact that the day after it's issued he's willing to say that this is the beginning and not the end is terrific.

Of course, the Foreign Corrupt Practices Act was passed initially in the wake of a lot of the Watergate events and in particular in the wake of disclosures that some U.S. corporations were running around the world with satchels of cash paying off government officials, and that was not the image that the United States wanted to project worldwide, it's not the image of the way we do business, and there was obviously a keen desire to put an end to that.

It's just as obvious that this statute goes a whole lot further. It covers essentially any payment to any government official or employee of a government instrumentality—and we'll get into that a little bit—to either secure business opportunity or maintain a business opportunity. And if you stop and think about the way business people do business, whether it's meals or playing golf or whatever, you will realize that you can very rapidly get to the borderline of something that might technically be covered, and so this made a lot of people very nervous.

I'm also glad to see that the Department has very much gotten out of the business of suggesting that somehow it's really lawyers who are generating all the concern, private lawyers generating all the concern, about this statute. I actually heard it suggested at one seminar in which I participated that all of the furrowed brows over the FCPA were really being generated by private lawyers who were looking to swat up large fees from terrified corporations. That's not the case, and I think the issuance of this Guide acknowledges that it's not the case.

This Guide makes some very practical conclusions. It clarifies that ordinarily—and that word and that concept appear frequently in here because, again, I was with the government for a period of time, and I watched the government handle cases. I understand that the government doesn't want to paint itself and shouldn't want to paint itself into an absolute corner by saying this is how it is in every case all the time, so words like "ordinarily" and "as a matter of course" appear in here, and it's perfectly natural, that ordinarily a company that is not an instrumentality of a foreign government, if its shares are not majority controlled by the foreign government. Now, in some areas of the world where government business is virtually the only business, that's welcomed news. It provides considerable detail in actual and hypothetical scenarios, and I stress "actual" because they include not only hypotheticals but actual declinations, that is, cases in which the government has declined to prosecute, and that's of great comfort. To be sure, this is a guide, and it says right up front and makes it very clear that this is not binding, so you can't, if your company is brought to book, brandish this or some subsection of it in a court proceeding, but it does give business executives I think some reason to believe what they can anticipate and what they needn't.

It also confirms that the SEC and the Department of Justice are on the same page when it comes to parent subsidiary liability, that the parent has to have actual knowledge or reason to believe that something is going on in the subsidiary before liability can be imposed. That was a huge problem as between those two agencies. It's been ironed out and we're now all on the same page. It reinforces that corrupt intent is required for corporate criminal liability even though the word "willfulness" isn't yet there, and I'm not going to get into how many angels can dance on the head of a pin and the distinction between corrupt intent and willfulness, but it's, I think, frankly close enough to satisfy a lot of lawyers and a lot of business executives.

There are other examples I could go into, but these are only the introductory remarks.

What I want to stress is that the Department and the SEC have to continue to administer this in a way that recognizes that the goal of U.S. business, particularly in the economy that we have, is to continue to be able to do business around the world, and I think that's been one of the great surprises, frankly, to me and I think to a lot of other people, that this so far has created only a few significant disadvantages for American business. Other countries, notably the British, certainly countries of the EU—Italy and so forth—have followed suit with their own statutes, and so we are not isolated, we are not looked upon as simply naives, and we are in fairly good shape. Of course, there are areas of the world where other countries, notably the Chinese and the Russians, are running around with the same suitcases of cash that generated the initial concern that produced the FCPA. What we're going to be able to do about that in the coming years I think is going to be a very big challenge, but at least we've got a start and we've got reason to hope that we're going to have a basis of continuing.

Thanks very much.

[Applause.]

MARK F. MENDELSOHN: Thank you for inviting me to join you today to talk about this subject, which is near and dear to my heart. I thought what I would do with my time here is to share with you a perspective that does two things: first it draws on my experience on the government side on one hand and more recently in the private sector counseling clients, mostly companies, on FCPA issues on the other; and number two, that partially reflects my views and partially makes some points I think for rhetorical purposes to stimulate discussion here today.

So I start with a question: Is there a problem either with the FCPA or with the way it's enforced that requires fixing? And now that the guidance is out, of course, I add to that, has the guidance addressed any of the alleged deficiencies that have been identified?

So let's start with the statute first. So what issues might exist? And here I'm talking about issues on either side, from the company/private sector perspective or frankly on the government side. You probably ought to start with the facilitation payment exception, which you may have heard about. The new U.K. Bribery Act[3] prohibits facilitation payments. Only a small minority of OECD countries—Australia, Canada, Korea, and the U.S.—permit them. The Department itself has been narrowly construing them through their enforcement actions. The OECD has been highly critical of the U.S. for maintaining this exception. So one possible issue for consideration if we're thinking about whether the statute requires some reform is what to do about the facilitation payment exception.

Number two, it has a written law affirmative defense, which, frankly, most practitioners have a difficult time explaining to their clients how and when it applies, and so there is a real question I think about whether this is a vestige of some 1977 issue that's no longer around, but the affirmative defense is there. What do we do about that?

The issue that Judge Mukasey identified with respect to the treatment of foreign subsidiaries of U.S. companies is a difficult and thorny issue that has been there prior to the enactment of the legislation. Now, unless there is some conduct in the territory of the U.S., the anti-bribery provisions don't reach the foreign subsidiary of a U.S. company except perhaps under the accounting provisions. But one could reasonably ask the question: Should this statute go further? If one is raising capital in the U.S., why should one's foreign subsidiaries be exempt unless, of course, there is some knowledge at the parent company or conduct in the U.S.?

And then the question that many have been asking: Who is a foreign official and what's a government instrumentality? Of course, instrumentality is not defined in the statute. We do have the benefit more recently of some judicial guidance on the

3. Bribery Act, 2010, c. 23 (U.K.).

topic, and as I'll talk about in a minute, the Resource Guide addresses that to a significant degree as well.

So there are some issues on both sides with respect to the statute. When you look on the periphery at the enforcement of the statute, are there issues there? Well, again, I think there are issues on both sides. I think the private sector has rightly, I think, asked questions for quite some time about, what are the benefits of self-reporting, of internal investigation, and can we achieve greater predictability and transparency around those issues?

On the other side, the government has long struggled with the statute of limitations that makes it difficult in some circumstances to properly investigate what can be very challenging and complex investigations. And looking to the U.K. as an example for a moment, there is no statute of limitations, and so the U.K. prosecutors have the luxury of investigating in some cases decades-old conduct. And so one could suggest perhaps the U.S. ought to have greater flexibility.

On the remedies side, those of you who practice in the area will probably find the disgorgement remedy that the SEC administers to be one of the most perplexing areas to deal with. How one calculates it and, frankly, conceptually how one gets to a disgorgement remedy in a situation where you're only dealing with an accounting violation, not a bribery situation, I think is a fair question.

And then we have questions about, who's the real victim of a foreign bribery offense? And I don't mean to suggest that there is no victim, there are lots of potential victims here, there are foreign citizens, there are foreign governments, there are shareholders, there is the market, there are competitors, and so what do we do about victims? Ought there be a restitution remedy that's administered more frequently? What recourse should victims themselves have?

And then last, but certainly not least, there is the level playing field issue, which others have already spoken about. The U.S. has always been a leader. Now there are some other countries that are enforcing, but enforcement outside the U.S. is nowhere near where it ought to be, and just recently, to pick two examples, very well-developed peer countries, France and Australia, have come under withering criticism from the OECD for their lackluster efforts to enforce their own foreign bribery legislation. The U.K. has a new act, which is all well and good, but they've really yet to apply it in a foreign bribery context. And then we have the vexing problems of China and Russia and India to deal with.

So has the guidance addressed these issues? Well, we're all still digesting the guidance at 120 pages and 450 some-odd footnotes, there is a lot to process, but I would suggest that the answer is to a substantial degree yes. The guidance draws on ample precedent from the DOJ's opinion releases to its enforcement actions, SEC enforcement actions. There are a few bright lines, I will acknowledge, but there are many useful hypotheticals, scenarios, practice tips, some general data on declinations, some specific anonymized cases involving declinations, and so in my personal view I think the guidance has some real utility particularly for in-house legal and compliance professionals at companies, and it makes it easier, frankly, if

you're an in-house compliance professional, to go to a single reference source rather than having to find the 1987 opinion release that addresses a particular topic, which isn't strictly speaking binding other than on the company that made that particular request. Now you have 2012 contemporary guidance that you can point to. But it doesn't tackle a couple of the issues that I think are continuing to vex the private sector, although perhaps it was too much to ask.

Transactional diligence is a particular difficulty, and while there is comfort provided with respect to acquirers who do the right thing, the Department has reserved fully its right to prosecute the acquired companies and I think that's of cold comfort to many companies that are engaged in transactions. I think predictability around self-reporting and cooperation remains a difficult issue, and I fully understand, having been on the government's side, wanting to retain full flexibility and rely on the corporate charging principles, and so I don't know that I would have taken a different approach in that area, but it remains a difficult issue and one for further dialogue.

So where do I end up on this? I would say that the FCPA, from any perspective, is not a perfect statute, but it is a perfectly serviceable one. FCPA enforcement is not perfect either, but there is no foreign bribery enforcement program that's better. If there is going to be a fulsome debate or discussion in the future and ongoing dialogue about areas for amendment or improvement, I think due consideration will have to be given on both sides to all the issues, and there are lots of stakeholders that care very much about these issues, obviously government, civil society, the private sector, and other countries as well.

I think at the end you can [sic] about U.S. foreign bribery enforcement sort of what is paraphrased with respect to democracy, you know, it's sort of the worst regime but for all the others. So I think that's sort of where we are.

[Applause.]

GEORGE T. TERWILLIGER III: Well, thank you, and thank you to The Federalist Society for inviting me to join this very august panel. One of the problems with going last, of course, on a panel with this many good people on it is that all the good things may have already been said, but I'll make an effort.

I do want to commend the Justice Department and the SEC, the Criminal Division and the Enforcement Division respectively, and Lanny personally, and the Attorney General, for undertaking this effort. I think Lanny is right, as far as I can tell, it is unprecedented. It's incredibly useful. If for no other reason than compiling this sort of institutional knowledge from such a variety of sources as are captured in the guidance has a great deal of utility and I think will lead to not only some clarity in terms of understanding the statute and how it is used, but also will lead to some greater understanding of why certain enforcement practices and policies are what they are, and as Lanny indicated, that that's to be a continuing dialogue, better understanding leads to better dialogue, so my hat is off to you on that.

I do think that talk of how the FCPA should be administered, indeed, discussion of how the statute itself should be structured, we've had it for a long time now, its enforcement, under Mark's tutelage, went into a new era for certain, but I think an enlightened one, frankly, in my dealings with the Department when Mark was there, but it is important to put consideration of these issues into the perspective of, why do we have an FCPA? And I thought Lanny captured very well the corrosive effect of corruption on both individuals, on governments, on economies, and on businesses, and it is absolutely true, and I don't think you'll get disagreement from the broad swath of the American business community that they want a corruption-free market in which to compete because corrupt markets can't be free markets, and a level playing field works to the benefit of all honest competitors.

But in that context, of course, we also have to face the realities of, what are the costs and benefits of a particular enforcement regime when measured against perhaps some of the very laudatory objectives of the statute? And I'll save sort of going into the particulars if somebody has questions about it, but suffice it to say that there is a growing body that I think reflects the common sense that a statute of this sort, which gives businesses additional requirements to meet in the context of their operations on a global basis, does carry a cost, and largely I think we can say that cost is worthwhile given the objectives of the statute, but we should be continuously looking, and I think this dialogue that Lanny reflects is part of that looking or examination, we should be continuously looking at ways to achieve the laudatory objectives of the statute but reduce the cost to businesses of dealing with it.

I think that there have been reforms that have been proposed. There are things that the U.S. Chamber of Commerce, with Mike's guidance, have championed. There are some other ideas that have been put out there. I think that is also a healthy and good part of this dialogue. And I just want to dwell on a couple of thoughts about that for a moment and pick up on something that Mark said about voluntary disclosure. Companies, all legitimate companies today, operate compliance programs to one degree or another. Almost all companies that have considerable international operations, when they discover a problem as a result of either their compliance operations or through some other source, take pains to investigate themselves. Particularly for a public company, the securities laws basically demand that that be done, and even if there is any ambiguity about that, most independent directors serving on audit committees will make their views known about the need to looking into possible wrongdoing or noncompliant behavior. And I think it's a reality, just a reality, that a company that undertakes a critical self-examination of certain conduct or conducts a compliance review of a given business unit or operation is in a far better position to discover facts efficiently, quickly, and probably more broadly than the government ever could given both legal and resource limitations, so that this is not a complete love fest.

I'll take the position that companies are not sufficiently rewarded, or at least are not sufficiently rewarded with sufficient certainty as they should be for undertak-

ing that kind of conduct. I don't think this is the time or place for necessarily a debate about how that certainty could be achieved or what those rewards should be, but I think it is totally consistent with the fundamental objectives of the statute to maximize the reward and benefit for self-policing and voluntary disclosure. And I will tell you candidly in my own experience in dealing with the Department under the prior administration and under this administration, there are real and tangible benefits to self-policing and voluntary disclosure, and they are significant. The difficulty is when you walk into an executive suite or a board room and you want to talk to the management of a company or to the board that's responsible for a company about that, it can be very difficult to quantify what those are when you start talking about disclosing their own wrongdoing.

There is one particular reform proposal that I really think is worth some serious consideration, and that does have to do with international acquisitions. If American companies are going to grow in those parts of the world where the greatest economic opportunity exists, they are going to have to take chances, and with all due respect—and I don't disagree with the need to do pre-acquisition due diligence—I'm sure, as most of you realize, and as all of us have experienced, pre-acquisition due diligence is extremely limited, and ferreting out corruption, which is usually conducted relatively clandestinely within a company in pre-acquisition due diligence, is very difficult. Therefore, it seems to me that it's worth considering that either by policy or practice, through a presumption perhaps, that a period repose after acquisition would be afforded in acquiring, U.S. company, a company acquiring a target abroad, not subject prior to that to the FCPA, during which the company can go in, thoroughly scrub that entity, if it finds anything, disclose it to the government, remediate the conduct, of course, and move forward without fear of prosecution of either the acquiring company or the subsidiary for the limited period of time in which it was owned.

And then, finally, I want to say something to those of you who may be on the business side at companies about the use of this statute. I think you can tell—and I don't think this is the former prosecutor in me coming out, I think it's the counsel to businesses perspective—this is a very good statute for American business overall because we do need a level playing field, and the best way to look at this statute and to look at the compliance programs that it requires are as risk management tools. We have all kinds of risks in the operation of a business, and managing those risks is a prudent part of the overall management program of a company. The Department has done an excellent job of capturing the elements of an effective compliance program in this guidance, and elsewhere frankly, and I think if looked upon not as a cost imposed on a company that is a burden, but rather looked upon as tools that can effectively manage the risk of noncompliance with the law, and indeed often with company policy, looking at it that way can go a long way to selling this not just within the management ranks but to shareholders as well.

Thank you.

[Applause.]

PRYOR: Well, Mr. Breuer, I'm not sure whether I wish you had waited until next week to issue the Guide in the hope of producing more acrimony or whether it would have been better to issue it two weeks ago so that there could have been more study and perhaps more opportunity to questions. It seems like you timed it perfectly.

[Laughter.]

But kidding aside, when I asked the panelists whether there are any reactions to what each other have said, Mark in particular has raised a number of issues including dispensing with the facilitation payments exception, issues about statute of limitations.

I don't think I heard you, Mark, recommend that we adopt the British model of no statute of limitations.

MENDELSOHN: I was raising but not recommending.

PRYOR: Right.

[Laughter.]

And issues about who is the real victim. And George, as well, has raised issues about foreign acquisitions and a period of repose.

Are there any reactions among any of you that you would like to speak to?

Lanny?

BREUER: Sure. Maybe I'll start. I'll just talk about a couple of the points.

With respect to facilitation payments, if Congress were to determine that we should now outlaw facilitation payments such as many of the other countries around the world do, that's, of course, Congress's prerogative, and we will act accordingly. What I said at the OECD when I spoke there—there is no question Mark is right, that some countries around the world are critical and ironically think that we should take it even further—is that we think we have it about right. I don't think facilitation payments in our mind are events of corrupt intent, we're pretty clear about what they are, they're for nondiscretionary decision making, and if you look really at how we even use our discretion, we just simply do not prosecute de minimis cases, we don't. And so in my mind—and maybe I'm wrong—it's an academic debate, but it's a bit much ado about nothing.

To George's point, I'm very sympathetic, and I understand it. I think in the Guide we tried pretty hard to talk about successor liability, and Judge Mukasey and others had raised it. We are all about companies making smart business decisions and going forward, and I think if you look at the Guide and you look at how we have used our discretion, we have not—we have not—prosecuted companies for acquiring other companies, we have not prosecuted the acquirer for innocently acquiring a company that perhaps has been engaged in corruption. And, indeed, effectively we have, I would say, a period of repose because what we encourage is for companies to come in if they determine that the company they have acquired has engaged in such conduct, we encourage them to stop that conduct, we encourage them to fire the employees who did it, we encourage them to take the

acquired company and make them part of the compliance program, and without exception those companies have not been prosecuted.

The one issue I guess I would have with George's thoughtful proposal is that I think it's just plain bad policy to say that if you're a corrupt company, let's say, in a foreign land and you're able to pull the wool over the eyes of, let's say, an American acquirer, that under no circumstances should we be able to go after the previous company in some iteration because what I don't want to do and what I don't think we can do is encourage bad companies to be bad until one day they're acquired by a good company and, poof, the criminal liability goes away. And so I think we have to preserve that option, and there can be, and could be, a situation where there would be a corrupt company with corrupt officials, and we want for good governance to be able to address that conduct. But I do say if you look at our record, we simply have not gone after the acquirers. And so my sense is we have it about right.

MUKASEY: Picking up on what Lanny said, I think part of what he said is encouraging, but part of it points to a substantial deficiency in a number of areas of the statute. He's talked about the reasonableness with which the DOJ, under his guidance, has administered the statute. The Old Testament contains a passage that I think has a cautionary tale for that kind of reliance, and it is, "And it came to pass that there was a pharaoh who knew not Joseph,"[4] and if you remember your Bible, you will remember that's when the trouble started. If it comes to pass that there is an assistant Attorney General in charge of the Criminal Division who is not Lanny Breuer, then that may be the beginning of a lot of difficulty, and I think the more we can do to avoid that kind of administration, the better off we are.

Going a little bit further, it is possible, I guess, to conceive of a standard whereby a, quote, bad company can be bad up to a certain point, and I understand the Department's position on this. If an American company acquires a, quote/unquote, bad company, it is acquiring whatever economic advantage that company got by being bad, and so on some view of the world, some of that ought to be given back, but it is possible to put that in terms of percentage, it is possible to put it in terms of absolute dollars or other media of exchange. It's possible to work out standards.

Coming to something else that was on our wish list that isn't really in here, and that's a compliance defense, and the Department has resisted that, and that's not really something that could have been in this Guide because it would have to result from statutory amendment, but I think a lot of companies feel that they are in essence putting themselves at risk when they establish vigorous thorough compliance mechanisms only to unearth all kinds of things that they then have to go in and self-report and get in trouble for, and they're to a certain extent at war with themselves, and I think they would feel much more comforted by at least being

4. *Exodus* 1:8.

able to establish a compliance defense. Now, I've heard people say, well, you give them a compliance defense and they'll all go to trial, they'll rely on their compliance defense. I think people who speak that way are not really fully attuned to the risk aversion of U.S. companies. The likelihood that a company would willingly risk an indictment even in many industries, which is virtually the coup de grace in order to go to trial based on a compliance defense, particularly when you start out with there having been a bad act; in other words, in order to have a compliance defense, you have to be defending against something, so there is a bad act to start with. You're laboring uphill to start with. I don't think it's giving a whole lot of way to have a compliance defense. How that might be designed I think is a matter of detail, but we would like very much to see that.

One more point and then I'll let all this go. We're talking about the length and the footnotes. One item we wanted to see covered, had discussed at least with Lanny, had to do with the so-called rogue employee. What happens to the rogue employee? Well, sure enough, in Footnote 305—

[Laughter.]

—we find reference to a rogue employee. It says, "When evaluating the pervasiveness of wrongdoing within the corporation, the prosecutors are advised that while it may be appropriate to charge a corporation for minor misconduct where the wrongdoing was pervasive, it may not be appropriate to impose liability upon a corporation particularly one with a robust compliance program in place under a strict respondeat superior theory for the single isolated act of a rogue employee."[5] Therein [sic] the problem. If you have a series of small acts that might otherwise not be prosecuted, and you do have a rogue employee in some distant location, what you risk is the possibility that the proverbial kitchen sink will be tossed into a subsequent prosecution when the acts of the rogue employee are discovered, and I think we need to go further than Footnote 305.

[Laughter.]

I guess the love fest is over.

ATTENDEE: Good.

[Laughter.]

BREUER: Well, first, hearing Judge Mukasey, I know it just breaks my mother's heart that I can't go toe-to-toe with him in talking about the Old Testament.

[Laughter.]

I wish I could.

[Laughter.]

So let me just address a couple of the issues that Judge Mukasey raised. First, with respect to the compliance defense. Were we to accede to a total compliance defense, we would completely go counter to the principles that have in my mind—and I think in many—have really dictated the way we look at criminal

5. FCPA GUIDE, *supra* note 2, at 116 n.305.

justice and how we evaluate cases in every area of the law, and we would treat the FCPA differently than any other criminal act. We have principles that have gone from many administrations about how we make a determination whether to prosecute organizations, and those principles that we use for prosecution have many factors. They look at the conduct, they look at the voluntary disclosure, they look at the criminal history of the organization, they go on, and there are about nine factors. And if were to say suddenly you have a compliance defense, then in essence we would be saying the other eight don't matter, it doesn't matter if you've been a corporate actor or a bad actor, it doesn't matter whether you have a criminal history or you don't have a criminal history, it doesn't matter whether you voluntarily disclosed or didn't voluntarily disclose, and to my mind, besides that—which I think would be a very deleterious and a very poor act—we also, frankly, would not be encouraging appropriately good, robust compliance programs. There would be, in my mind, I'm worried, a race to the bottom. All we need is to have a program and then to hire good counsel who can argue in court that there is the existence of a compliance program, and that would be the debate. What is the program and is it adequate enough? And so what we would be litigating in front of judges is not the underlying conduct but rather the existence of the program itself.

In reality, what you find is that we very much take credit to compliance programs, and if you look at the Guide or you look at our website, et cetera, you will see that the companies that have good compliance programs are highly regarded. And what's the example? You don't have to look at Footnote 305, look [sic] the *Morgan Stanley*[6] case of not so long ago, and Garth Peterson, their managing director. Morgan Stanley had a managing director in China; he violated the FCPA. Morgan Stanley came in. They said, We have an excellent compliance program, we train our employees, we've trained them on the FCPA, we've trained them on corruption issues, and we trained Garth Peterson. We were persuaded, and in all due respect, it has nothing to do whether I'm the AAG, it doesn't matter who the administration is, it's just plain smart lawyering. We looked at it, we were persuaded that in fact what Morgan Stanley said was right, we were very clear and very transparent, we didn't bring a case against Morgan Stanley at all. Garth Peterson is sitting in jail right now. That's, I think, smart lawyering, that's what we're doing, and frankly I don't see why we want to muck around and change the legislation and change the Act. I think we talk about hypothetical issues here, but in reality in the implementation I think we have it right.

PRYOR: Do either one of you want to speak next?

TERWILLIGER: I'll just react a little bit to what Lanny said a little bit earlier about successor liability and so forth. I appreciate the points that he makes, and they're certainly valid ones from an enforcement perspective. But I think in the reality of

6. United States v. Peterson, Nos. 12-CR-224, 12-CV-2033, 2012 WL 1448108 (E.D.N.Y. Apr. 26, 2012).

the commercial world, I mean, let's take the bad company that's been making money through corrupt means that's acquired by a U.S. company, most U.S. companies will take steps to end that corrupt behavior, which is going to, in most cases, affect the bottom line of that company, so it's not that they're going to continue to benefit from the corrupt activity; if anything, the real value of the asset being acquired is going to be diminished as a result of taking the corrupt element out of the equation that produces the revenue stream. And regardless of what entity winds up being charged or penalized at the end of the day, it's the acquiring company's assets, it's money, that's going to go to satisfy that.

But Lanny's points are well taken and they're certainly subject to very important consideration, but let's just go a step beyond that and go back to what I tried to allude to at the outset of my remarks: Why do we have this statute? And I think we all agree that the statute serves legitimate objectives, and if the government's enforcement objectives are geared toward that statute, it just seems to me that doing everything we can to encourage and reward U.S. companies who, when making an acquisition, come in and do the right thing for the right reasons and clean something up is going to serve not only the objectives of the statute but the enforcement objectives of the United States and that penalizing them for doing so, regardless of the vehicle that's used to exact that penalty, is not consistent with those objectives or at least doesn't lean forward as far as it could.

Breuer: If I could just say, though, George—and I hear you—we really are talking in the hypothetical. You cannot and no one in this room can name one example of one American company that has been penalized under the FCPA by our division for making an acquisition, we just don't do it. You acquire it, you come in and you tell us, and we've treated you appropriately. We want to encourage business. So I understand we may be talking about some theoretical possibility, but in reality we are encouraging companies to clean up these companies that they acquire, to let us know about it, and we've been very supportive, and I think that's what the Act is about and I think that's why we are trying to use our discretion judiciously, and it's not just us, I think our predecessors did the same.

Mendelsohn: I would like to briefly address two points. First, the idea of [sic] affirmative defense for an adequate compliance program. I agree wholeheartedly with Lanny on this one for a couple of reasons, and I say this having devoted a significant amount of time and energy to developing, when I was in government, what the Department's views are with respect to what's an adequate anti-corruption compliance program, which really continued to be refined and are now memorialized in this guidance, and my concern is the following: I am concerned that if we were to adopt such a defense, that it would result not in perfection or improvement, continuous improvement, of compliance and what companies do around compliance, but, rather, result in a dilution of the progress that has been made in that the standards would necessarily end up being below where they are now if we were to articulate what was necessary in order to make out the defense, and that's for a couple reasons. One is because the Department has always said

there is no one-size-fits-all program; right? A compliance program has got to be tailored for the risk and size and profile and international footprint of a company. So the question is, how do you set standards that are going to apply to the small private company that is just beginning to export but has no presence outside the U.S., on the one hand, and on the other hand, to a major super multinational with presence and operations in 120 markets around the world? I mean, there is no common ground in the middle there except on the most basic level. So I worry that the result will be an understanding of what an adequate compliance program is that is well below what our current practices in the marketplace and what the Department expects. So I have that concern.

And then the second issue just briefly to touch on is this issue about transactional diligence, and I'm uncomfortable instinctively disagreeing with Lanny about anything, but I'm going to disagree just a little bit here because while I think there is great comfort that is taken by the acquirors who do the right thing and commit appropriate attention and resources to pre-acquisition diligence, post-acquisition diligence, compliance integration, training, everything that the Department wants to see, if at the end of that discussion, after that company has self-reported a problem that it finds, the outcome is, great, we won't prosecute you, as the acquiror, but that subsidiary, that division, that company that you've just acquired and is now part of your corporate family, we're going to prosecute it, and it, instead of saying Company X is Company X, Latin America, or whatever, the acquiror suffers the reputational harm, all of the costs, obviously, but in some ways those are less important, frankly, than the branding of being an FCPA violator, which is the way it gets reported in the press. And so if there is room for improvement in my view, it's around greater comfort to acquirors that there can be a declination at the end of the road if they've done all the right things rather than that reservation of rights to prosecute the target company. And I don't think this is a hypothetical situation because there are a number of cases, and, granted, some of them are SEC cases, not DOJ cases, but there are a number of cases that fit that fact pattern, and I think it makes it difficult to counsel clients to come in and self-report under those circumstances, which is I think what often they would like to do.

BREUER: Just for one moment, and then I know the Judge wants to say something. Just on that last point, I just want to go back to what Judge Mukasey said, by the very definition of what we do, we have to speak about ordinarily, and we cannot say absolutely, but, Mark, you know we are painfully aware and cognizant of that issue, so I understand that a responsible company acquiring another company, it still hurts it if we go after the company it acquired, I understand that, and that's why you see we don't do it, but we have to preserve the option that in certain circumstances we would. And I'm not speaking about the SEC, I'm not authorized to, but for the Department, we are very aware in balancing as we go forward whether or not even to prosecute the acquired company because of the collateral consequences, but we simply can't be in a place where that is taken off the table and we can't do it.

PRYOR: Judge Mukasey.

MUKASEY: Just two small points about the compliance defense. First, if one were established, it would not be unique to the FCPA. We have a compliance defense in civil rights cases, and those are fraught with all kinds of issues. If we can do it there, I think we can do it here. Nor do I think that it would have to be a one-size-fits-all solution. You can have a compliance defense that requires a program appropriate to the size and scope of the company involved. That would be a risky enterprise for a company, but at least it would have the possibility of establishing a defense.

And, finally, since there is nobody here to defend the SEC, I'm going to beat up on them a little bit.

[Laughter.]

And point to the Oracle settlement[7] in August of 2012 where Oracle settled what was admittedly just a books and records violation but with substantial penalties for a situation in which an Indian subsidiary did not audit third-party payments. There were no red flags, admittedly, requiring such an audit, and the payments were concealed from the parent corporation. Nonetheless, a books and records violation was extracted, and that presents I think in micro the dangers of the absence of defenses.

PRYOR: Okay. I think we're now at a point where we're ready for some questions and answers. We have a microphone in the center of the room, and so those who want to ask a question, please approach that. There have been some cell phones and other electronic devices that have been going off. If you have any of those that you haven't already turned off or muted, please do so.

Professor Baker?

PROFESSOR BAKER: Thank you, Judge. I know very little about the statute, so I'm very appreciative of the presentations made here. And it may reflect my lack of knowledge in this question, and please forgive me. But despite the fact that there may not be a practice of prosecuting either the acquiror or the acquired company, I'm wondering about the legal justification in terms of retroactivity and extra-territoriality. If you have a company in another country that is engaged in bribery within that country, and then it is acquired by an American company, where do we have jurisdiction over prior acts under a different sovereign? I just don't understand that.

I would also mention that Judge Pryor has just written a very interesting extraterritoriality decision.

BREUER: Well, may I?

PRYOR: Yes, go ahead.

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7. *See* Press Release, SEC Charges Oracle Corporation with FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012), *available at* http://www.sec.gov/litigation/litreleases/2012/lr22450.htm; *see also* Sec. & Exch. Comm'n v. Oracle Corp., CV-12-4310 CRB (N.D. Cal. Aug. 16, 2012).

BREUER: Professor, on your question, the reason you don't understand it is because, you're right, we can't do it, and we say that in the Guide.

PROF. BAKER: I haven't read the Guide.

BREUER: Okay, but your point is excellent, and that's a great example of when we take something head-on and we debunk a myth, which is if you're a foreign company, and we didn't have jurisdiction before, and your conduct was before we had jurisdiction, and now an American company or an entity with which we do have jurisdiction acquires you, we don't get jurisdiction retroactively, we don't seek it, we can't do it, and we don't, and we say that very clearly.

PROF. BAKER: Well, thank you, because in the discussion that was not at all addressed.

MUKASEY: Just with respect to jurisdiction, there are some fairly aggressive concepts of jurisdiction that are set out in the Guide, and they're not certainly unique to FCPA, but even if an e-mail passes through a server in the United States, we're not talking about retroactive, we're talking about current, if an e-mail passes through a server in the United States or somebody participates in a meeting in the United States from a foreign company with respect to a bribery that's going on overseas, as I understand it, the Department could, on its own view of jurisdiction, exercise jurisdiction in such a case.

PRYOR: Next question.

ATTENDEE: Sure. Following up on that question, could you talk for a minute about the problem that was alluded to earlier, which is the violation committed by the subsidiary while it is a subsidiary of the American company and how that's going to be addressed under the Guide, which I have not read yet either?

BREUER: Well, I don't know about the Guide, but I guess what I would say is we would have to look at the conduct and the facts. If it's an American subsidiary and it has a nexus to the United States, it's engaged in violating the FCPA, we think it's a case of significant import, then we may prosecute the subsidiary, or we may prosecute the executives of the subsidiary, we may and probably would leave the parent alone. If you look at our FCPA resolutions, all of which are public and on our website, you'll see all of those kinds of iterations where we might just go, we may take a plea from a subsidiary, we may do nothing with the parent at all, we may do nothing with the subsidiary given a deferred prosecution agreement or non-prosecution agreement and go after the executives. So we try to be as discerning as we can.

MENDELSOHN: Just to supplement that, the Department's position since time immemorial has been that a parent company can be liable for the acts of its subsidiary—this is a U.S. parent company—where somebody at the parent company authorized, directed, or was aware of the conduct at the subsidiary, that's been the test. The Resource Guide does have a helpful discussion on this topic. It does raise some interesting questions about where a parent company controls a subsidiary but does not necessarily have knowledge or certainly didn't authorize any improper payment, and that I think is sort of an interesting area for discussion

because traditionally the Department has not prosecuted parent companies on a strict respondeat superior theory of liability, but there is at least now an intimation that maybe that's on the table. I'm not sure if they meant to go quite that far, but it's one way to read the Guide.

Breuer: I don't think we meant to do that.

[Laughter.]

Mendelsohn: And I'm going to write that down and hopefully repeat that back to you at some point.

[Laughter.]

Pryor: Judge Mukasey?

Mukasey: Yeah, Lanny's mention of deferred prosecution agreements and non-prosecution agreements raises another issue that's been much bruited about, about under the statute, and that is that a lot of the law, l-a-w, in this area arises from lore, l-o-r-e, of negotiations in prosecutors' offices because a lot of these cases do not get brought largely because corporations can't risk even the possibility of indictment, let alone conviction, and so settlements are negotiated, I'm not saying they're all unreasonable or even most of them are unreasonable, but the fact is that there is a whole body of law being developed in negotiations between the government and private companies that is taking place in prosecutors' offices. I think a lot of this may very well be remedied if the disclosure of declinations or of the circumstances in which deferred prosecutions are negotiated are disclosed on an anonymized basis. I think that will kind of lift the lid off that and perhaps demystify it to a certain extent, but it has been a somewhat remarked on difficulty with the statute.

Mendelsohn: I was just going to add to that, on the other hand, I think it is to the Department's great credit that they have been more aggressively prosecuting individuals, not just companies, and the consequence of that, of course, is that there is a growing body of judicial decisions both at the district court and we're beginning to see it at the appellate court level as well, and ultimately I think that's for the benefit of everyone, that we have some judicial input and review of some of these issues, and companies benefit from that. We're not perhaps where we would like to be, there are many issues that have not yet been addressed by the courts, but increasingly, for example, this issue of, who is a foreign official? There are now at least four district courts within the past eighteen months or two years that have addressed that issue, it's on appeal in the Eleventh Circuit now, that issue, and so there is a growing body of law.

Mukasey: Yeah, but let me suggest to you that when you tell somebody going to trial for a felony that, "Who is a foreign official?" is a jury question, I think that's very cold comfort.

[Laughter.]

Breuer: Yeah, again, though, I hear that, but in the reality—and, look, these are very important issues, but, first, Mark is right, which is I said back four years ago, as early as in my confirmation hearings, and this was an issue that was very

important to all of the Senators, Republicans and Democrats alike, that we would hold individuals accountable for these acts and not simply have some anonymous company seek some sort of a resolution, and we've done that. So in the last four years, approximately forty individuals have been prosecuted on the FCPA, which is a huge number, and, of course, we are going to go to court more and more.

Yes, we do debate issues like, "Who's a foreign official?" but at the end of the day we still have to prove in all of these cases that you had corrupt intent, and, you know, when you bribe someone, even a private citizen, I know you have to make a determination whether you should bribe a private citizen, you also have to make a determination whether you're breaking a law, and you may be breaking another American law through the Travel Act,[8] and you certainly may be breaking a local law as well. So I do recognize that a number of our cases get resolved through negotiation, but you can only have two sides negotiate, and that's not different than in the vast majority of white collar cases with corporate entities. There is nothing unique about the FCPA.

TERWILLIGER: Judge, if I may.

PRYOR: Yeah.

TERWILLIGER: Just to bring this down to a very practical level, one of the difficulties companies have when dealing with a statute like this is normalizing their compliance procedures and their policies to the norms of cultures in places where they're doing business, and by raising this and by what I'm about to say, I'm not saying that there should be a cultural exception to corruption, but if you're measuring what is corrupt intent, particularly on the part of individuals perhaps, looking at it in the context of what is expected and is the norm in a given culture can be different from one place to another, and I'm not talking about gifts of great value or large sums of money, but I am talking about cultural practices in different parts of the world where there is a level of expectation that the business relationship is going to carry some gestures which include things of value.

Now, having said that, I will say that again in my experience in dealing with the Department in the context of these cases, there has been what I would consider a very reasonable approach, at least in the matters that I've been involved in. But I think we do have to consider Judge Mukasey's wise admonition that relying on the good faith of the prosecutors is a slippery slope in terms of the administration of the law and is a factor that tends to produce less certainty rather than more where more is needed.

BREUER: Well, just on George's point until somebody else gets up to ask a question, I think we're trying to do exactly that. If you want to be practical, I don't know how much more practical we can be. In the Guide, we say you give a wedding gift to a government official, you are not violating the FCPA, assuming it's not an absurd gift; if you take a series of people out for drinks or a reasonable

8. Travel Act, 18 U.S.C. § 1952 (2012).

meal, you are not violating the FCPA; if you bring the people, these government officials, to the United States to see your plant and you let them come in business class and you take them to a ballpark and you have a reasonable trip based on seeing the plant, you're not violating the FCPA. I don't think you could find another area where we're as practical and we give such realistic real advice as to what we want. But culture aside, if you're going to give a $50,000 gift to a government official, I don't know the culture, we may and we have to preserve the right to prosecute you, and you can look high and low, you're just not going to see the Department prosecuting the former; you are going to see the government prosecuting the latter.

Pryor: Well, as a state attorney general, I can tell you there are some politicians in our country that would like a culture of corruption exception.

[Laughter and applause.]

Attendee: In my state, we call that the New Jersey defense.

Pryor: Pardon me?

Attendee: We call that the New Jersey defense.

Pryor: Yeah. Well, I've lived in Alabama and Louisiana, so I don't know if it's unique to any particular place.

Attendee: I want to ask a brief follow-up. Could you talk for a minute about whether you think the Department's approach towards the Act in terms of things like jurisdiction and subsidiaries is consistent with or not consistent with the Department's approach to other federal statutes?

Breuer: Well, there are many in this room probably who are smarter than me about a lot of statutes, there are a lot of statutes out there, so I am not comfortable talking about how we look at everything. What I would say is our approach to the FCPA is very consistent with the way we pursue and prosecute criminal laws. I mean, our criminal division has been extremely active over the last four years in a whole array of areas. Last Friday, I announced in Houston, Texas, the takedown of the Aryan Brotherhood. We prosecuted and indicted the entire leadership of the Aryan Brotherhood in a massive racketeering enterprise, and we had arrests throughout Texas and Oklahoma. That's an expansive use of a statute. I think that's an important use of a statute, and we did it. After the Consulate murders two years ago, I said we were going to go after the thugs who killed our Consulate officials in Juarez, did the exact same thing with the Barrio Azteca thugs, the gang who works with the Sinaloa Cartel. Once again, a massive case by any measure, an expansive use of a statute, and we took down, I think, a group.

So I think we have to have the ability to go after crimes. We have a huge Libor investigation going on right now. So it's very hard for me to say. All I can tell you is we have these statutes that Congress gives us, there are a lot of statutes out there, as Judge Mukasey knows, and what we're doing in this case I don't think with the FCPA, candidly, is any different from what we're doing in others. In fact, what we have tried to do is try to hold individuals accountable to an unprecedented level, and I think that that's good criminal justice policy.

PRYOR: Mark?

MENDELSOHN: Yeah. One way in which FCPA enforcement is different than almost every other federal criminal statute—and different for the better frankly—is that the Department's Criminal Division has exclusive jurisdiction, if you will, over this enforcement area as opposed to the ninety-four U.S. Attorneys' Offices around the country who can all prosecute wire fraud, mail fraud, and a variety of other statutes.

BREUER: I want all our U.S. Attorneys to know that was Mark who said it.

[Laughter.]

MENDELSOHN: And let me explain why I say that, though, because it's important. It's important because it means that the Department can issue the kind of guidance that it just issued—

MUKASEY: And it means something.

MENDELSOHN: —and you know that it means something. There is a much higher degree of predictability in dealing with the fraud section, and you can take comfort that you're dealing with experienced prosecutors who know the field, who know the subject matter, and if one case was handled one way, you can reliably point to that case and say, "I ought to be treated the same way," and what you won't hear is, "Well, that's fine. That's a different U.S. Attorney's Office. The way we approach things is this way." So that is one important difference.

PRYOR: Another question?

ATTENDEE: Yeah. I'm one of those in-house attorneys that tries to keep our international businesspeople up to speed on what the FCPA requires, so I very much appreciate the guidance and I greatly look forward to reading it and trying to understand it. My question is, at least there was good discussion as to whether there should be a compliance defense, and what I hear Mr. Breuer saying is that at least as long as there is a pharaoh that does know Joseph, that that will be an important factor if there is a violation and looking at what the response of the Department of Justice will be. Are there any particular factors in the compliance program for an international company that would differ from sort of the general compliance programs that U.S., you know, solely U.S., companies would have?

BREUER: I guess I wouldn't say different, I guess I would say—and there are people who are far more expert than I am actually conceiving of the programs—is I think what we want you to do is I think we want you and your business, you know your business far better than we, at the Department, could ever know. You know, I think, where your risks are. Where are your most high-impact risks, both geographically and within your different sales units? And we want a compliance program that you think addresses that. And if you come in and say, "Something went awry, but it went in this de minimis small area that's really not central to our business," we don't want you going broke by having a ridiculous compliance program that covers every conceivable thing under the sun because we know that's impossible, but we are going to look to see, what's your business? What are your business lines? And was your compliance program in a real sense directed at that?

And if it was, I think you will find that you will get a very hospitable reaction from our prosecutors. If, on the other hand, we think it's a cookie-cutter compliance program that really wasn't meant to address the central issues of your business, then I think you would probably get a different reaction.

PRYOR: George Terwilliger first.

TERWILLIGER: Yeah, if I could just add to that. I do think this is one area where the government's view of things and what's good for business and, indeed, what are best business practices are aligned. Compliance for compliance sake is a waste of money; compliance to manage risk has a lot of value. And I actually remember very well when Mark was relatively new to his position at the Justice Department sitting down when we were about to begin a global compliance review for a company that had had some problems and explaining that we're going to identify through a methodology where the risks are the greatest and go there because in spending compliance resources, we're going to get the most bang for the buck by doing that, and at the same time be in a position to assure the government that we are looking at indeed where the problems are the greatest. I think that makes good sense from an enforcement perspective; it also makes good business sense.

PRYOR: Follow up?

ATTENDEE: No, I just want to say thank you and I hope we never have one of those conversations.

[Laughter.]

PRYOR: Yeah, I was wondering earlier when Mark was talking about it, oh, it's so good that we get all this case law. Of course, we only get it if there are prosecutions, and we're only getting prosecutions if people think that the law is being violated, and so it's not always a great thing.

But, yes, a question.

ATTENDEE: It's piggybacking on something, an issue, that Judge Mukasey raised. I would like to hear the panel's response to the suggestion that there is this prosecutorial common law that's been developing because of the absence of judicial review. And isn't the fact that the Department of Justice had to produce this guidance book kind of prove [sic] the fact that there's a problem here with the absence of judicial review?

MUKASEY: In fairness, I mean, I was pointing to a problem, but this is a response, and the fact that they are going to be generating information on an ongoing basis about declinations, about non-prosecution agreements, and so forth, I think will help improve the situation. Of course, as I said before, I think a compliance defense would do more, but I don't want to refight that battle a fifth time up here.

BREUER: Yeah, I mean, it would be heartbreaking for me if the conclusion people drew after a year's effort is that our guidance proves the problem. I think our guidance proves that we are receptive and that we heard the business community and other communities and decided to be as transparent as we could. I think that's a good thing. I don't think that suggests an underlying problem at all.

PRYOR: Any other questions? Yes.

ATTENDEE: I wonder if you could address the situation where small or medium-sized businesses, address it from an enforcement policy perspective, small, medium-sized businesses venturing out for the first time in the international marketplace, maybe even are solicited by foreign government entities to get into bidding situations and run afoul of the law. How, if at all, does your enforcement policy differ?

BREUER: So the Guide actually addresses that, and we do. We obviously expect less from small and medium-sized businesses than we do from large multinational. We completely understand what's going on, and we don't expect the same level of sophistication. We still don't think you should be giving big bribes or bribing government officials, but we would expect less from your compliance program, obviously, we would probably expect you to be less sophisticated in it, but we would still hope and expect that if you ran afoul and you found that one of your people was bribing someone, that you would, you would stop it, you would fire the person. We would want you, if possible, you have to make your determination whether you're going to come in or not. So there are no bright lines but clearly there is a different level of expectation, and we say as much.

ATTENDEE: I've got a couple of questions. One of them is with respect to this compliance defense. Nobody has ever suggested taking individual prosecutions off the table. Why the Department wouldn't somehow be satisfied with holding out the potential for civil liability if the company disclosed but taking off the table criminal prosecution in order to encourage disclosure?

And my second, unrelated, question is there was a reference to deferred prosecution agreements, and there have been a number of reports about Fortune 50 or Fortune 100 companies entering into these agreements and that they could be quite intrusive in terms of departmental oversight of business decisions, and I'm curious to get, Lanny, your reaction, and also everybody else's, now that they're on the other side, in dealing with the corporate executives who are subject to those agreements.

BREUER: So John asking me questions terrifies me because he was my fraternity brother, so if he doesn't like my answer, he can blackmail me.

[Laughter.]

With respect to the first, I just think with the compliance defense, I sort of addressed why I and the Judge don't agree and why I don't think it's adequate, and frankly I just don't think that civil alternatives are always satisfactory, and we just need the option and we need the alternative for criminal cases in all kinds of contexts outside of the FCPA. Yesterday I resolved the largest criminal case in history, and just different cases require different responses, and there is a course of conduct where you must hold companies criminally liable, and I just think it would be bad policy to take that off the table.

With respect to deferred prosecution agreements more generally, I think they're good. I think they give the government far more discretion and I think they allow us in a much more nuanced way to address conduct that before deferred prosecu-

tion agreements we had a binary choice of indicting or walking away, and I think that did not give the government adequate discretion. Within the intrusiveness, I think we have to, it's on us, to make our deferred prosecution agreements with the companies, meet the circumstances in a situation, and, John, I think we're doing that. If you look now at deferred prosecution agreements, for instance, you will see that we use monitors far less than four or five years ago when it was routine. It's not routine. Why? Because we try to address it.

So there are some who think deferred prosecution agreements are giving companies a pass, and there are others who say, well, maybe they're too intrusive, and I think they're just another tool, and just like the FCPA and everything else we're talking about, we just have to use them appropriately.

Mukasey: Just to underscore the dangers of monitorship, I mean, those things can go on—I mean, I am to a certain extent talking against my own interests here, but to the great enrichment of lawyers and law firms who get monitorships and make a great deal on them. But there is the story about the monitor who thought it was his function to invite the United States Attorney to attend board meetings, and did. I think the last politician to run on a platform advocating that kind of thing was Benito Mussolini. So that's the sort of thing you really want to avoid.

Terwilliger: Judge, if I could just—

Pryor: Yeah.

Terwilliger: Sorry, Mike. Did I interrupt?

Mukasey: No, I'm done.

Terwilliger: Just a word on monitors. I really want to heartily endorse the trend that Lanny alluded to and which is evident of moving away from the use of that tool. I would be the first to admit there may yet be cases where it is appropriate, but there is another reason for that apart from the expense and the intrusiveness and so forth. I think experience is demonstrating that the compliance programs that work best are those where the compliance function is firmly woven into the management operations of a company and is not viewed within the company as something on what you might call the Inspector General matter where the internal cop is kind of imposed over the structure of the company. And monitors tend to be exactly that, the outsiders who are watching what's going on and probing and testing and that sort of thing. Holding a company, say, through the terms of a deferred prosecution agreement to certain standards and perhaps certain disclosures by its compliance operation and perhaps its audit committee I think can accomplish much the same thing and have the desired effect of bringing that compliance more into the mainstream of corporate management.

Pryor: Isn't there something to the response that Lanny had earlier that we don't have compliance defenses under other federal statutes?

Mukasey: We do under the Civil Rights statute,[9] and again I think it's important

9. Civil Rights Act of 1964, Pub. L. No. 88-352, 8 Stat. 241 (codified in scattered sections of 42 U.S.C.).

to take a look at what the underlying conduct is that's being regulated. We're not talking about regulating bribery. Everybody agrees that's unlawful. We're talking about regulating really the doing of business, and there is a balance here to be struck, and I don't think conceptually that a compliance defense is out of line. I mean, I understand why you don't have a compliance defense in narcotics cases—

PRYOR: Right.

MUKASEY: —but I just don't think this is the same.

BREUER: But we also don't have a compliance defense when a company bribes the Mayor of New York or the Mayor of Birmingham. We don't have a compliance defense, we prosecute, and I just don't think we can do it differently domestically or internationally.

PRYOR: Question.

ATTENDEE: This is a somewhat frivolous question, so maybe deduct it from the CLE time—

[Laughter.]

—but I was just wondering, as Judge Mukasey alluded to, this a very lucrative area, companies are very scared, they're willing to open their pocketbooks, they fly lawyers all over the world, it's very business class, so what is the lifestyle like of an FCPA defense lawyer? And would you call this practice area fun?

PRYOR: That is a frivolous question.

[Laughter.]

MUKASEY: He's now speaking to what he hopes will be his future.

[Laughter.]

BREUER: Do you want an answer? I'll give you a real answer. So obviously I've been in this for four years, and I'm going to give you two serious answers. Serious answer number one, that I've said, is I think companies sometimes should, with their lawyers, seriously consider coming to the Department early on. You know, if you look at who's the head of my Fraud Section, he was a friend and contemporary of mine who was in the private sector like I was, he was at a major firm in New York for twenty years, and so I think you'll find if you come in and say, "We've identified the problem, we want to figure out a way to address it, that we're not going to say you have to go to every continent around the world." So we're going to be reasonable. So answer one, think about coming to us.

Answer two is I think there is something to what you say because I always joke that if I string the letters F-C-P-A together in anything, it gets covered, whereas, if I talk about a whole host of other issues that the Criminal Division is involved in, such as taking down organized crime or gangs or the like, the press and others are far less interested, and I think in part it's because of companies, but I also think in part it's because law firms have found it to be, for many, a niche area, and so I don't know about the lifestyle so much, but I do think that that's one of the reasons why there is "a" reason, not "the" reason, a reason why there is such intense interest.

MENDELSOHN: I don't particularly recommend the lifestyle. It's a lot of logging a lot of miles on a lot of planes to a lot of places that you might not otherwise choose to vacation in.

[Laughter.]

TERWILLIGER: Talking to hostile people.

MENDELSOHN: Exactly, who really are more interested in talking to you about local practices than understanding why this piece of U.S. legislation applies to them in some remote corner of the world.

But in all seriousness, and as far as the practice goes, since I'm still relatively new to it, I must say I find it in many ways incredibly satisfying because a large part of what you spend your time doing is counseling clients and helping them work their way through, if they have an issue, what can be very difficult, sometimes intractable, issues and find creative solutions; or if you're counseling on the compliance and prevention side, helping them avoid being on the wrong side of one of these issues, and it's an area where I think real subject matter expertise can add value, and to Lanny's point, help you avoid the situation where your client is spending unnecessary money conducting unnecessary work, and, instead, help them focus on what the real issues are. So.

PRYOR: Are there any other comments? No more questions?

Please join me in giving a warm round of applause to our panelists.

[Applause.]