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"American Imperialism":
A Practitioner's Experience with Extraterritorial Enforcement of the FCPA

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Brittany D. Parling

INTRODUCTION

The Foreign Corrupt Practices Act (FCPA), which makes unlawful the bribery of foreign government officials for the purpose of obtaining or retaining business, became law in 1977.¹ But it took almost thirty years for the regulatory agencies charged with enforcing the statute—the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)—to enforce its restrictions against a non-US company. In 2006, a Norwegian company, Statoil ASA, agreed to pay $21 million in combined DOJ and SEC fines and penalties to settle an FCPA enforcement action based upon alleged improper payments made to secure a contract in Iran.² In the six years since that first enforcement action against Statoil, there has been a dramatic increase in the number of FCPA enforcement actions against other foreign companies. These enforcement actions have resulted in multimillion-dollar settlements between US regulatory agencies and a number of large foreign companies, including Siemens AG (Germany),³ BAE Systems plc (United Kingdom),⁴

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⁴ See DOJ, Press Release, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar 1, 2010), online at http://www.justice.gov/opa/pr/2010/March/
Does enforcing the FCPA against foreign companies unfairly impose a US value system on the rest of the world? How does this type of “extraterritorial” FCPA enforcement affect the way the rest of the world views the United States? And how does that affect the way companies do business in the United States? In this Article, we evaluate the recent trend in FCPA enforcement against foreign companies. In particular, we explore the development and legitimacy of what could be labeled “American imperialism” in the FCPA context. Part I sets forth the statutory basis for holding foreign companies liable under the FCPA. Part II evaluates the recent trend in FCPA enforcement against foreign companies by discussing a few notable examples, including Statoil, Siemens, BAE Systems, and Daimler. Part III focuses on the legitimacy and practical implications of imposing US anticorruption laws on non-US companies. This Part also proposes some adjustments to how these matters are handled that respect the concerns of foreign companies, governments, and citizens. Finally, Part IV provides a brief conclusion.

I. BACKGROUND: THE STATUTORY BASIS FOR ENFORCING THE FCPA AGAINST FOREIGN COMPANIES

Under the plain language of the FCPA, certain foreign companies may be subject to the statute’s requirements. This Part provides a brief background of the FCPA’s substantive provisions and discusses the statutory basis for enforcing those provisions against foreign companies.

The FCPA consists of two provisions: the antibribery provision and the accounting provision. In general, the antibribery provision prohibits any person or entity subject to the FCPA from offering or paying anything of value to any foreign official, foreign political party, or candidate for foreign political office for the purpose of obtaining, retaining, or directing business to any person. The accounting provision requires entities to maintain

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6 For the antibribery provision, see 15 USC § 78dd-1. For the accounting provision, see 15 USC § 78m.

7 15 USC § 78dd-1–3.
accurate books and records\(^8\) and to create a system of internal controls to ensure that transactions are properly authorized.\(^9\)

A foreign company can be subject to both the antibribery provision and the accounting provision. Both provisions apply to an “issuer,” that is, any entity that has a class of securities registered under Section 12 or that is required to file reports under Section 15(D) of the Securities Exchange Act of 1934.\(^{10}\) Foreign companies that meet either of these requirements are “issuers” within the meaning of the FCPA. Although the accounting provision applies to all issuers, the antibribery provision includes an additional jurisdictional hurdle: to be found liable under the antibribery provision, an issuer must also “make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance” of the offer or payment.\(^{11}\)

Yet in other respects, the antibribery provision is potentially broader in scope than the accounting provision. For example, the antibribery provision applies to any person or entity that engages in an act within the territorial US in furtherance of a prohibited payment, regardless of whether that person or entity qualifies as an issuer.\(^{12}\) This type of “territorial jurisdiction” may be invoked, for example, when a person or entity uses an instrumentality of interstate commerce (such as a wire transfer of funds through a bank located in the US) to facilitate a prohibited payment.\(^{13}\) Moreover, in addition to the person or entity itself, the antibribery provision applies to “any officer, director, employee, or agent” of any person or entity “or any stockholder thereof acting on behalf of” any person or entity.\(^{14}\) These provisions expand the ability of US regulators to enforce the FCPA’s antibribery provision against foreign companies and their agents.

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\(^{8}\) 15 USC § 78m(b)(2)(A).
\(^{9}\) 15 USC § 78m(b)(2)(B).
\(^{10}\) 15 USC § 78dd-1; 15 USC § 78m(b)(2). For Section 12 of the Securities Exchange Act of 1934, see 15 USC § 781. For Section 15(D), see 15 USC § 780(d).
\(^{11}\) 15 USC § 78dd-1.
\(^{12}\) 15 USC § 78dd-3. The antibribery provisions also apply to “domestic concerns,” which includes US citizens and resident aliens as well as entities organized under US law or having their principal place of business in the US. 15 USC § 78dd-2. This category includes “any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern.” Id.
\(^{13}\) 15 USC § 78dd-3.
\(^{14}\) 15 USC § 78dd-1; 15 USC § 78dd-3.
II. THE RECENT TREND OF FCPA ENFORCEMENT ACTIONS AGAINST FOREIGN COMPANIES

In recent years, both the DOJ and SEC have used the broad language of the FCPA to enforce the antibribery and accounting provisions against foreign companies. Since 2006, US regulators have brought enforcement actions against numerous foreign companies, including Siemens AG (Germany),\textsuperscript{15} BAE Systems plc (United Kingdom),\textsuperscript{16} Daimler AG (Germany),\textsuperscript{17} Technip SA (France),\textsuperscript{18} Snamprogetti Netherlands BV/ENI (Holland/Italy),\textsuperscript{19} ABB Ltd (Switzerland),\textsuperscript{20} Panalpina World Transport (Holding) Ltd (Switzerland),\textsuperscript{21} Alcatel-Lucent SA (France),\textsuperscript{22} JGC Corpora-


\textsuperscript{16} See DOJ, Press Release, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (cited in note 4).

\textsuperscript{17} See DOJ, Press Release, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (cited in note 5); SEC, Press Release, SEC Charges Daimler AG With Global Bribery (cited in note 5).


\textsuperscript{22} See DOJ, Press Release, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec 27, 2010), online
tion (Japan),\textsuperscript{23} Deutsche Telekom AG (Germany),\textsuperscript{24} and Magyar Telekom PLC (Hungary).\textsuperscript{25} Indeed, according to one source, "eleven of the twenty corporate matters brought in 2010 involved non-U.S. companies."\textsuperscript{26} These companies "were responsible for 94 percent of the penalties imposed on corporations in 2010."\textsuperscript{27} And of the ten highest FCPA penalties recovered against corporate defendants to date, nine were paid by foreign companies.\textsuperscript{28}

This Part briefly discusses a few notable examples of FCPA enforcement actions against foreign companies. We begin with the first FCPA enforcement action against a foreign company, Statoil. We then discuss the subsequent multimillion dollar enforcement actions against Siemens, BAE Systems, and Daimler, all of which involved some of the highest FCPA penalties recovered against corporate defendants to date.

A. Statoil ASA

The first foreign company to face an FCPA enforcement action was Statoil ASA, an international oil company headquartered in Norway.\textsuperscript{29} Because Statoil's shares were listed on the New York Stock Exchange and registered under Section 12(b) of
the Exchange Act, the company qualified as an “issuer” within the meaning of the FCPA.\(^3\)

In October 2006, the DOJ and SEC charged Statoil with violations of both the antibribery and accounting provisions of the FCPA.\(^3\) The agencies alleged that Statoil made payments by way of a US bank in New York to an Iranian official to assist Statoil in obtaining a contract to develop portions of the South Pars oil field in Iran and “to open doors to additional projects in the Iranian oil and gas exploration industry.”\(^3\)

As part of a deferred prosecution agreement with the DOJ, Statoil acknowledged responsibility for the bribe payments and agreed to pay $10.5 million in penalties.\(^3\) The company also agreed to the appointment of an independent compliance consultant, who would review and periodically report on the company’s FCPA compliance during the three-year term of the agreement.\(^3\) In the related SEC proceeding, Statoil consented to entry of an administrative order requiring the company to pay disgorgement of $10.5 million.\(^3\) The order also required Statoil to cease and desist from committing violations of the antibribery and accounting provisions of the FCPA and to retain an independent compliance consultant.\(^3\)

Important, the US was not the only country to prosecute Statoil for violation of its antibribery laws. The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (“\(\text{\O}kokrim\)”) also investigated Statoil for its conduct in Iran.\(^3\) In June 2004, \(\text{\O}kokrim\) charged Statoil with violating Norway’s trading-in-influence statute and

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\(^{31}\) See Statoil Information at *4–6, 9–10 (cited in note 30); Statoil Cease-and-Desist Order at *2 (cited in note 30).

\(^{32}\) Statoil Information at *4–9 (cited in note 30). See also Statoil Cease-and-Desist Order at *4–5 (cited in note 30).

\(^{33}\) See Deferred Prosecution Agreement, \textit{United States of America v Statoil ASA}, No 06 Crim 960, *14 (SDNY filed Oct 13, 2006). Statoil was not required to pay $3 million of the $10.5 million penalty in consideration of the penalty the company already paid to Norwegian authorities for the same conduct. See id at *14–15.

\(^{34}\) See id at *7–14.

\(^{35}\) See Statoil Cease-and-Desist Order at *12 (cited in note 30).

\(^{36}\) See id at *8–12.

\(^{37}\) See id at *7.
issued penalty notices requiring Statoil to pay approximately $3 million.\(^{38}\)

Although Statoil’s settlements with the DOJ and SEC involved relatively small penalties—especially compared to more recent FCPA enforcement actions—the Statoil case is noteworthy because it was the first time the DOJ and SEC brought FCPA enforcement actions against a non-US company. As such, the case signaled the beginning of a more aggressive enforcement stance on the part of both agencies. The DOJ made that point unmistakably clear. For example, Assistant Attorney General Alice S. Fisher stated that,

> Although Statoil is a foreign issuer, the Foreign Corrupt Practices Act applies to foreign and domestic public companies alike, where the company’s stock trades on American exchanges. . . . This prosecution demonstrates the Justice Department’s commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope.

In a speech to the American Bar Association National Institute on the Foreign Corrupt Practices Act, Assistant Attorney General Fisher again emphasized this point, stating that, “I want to send a clear message today that if a foreign company trades on U.S. exchanges and benefits from U.S. capital markets, it is subject to our laws. The Department will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies.”\(^{40}\)

B. Siemens AG

In December 2008, the DOJ filed a criminal information against Siemens AG, a German manufacturer of industrial and consumer equipment, and three of its subsidiaries for violation of the FCPA’s accounting provision.\(^{41}\) The SEC also filed a civil complaint against Siemens for violation of the antibribery and

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\(^{38}\) See id.


accounting provisions. These enforcement actions resulted from the company's disclosure of FCPA violations to US authorities after cooperating with DOJ and SEC investigations and conducting its own internal investigation. Both the DOJ and SEC alleged that Siemens was an "issuer" within the meaning of the FCPA because its shares were listed on the New York Stock Exchange and registered pursuant to Section 12(b) of the Exchange Act.

The court documents filed by the DOJ and SEC alleged that Siemens engaged in systematic efforts to pay bribes to foreign government officials to obtain business, falsified its corporate books and records, and failed to maintain sufficient internal anticorruption controls. According to the SEC's civil complaint, Siemens paid $1.4 billion in bribes to obtain business in countries such as Venezuela, Israel, Mexico, Bangladesh, Argentina, Vietnam, China, and Russia.

Siemens pleaded guilty to both counts of the criminal information and agreed to a civil settlement with the SEC. Under the terms of the criminal plea agreement, Siemens agreed to pay a combined total fine of $450 million and to retain an independent compliance monitor for a four-year period. To settle the SEC's civil enforcement action, Siemens agreed to pay $350 million in disgorgement and to retain an independent compliance monitor. The combined $800 million in US penalties was the

44 See Siemens Information at *3 (cited in note 41); Siemens Complaint at *4 (cited in note 42).
45 See Siemens Complaint at *1–2 (cited in note 41); Siemens Complaint at *1–3 (cited in note 42).
46 See Siemens Complaint at *2 (cited in note 42).
largest monetary sanction ever imposed in an FCPA case against either a US or a foreign company.\(^\text{50}\)

As in the Statoil case, the US was not the only country to enforce its antibribery laws against Siemens. On the same day it settled with the DOJ and SEC, Siemens agreed to pay €395 million, or approximately $569 million, to settle an investigation by the Munich Public Prosecutor’s Office based on the company’s failure to supervise its officers and employees.\(^\text{51}\) A year before, in October 2007, Siemens had entered into a €201 million (approximately $287 million) settlement with the Munich Public Prosecutor’s Office in connection with charges of bribery by the company’s Telecommunications operating group.\(^\text{52}\) Like Norway in the Statoil case, then, Germany willingly enforced its own antibribery laws against a company headquartered in its own country.

C. BAE Systems plc

In March 2010, BAE Systems plc, a defense contractor with its headquarters in the United Kingdom, pleaded guilty to conspiring to defraud the US by making false statements about its FCPA compliance program.\(^\text{53}\) According to the criminal information, BAE falsely stated to the US Department of Defense and US Department of State that it would create and implement policies and procedures to ensure compliance with the FCPA.\(^\text{54}\) Instead of ensuring compliance with the FCPA, however, the information alleged that BAE made payments of over £135 million and $14 million to “marketing advisors” through offshore shell companies, even though there was a high probability that part of the payments would be used to ensure that BAE was favored in


\(^{51}\) See DOJ, Press Release, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (cited in note 3).

\(^{52}\) See id.

\(^{53}\) See DOJ, Press Release, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (cited in note 4).

foreign government decisions regarding the purchase of defense articles. According to the information, these payments were not subjected to the kind of internal scrutiny that BAE represented they would be. BAE also allegedly concealed its relationships with certain "marketing advisors" and the existence of these payments.

BAE pleaded guilty and was sentenced to pay a $400 million criminal fine—one of the largest in FCPA history. BAE also agreed to maintain a compliance program to detect and deter violations of the FCPA and other anticorruption laws and to retain an independent compliance consultant for three years to assess the program and report to the DOJ.

Notably, the DOJ did not charge BAE with a violation of the FCPA's antibribery or accounting provisions. By charging BAE with knowingly making false statements to the US government, it was not necessary to allege that BAE was an "issuer" or subject to territorial jurisdiction under the FCPA. Indeed, it appeared that the jurisdictional nexus to allege a violation of the antibribery provisions may have been quite weak, as most of the questionable payments were made outside of the US. The DOJ's continued prosecution of BAE in the face of potential jurisdictional hurdles only serves to highlight the agency's aggressive enforcement of the FCPA against foreign companies.

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55 See id at *7-9. See also DOJ, Press Release, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (cited in note 4).
56 See BAE Information at *8 (cited in note 54).
57 See id at *8-9.
59 See DOJ, Press Release, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (cited in note 4).
60 See BAE Information at *2 (cited in note 54).
62 Another recent FCPA enforcement action illustrates the DOJ's aggressive enforcement stance in the face of jurisdictional issues. On December 29, 2011, Magyar Tele-
D. Daimler AG

In April 2010, Germany-based automobile manufacturer Daimler AG resolved charges relating to FCPA investigations conducted by the DOJ and SEC. Both the DOJ and SEC maintained that Daimler was subject to the FCPA by way of its status as an “issuer” of stock listed on the New York Stock Exchange and other US exchanges. The DOJ also alleged that Daimler was subject to territorial jurisdiction under the FCPA as a result of its “use of U.S. bank accounts and U.S. companies in transacting business with foreign governments and officials.”

As part of the resolution of the DOJ’s criminal investigation, Daimler entered into a deferred prosecution agreement and agreed to the entry of a criminal information charging the company with violating the FCPA’s accounting provision. The criminal information charged that Daimler engaged in a longstanding practice of paying bribes to foreign officials through a variety of mechanisms, including corporate ledger accounts known as “third party accounts,” corporate “cash desks,” offshore bank accounts, deceptive pricing arrangements, and third-party inter-

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65 Daimler Information at *3 (cited in note 64).

mediaries. The information also alleged that, between 1998 and January 2008,

Daimler made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least twenty-two countries—including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam, and others—to assist in securing contracts with government customers for the purchase of Daimler vehicles.

According to the information, “Daimler improperly recorded these payments in its corporate books and records.” Similarly, the SEC complaint alleged that Daimler violated the antibribery and accounting provisions of the FCPA by paying at least $56 million in bribes to government officials to further government sales in at least twenty-two countries around the world over a period of more than ten years.

As part of the deferred prosecution agreement, Daimler agreed to pay a monetary penalty of $93.6 million and retain a corporate compliance monitor. Daimler also agreed to pay $91.4 million in disgorgement and retain an independent compliance consultant to settle the SEC’s charges. On May 14, 2010—just over a month after Daimler resolved its cases with the DOJ and SEC—Daimler announced that it was delisting its shares from the New York Stock Exchange.

III. A PRACTITIONER’S PERSPECTIVE: THE LEGITIMACY OF EXTRATERRITORIAL FCPA ENFORCEMENT AND PROPOSED SOLUTIONS

This Part provides a practitioner’s perspective on enforcement of the FCPA against foreign companies. Part IIIA provides
some examples, both from the press and our own experience, of how the rest of the world views FCPA enforcement against foreign companies. Part IIIB discusses some of the unintended consequences of such an aggressive enforcement stance by the US government. Finally, Part IIIC proposes some adjustments to how these matters are handled that respect the concerns of foreign companies, governments, and citizens.

A. How the World Views Us

Lawyers who practice antibribery law internationally are often asked the same questions: Why does the US believe that it has the right to regulate the moral or business conduct of non-US companies operating in some of the most corrupt countries in the world? Is this in fact “American imperialism” run amok? Is it an effort to impose peculiarly American standards of ethical conduct on areas of the world that do not accept or operate by those standards? Or, in a more sinister vein, is it an effort to tilt the playing field in highly competitive industries by taking enforcement action against international companies that would never be taken against their US competitors?

The last of these questions is the one we hear most often when the US government is considering an enforcement action against a foreign company. The Daimler investigation is an obvious example. Daimler’s major US competitors, General Motors and Ford, have never been the subject of an FCPA enforcement action, notwithstanding the fact that they largely sell the same kinds of vehicles through the same kinds of distribution networks in the same high-risk countries around the world. It is reasonable for a German business person to question why the US government devoted extensive resources for over half a decade to prosecute a German competitor of the major American automakers.

A related issue is how people in other countries view law enforcement methods and tactics that are viewed as mainstream by Americans. Again, Daimler is illustrative. The German press focused much attention on the investigative tactics of the law firm hired by Daimler to investigate allegations of wrongdoing—tactics that would not be questioned in the US. One article, for example, compared Daimler’s own attorneys to “prosecutors,” claiming that the attorneys had been searching for “incriminating material since August 2004—as a kind of deputy sheriff to
the American stock exchange watchdogs in Germany." Another article also compared Daimler's attorneys to prosecutors,

except that [Daimler's attorneys] were not subject to the same restrictions. They questioned managers in Germany, Eastern Europe, Africa and Asia, without having to submit requests for legal assistance first. They searched offices and confiscated computers without having to present search warrants.\(^7\)

The SEC and DOJ investigations of Daimler also generated intensely negative reactions from the German media. For example, the German press noted that,

[h]igh-ranking legal experts consider it "unimaginable" that BaFin, the German banking and stock exchange supervisory authority, would similarly strong-arm American global companies like Exxon or General Motors. Even the Federal Ministry of Justice internally considers the actions of the SEC to be "extremely unpleasant."\(^7\)

The press also noted that the SEC "not only has a hand in deciding which [Daimler] manager may lead the department, but the Americans can even send their own people to Stuttgart in order to keep a closer watch on the corporate managers."\(^7\)

Another more recent article from a German news magazine cited the Daimler case as "an example of how German companies can come under the control of American regulatory agencies."\(^7\)

The article referred to the independent compliance monitor appointed as part of the settlements with the SEC and DOJ as having "almost as much power as a district attorney" and described the company as being "on parole."\(^7\)

Finally, the article noted that senior Daimler executives "accuse the US authorities of using

\(^7\) Und Uncle Sam befehlt, 38 Focus Magazin 212, 213–14 (Sept 18, 2006).
\(^7\) Dietmar Hawranek, US Investigators Crack Down on Daimler’s Culture of Corruption, Spiegel Online International (Der Spiegel Mar 30, 2010), online at http://www.spiegel.de/international/business/0,1518,686238,00.html (visited Sept 10, 2012) (Christopher Sultan, trans).
\(^7\) Und Uncle Sam befehlt, 38 Focus Magazin at 214 (cited in note 74).
\(^7\) Id at 216.
\(^7\) Dietmar Hawranek, Daimler Upset with Over-Eager American Oversight, Spiegel Online International (Der Spiegel Dec 13, 2011), online at http://www.spiegel.de/international/business/0,1518,803350,00.html (visited Sept 10, 2012) (Christopher Sultan, trans).
\(^7\) Id.
their extensive investigations to make it more difficult for German companies to do business.\textsuperscript{80}

We believe the international criticism, as illustrated above, arises primarily from (i) differences in nations' laws governing the collection and use of personal information, (ii) a misunderstanding of the role a company's counsel plays in a US regulatory investigation, and (iii) deeper issues of sovereignty.

1. Use of personal information.

First, it is fair to say that the US government is viewed as a bull in a china shop when it comes to the protection and use of personal information. Most countries have data privacy laws that provide for extensive protection of personally identifying information. Germany, for example, prohibits the collection and use of such information except for stated purposes, and the violation of Germany's data privacy laws can lead to serious criminal consequences for individuals involved.\textsuperscript{81} Indeed, senior corporate executives have lost their jobs and have been prosecuted due to data privacy violations that occurred on their watches.\textsuperscript{82}

The US has few such protections. If authorities want an employee's e-mail, for example, a cooperating company may produce that e-mail without any subpoena and without providing any notice to the employee. This would be inconceivable in Europe and most other places in the world. The different notions of what constitutes confidential personal information and the reduced protection for that information is one source of criticism of US investigation methods. One client exclaimed to us, when we explained to him that we could (and would) produce to the US government e-mails of hundreds of employees, "Are you not a country of laws?!"

\textsuperscript{80} Id.
\textsuperscript{81} See Federal Data Protection Act ("Bundesdatenschutzgesetz") Art V, § 44 (2009).
\textsuperscript{82} For example, in March 2009, Deutsche Bahn's CEO, Hartmut Mehdorn, resigned and the company was fined €1.12 million for breaching data protection laws after allegations emerged that the company had spied on and monitored the e-mails of many of its employees. See Keith Barrow, \textit{DB Reflects on Tough Times}, International Railway Journal 31, 31 (Sept 1, 2010). See also Caroline Brothers, \textit{Scandal Topples Chief of Deutsche Bahn}, International Herald Tribune 16, 16 (Mar 31, 2009); \textit{Spy Scandal Rattles Deutsche Bahn Top Managers}, Spiegel Online International (Der Spiegel Feb 12, 2009), online at http://www.spiegel.de/international/germany/0,1518,607206,00.html (visited Sept 10, 2012). Other senior managers of the company also resigned in the wake of the scandal. See \textit{DB Ushers in Grube Era as Resignations Continue}, International Railway Journal 4, 4 (June 1, 2009).
2. Role of counsel.

Second, the press coverage of the Daimler matter evidenced a fundamental misunderstanding of the role the company’s attorneys (our firm in that instance) play in a US regulatory investigation. When an investigation begins, often through an informal request for information from the SEC or DOJ, the company will hire counsel to investigate issues and produce the information requested by the authorities. That attorney is counsel to the company, not the SEC or DOJ; but it is very difficult for people outside the US to understand that distinction.

The difficulty in comprehending the role played by counsel in these matters is understandable. Other countries often do not have the same investigation structure—generally, if the government wants to investigate a company, the government uses its own resources to do so. In addition, at times the SEC and DOJ request that company counsel conduct the investigation in a way that creates the appearance that counsel is not acting on behalf of the company. For example, the agencies may request that counsel appear at an employee’s office unannounced and seize paper files or computer hardware to reduce the risk of spoliation. To company employees or others who witness this action, it may seem that counsel is acting on behalf of the regulator rather than the company. And, as a result, the view inside a company (and outside, through press accounts) may be that the US government, through its “agents,” is intruding into the operations of the company in an aggressive and inappropriate way.

3. Respect of sovereignty.

Third, and perhaps most fundamentally, the very action of US authorities investigating and seeking to penalize a non-US company raises questions about whether the US is overreaching in a way that undermines the legitimate sovereignty of a company’s home nation. Suppose Acme Corporation is a French pharmaceutical manufacturer, which is also SEC-regulated as a foreign private issuer. The SEC and DOJ launch an investigation into Acme’s activities in selling to state-owned hospitals in Eastern Europe. Assume that France is aware of the conduct the US is investigating, but that France does not have the same concern with how drug companies sell their products to state-owned hospitals in Eastern Europe. If France has chosen not to view this conduct by a French company as improper, it is difficult to see what business the US has in second-guessing that decision.
This is not a purely academic point. Until recently, bribing foreign government officials was not only permissible in large parts of the world; it was tax deductible. Both Siemens and Daimler are based in a country—Germany—where this was the case until 1998.83

A certain amount of hubris drives US policy in this area. Americans believe they know best how to conduct business internationally, and because it is unlawful to bribe US government officials to obtain a benefit, they assume that should be the case everywhere else. The DOJ and SEC also believe that if they enforce the FCPA rigorously, this may have an effect both on how companies conduct business overseas and also in making other countries take corruption more seriously. Indeed, US enforcement of the FCPA may help counter a tendency among other countries to implement lowest-common-denominator regulatory frameworks designed to attract companies through the appeal of less stringent and less costly requirements.

Yet citizens of other countries chafe at the notion that “America knows best,” and at the idea that, even if the US is right, it is the job of the US to impose its view on foreign companies through criminal or civil enforcement actions. Put another way, if bribery of foreign officials by a French company is bad, then France should take action. America acting as the world’s policeman has long been a source of strain in US foreign policy, but it is more troublesome when the legal framework the US seeks to impose on others is viewed as inconsistent with both the US’s own values (at times) and with the realities of operating on large swaths of the planet, where petty and less petty corruption are the way things get done.

The collective result of these three themes—lack of respect for personal data, intrusive investigative techniques by counsel viewed as agents of US authorities, and disregard for sovereignty—is that parties outside of the US view the recent aggressive enforcement of the FCPA against international companies not as the Lone Ranger riding in on a white horse to save the day, but rather as a more ambiguous entity, a Clint Eastwood-like mix of positive and negative, with the threat of overreaching ever present.

B. Unintended Consequences

The disconnect between how the US sees its anticorruption enforcement role and how other countries' companies and citizens see that role has resulted in several unintended consequences.

First, although it is difficult to quantify, there can be no question that rigorous FCPA enforcement against foreign private issuers has resulted in fewer foreign companies accessing US capital markets. Some foreign private issuers, such as Daimler, have delisted from US exchanges.\(^{84}\) Others undoubtedly have chosen to raise capital in Hong Kong, London, Frankfurt, or other stock exchanges that have shown an ability to launch companies into the public markets. The competition for new listings is fierce, and arguably it is unfortunate that the US exchanges are losing listings because of the cost of complying with US anticorruption regulations.

It is important to recognize that the decision not to list on a US exchange is not a tacit admission that a company pays bribes or wants to pay bribes. Because the SEC and DOJ have taken a sweeping view of the FCPA's scope (including application to dealings with state-controlled companies, for example) and because they have insisted that an acceptable antibribery compliance structure for a typical public company must include costly elements that may not necessarily provide any substantive benefit,\(^{85}\) listing on a US exchange and complying with the FCPA necessarily imposes substantial costs on a company, even if that company has no intention of ever paying bribes anywhere.

Second, as discussed previously, aggressive enforcement has, at times, led foreign companies and citizens to view the US regulators not as policemen but as biased referees who are trying to punish foreign companies in order to help their US competitors.

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This view, whether valid or not, risks inviting countervailing measures by foreign governments against US companies. Rather than leveling the playing field, the result could be to legitimize an ongoing chess game in which countries use their regulatory enforcement mechanisms to create tactical business advantages for their locally based businesses.

C. The Bottom Line

The point of this Article is not to assert that the US government should reduce enforcement of the FCPA against foreign companies. We believe the world is a better place with less government corruption, and that corporate corruption of government officials remains a problem in many regions because of the amount of money involved and the longstanding active or passive acceptance of corruption. The FCPA is one tool for addressing that problem. Nonetheless, based on our experience, we believe the SEC and DOJ could take a number of steps to reduce the negative collateral effects of enforcement actions against foreign companies.

First, the SEC and DOJ could defer to foreign government enforcement authorities. One simple principle seems noncontroversial: if a company’s home country is willing to combat corruption at the company, the US should stand down. Standing down, in our view, does not include exacting a pound of flesh for the US just because the US holds a knife—it means deferring entirely to the home-country enforcement process. Increasingly, countries are enacting or enhancing their own anticorruption laws or enforcing long-existing laws that had been gathering dust. Even if the US technically could assert jurisdiction in such a circumstance, it would be better off letting the company’s home country proceed—whether or not the SEC and DOJ would agree with the ultimate outcome of that enforcement action. This principle respects the sovereignty of foreign nations and decreases the risk that US conduct can be portrayed as heavy-handed or overreaching. A further step might be for US regulators to first bring conduct that comes to their attention to the home country’s regulator, in order to give that regulator the opportunity to take action.

Second, US regulators could focus on core violations rather than wade into the muddy waters of expanding liability under

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the FCPA. FCPA enforcement over the past decade has become an unfortunate example of "mission creep." No longer do the SEC and DOJ focus their efforts exclusively on payments that everyone would agree are improper, such as briefcases of cash to government officials. Instead, they have expanded into gray areas, such as noncash benefits to employees at state-owned enterprises (often in countries where virtually every enterprise that would be a private company in the US is partly state-owned). As enforcement moves away from conduct that is viewed as immoral or illegal throughout the world, it is more likely that foreign companies, citizens, and even governments will view that enforcement activity as illegitimate or improperly motivated.

Third, US regulators should consider industry sweeps. One way to blunt the criticism that the SEC and DOJ are unfairly targeting foreign competitors of US companies is to use information about how bribes are being paid by one company in an industry to review conduct by that company's competitors—including the US competitors of foreign companies that are under investigation. If one widget manufacturer is bribing officials in Poland to make sales, for example, the US could consider whether others might be doing the same thing. Paradoxically, this recommendation may increase enforcement activity. Very recently, it appears the government has begun to take this approach in certain industries, such as pharmaceuticals and medical devices.\(^8\) Similarly, the Panalpina-related investigations involved a number of companies that were using the same corrupt freight-forwarder.\(^8\)

Fourth, US regulators should respect international data privacy laws. Admittedly, if our first recommendation is adopted, this becomes less of an issue. Regulators in Europe and elsewhere regularly conduct investigations while remaining in compliance with local data privacy laws. However, to the extent the SEC and DOJ continue to conduct international investigations, they need to devote energy to finding ways to do so in a manner that is respectful of international data privacy laws. Both agencies have already made efforts to work with European governments in this area, and they should continue to do so.\(^9\)


\(^8\) See DOJ, Press Release, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (cited in note 21).

\(^9\) See DOJ, Press Release, Attorney General Eric Holder Delivers Remarks to the
IV. Conclusion

Since the Statoil enforcement action only six years ago, there has been a dramatic increase in FCPA enforcement actions against foreign companies. In this Article, we have evaluated this recent trend, focusing particularly on the legitimacy and practical implications of imposing US anticorruption laws on non-US companies. This brand of “American imperialism” has prompted negative reactions from foreign companies, foreign governments, and international media. Much of this backlash stems from a sense that the US enforcement efforts invade the sovereignty of companies’ home countries. We believe that a few simple steps could both enhance overall international antibribery enforcement efforts and simultaneously reduce the level of criticism leveled at the US.
