Testimony of

Michael Volkov, Esq.
Partner, Mayer Brown LLP

Before the

Senate Judiciary Committee
Subcommittee on Crime and Drugs
Hearing on
"Examining Enforcement of the Foreign Corrupt Practices Act"
Tuesday, November 30, 2010
Dirksen Senate Office Building, Room 226
9:30 a.m

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Good morning Chairman Specter, Ranking Member Graham, and Members of the Subcommittee: thank you for this opportunity to discuss with you the enforcement of the Foreign Corrupt Practices Act, commonly known as the FCPA.

At the outset, I want to say that it is an honor to appear before the Subcommittee for the first time since I left the Judiciary Committee staff in 2005. I have many fond professional and personal memories of the work I was able to do here as part of the Committee staff.

Today, I bring my perspective as a former federal prosecutor in the US Attorney's Office in the District of Columbia for more than 17 years, and as a partner at Mayer Brown currently representing individuals and companies.

The Historical Context of the FCPA

In the mid-1970s, more than 400 American companies admitted to the Securities and Exchange Commission that they had collectively made over $300 million in improper or illegal payments to officials of foreign governments and had, in many cases, failed to accurately record those transactions in their corporate books and records.[1] Viewing these revelations as a sign that the American business climate was being jeopardized by corporate bribery,[2] Congress responded by enacting the landmark Foreign Corrupt Practices Act of 1977.

The FCPA addressed this perceived crisis in two ways. First, the statute made it unlawful for companies headquartered in the United States or with securities registered in the United States to use instrumentalities of interstate commerce, such as the mail and wires, to offer or pay bribes to officials of foreign governments for the purpose of obtaining or retaining business.

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[1] *See* H.R. Rep. No. 95-640, at 1-2 (1977).

[2] *See* S. Rep. No. 95-114, at 3-4 (1977) (concluding that due to these bribes, "[t]he image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been impaired . . . . A strong anti-bribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.")

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Second, Congress imposed more stringent recordkeeping requirements on public companies with securities listed in the United States.

Since 1977, the FCPA has had enforcement "ups" and downs." However, it is clear that in the last five (5) years FCPA enforcement has risen to unprecedented levels. Record-setting fines have been paid by companies and more and more individuals have been prosecuted.[3]

The Justice Department has sent a very strong message – they have employed techniques typically reserved for prosecutions of violent gangs and organized crime – that is, the use of undercover officers, confidential informants, one-party consent recordings, and search warrants. In addition, the Justice Department has announced industry-wide investigations which are directed at specific businesses and their foreign operations. Finally, and probably most importantly, the Justice Department and the SEC have both dedicated additional resources – attorneys, law enforcement, and support staff – to FCPA enforcement.

The FCPA defense bar is well aware of the Justice Department's new strategies and approaches. As a result, more and more company clients have sought proactive advice and assistance on designing and implementing sophisticated compliance programs. Much of my practice now is devoted to advising corporations on compliance issues. From the Justice Department's and SEC's perspectives, the increase in compliance efforts should be a welcome development.

The Justice Department's focus on aggressive enforcement, like any other criminal law, is aimed at deterring violations. For companies that means increasing compliance. If compliance is the overall aim, the Justice Department and the SEC should entertain new approaches and strategies.

In looking at the issue of compliance, the enforcement programs must distinguish between companies that seek in good faith to comply with the FCPA by dedicating resources to implement meaningful controls, conduct comprehensive training and impose a due diligence

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[3] In recent years, both the DOJ and SEC have aggressively pursued FCPA actions against individuals. These criminal actions demonstrate the breadth of both the conduct susceptible to FCPA criminal enforcement and the individuals within the statute's reach. In *Jefferson*, U.S. Congressman William Jefferson was indicted on charges including, violation of the FCPA for allegedly paying bribes to a Nigerian official to advance the business interests of his family. Press Release, Dep't of Justice, Congressman William Jefferson Indicted on Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges (June 4, 2007). In *Salam*, a former U.S. army civilian translator and naturalized U.S. citizen, pleaded guilty to violating the FCPA by offering a senior Iraqi police official $60,000 in exchange for the official's assistance in facilitating the purchase of 1,000 armored vests and a map printer for $1 million, plus an additional $28,000 to $35,000 to an undercover agent posing as an Iraqi procurement officer. Press Release, Dept of Justice, U.S. Civilian Translator Sentenced for Offering Bribes to Iraqi and U.S. Officials While Working in Adnon Palace in Baghdad (Feb. 5, 2007). In *Amoako*, a former regional director for ITXC Corp. pleaded guilty to violating the FCPA in connection with paying bribes worth approximately $266,000 in the form of illegal "commissions" to employees of foreign state-owned telecommunications companies located in Nigeria, Rwanda, and Senegal. And in March 2007, Edgar Valverde Acosta, a Costa Rican citizen and Christian Sapsizian, a French citizen, were indicted on charges they conspired to pay $2.5 million in bribes to Costa Rican officials in order to obtain a telecommunications contract on behalf of their employer, Alcatel, a French company whose American depositary receipts were traded on the New York stock exchange. Press Release, Dep't of Justice, Former Regional Director of ITXC Corp. Pleads Guilty in Foreign Bribery Scheme (Sept. 6, 2006).

review process to make sure that third party agents hired in foreign countries do not engage in bribery. Assuming that a company makes such good faith efforts to comply with the FCPA, there is no reason to punish the corporation for the illegal actions of a "rogue" employee or small group of "rogue" employees that violate the FCPA contrary to the company's code of ethics, compliance program and training efforts. Unfortunately, under current corporate criminal law, the actions of a **single** employee can be – and frequently are – attributed to the corporation to hold the corporation criminally liable. As reflected in the US Sentencing Guidelines, the corporation's compliance efforts can be recognized as a "mitigating" factor but the tarnish of a conviction and a fine, with all of the attendant consequences can be far-reaching and frequently unfair.

Voluntary Disclosure: The Engine That Fuels FCPA Enforcement

The Justice Department regularly urges companies to engage in the "voluntary disclosure" process. After a company makes a voluntary disclosure, the Justice Department then enlists the company to conduct a comprehensive internal investigation which eventually leads to a disclosure of any and all potential violations. At the conclusion, the Justice Department negotiates a fine, a guilty plea typically for subsidiaries, or a non-prosecution or deferred prosecution agreement.

By encouraging voluntary disclosure, the Justice Department has increased its prosecutions, minimized the use of its investigative resources, and increased the Treasury's coffers with substantial fines. Cooperating witnesses from the company are mined for additional leads on other companies and other bribery schemes, which frequently lead to further investigations and disclosures by companies.[4]

For most corporations that discover a potential FCPA violation, there is simply no other choice but to engage in the voluntary disclosure process. But the decision to do so is complicated by one major consideration – what are the terms of the disclosure? What benefit is there to such a disclosure and what are the costs of such disclosure?

The Justice Department has not provided clarity on this point. Instead, the Justice Department offer vague promises of benefits and little to no certainty as to results, all to preserve its discretion to impose a fine and plea as they see fit. FCPA professionals advise companies in this situation by reading "tea leaves" – trying to make sense out of a number of past prosecutions. But it is difficult to do. There simply is no guarantee for what benefits a corporation will earn for voluntary disclosure.

[4] Of course, voluntary disclosure necessarily implicates attorney-client privilege issues. I agree with Chairman Specter's proposed Attorney-Client Privilege Protection Act of 2006. Although the bill would prohibit federal prosecutors from seeking corporate waivers of attorney-client privilege in return for leniency in prosecutions, or from considering such waivers in making charging decisions, and protect employee rights in corporate investigations, overriding provisions of the so-called Thompson Memorandum of 2003, it was not enacted and this issue remains an ongoing concern.

You do not need an economist to know that in the absence of clarity and transparency, companies may not accurately weigh the pros and cons of voluntary disclosure. Or as Bob Dylan wrote, "You don't need a weatherman to know which way the wind blows."[5]

For many companies, it is a difficult choice – does the company disclose the problem with no certainty as to the result or punishment, or does the company fix the problem internally and implement new programs to ensure compliance while running the risk that law enforcement may learn of such past violations. In most cases, companies opt to enter the Justice Department's disclosure process.

A Corporate Self-Compliance Program: Maximizing Incentives to Comply

A more balanced approach is needed: (1) to increase even more the incentive to comply with the law; and (2) to distinguish between corporations that engage in flagrant violations of the FCPA and those that seek to comply in good faith but nonetheless can be held liable for the actions of a few employees.

In my view, these two goals can be accomplished by adopting a corporate self-compliance, limited amnesty program. This would be a win-win for the government and for businesses. Such a program would establish a corporate compliance baseline which will inoculate companies against certain FCPA violations.

Because of the lack of any structure or established incentives, more and more FCPA professionals are urging the Justice Department to adopt some form of a corporate amnesty program so that corporations know and act in response to a set of defined benefits. I join the chorus of FCPA professionals – former DOJ officials and legal scholars – to propose a program which will increase compliance without undermining the Justice Department's enforcement program; indeed, my proposal will enhance the Justice Department's ultimate aim of increasing compliance.

I want to acknowledge here that former judge Stanley Sporkin, a mentor and the so-called father of the FCPA, has articulated a very similar proposal for many years. To give credit where it is due, he is the source for this proposal and he has the experience and the credibility to know that such a proposal would enhance corporate compliance.[6]

Judge Sporkin's proposal consists of the following elements:

1. A participating company agrees to conduct a full and complete review of the company's compliance with the FCPA for the five (5) previous years;

2. The internal review is conducted jointly by a major accounting firm or specialized forensic accounting firm and a law firm;

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[5] Subterranean Homesick Blues, Bob Dylan, Columbia Records (1965).

[6] At the inception of the FCPA, there was a voluntary disclosure program that fell into disuse in the 1980s. In 2001, however, the Seaboard Report was issued and echoed what former Judge Sporkin had earlier proposed, and which I have outlined here, as an effective means to increase corporate compliance.

3. The company further agrees to disclose the results of the legal-accounting audit to the SEC, the DOJ, its investors and the public;

4. If the company discovers any violations in the audit, the company agrees to take all steps to eliminate the problems and implement the appropriate controls to prevent further violations.

5. The company would subject itself to an annual review for five (5) years to ensure that compliance was being maintained.

6. The company would retain an FCPA compliance officer (akin to an independent compliance monitor) who would annually certify the SEC and the DOJ that the company was in compliance.

7. In exchange for these actions, the SEC and DOJ would agree not to initiate an enforcement action against the company during this period ***except*** that such an agreement would not apply to violations which rose to a ***flagrant*** or ***egregious*** level.

As such, the program would create incentives for companies to adopt and maintain robust compliance measures and reduce the case load and investigative burden of government agencies that enforce the FCPA while reassuring regulators that companies are proactively taking steps to address corruption issues.

Some have suggested that the Justice Department implement a leniency program similar to the one currently used by the Antitrust Division with great success.[7] The Antitrust Division first implemented a leniency program in 1978[8] and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994. Through the Division's leniency program, a corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.[9]

While at first glance, the Antitrust Division's model is attractive for the FCPA, there are significant differences in purpose between the FCPA and Antitrust Division's enforcement programs. The Antitrust Division program is intended to encourage corporate cooperation to

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[7] Robert Tarun and Peter Tomczak of Baker & McKenzie have recently proposed a detailed FCPA Leniency Policy in the *American Criminal Law Review*. *See* Vol. 47 at 153. Their proposal draws upon the Antitrust Division policies and responds to growing concerns by corporate clients and their counsel that the benefits to companies that conduct costly and lengthy internal investigations and self-report misconduct are uncertain since it is virtually impossible to predict whether DOJ will impose a deferred prosecution or non-prosecution agreement, penalties or pass altogether.

[8] *See* http://www.justice.gov/atr/public/criminal/leniency.htm.

[9] The Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know for certain whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter. The Division grants only one corporate leniency per conspiracy, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency.

unravel cartels, i.e. anti-competitive agreements among member companies. The first to cooperate is given a benefit and higher penalties are extracted from the other companies based on their decision to cooperate or plead guilty. This same purpose – the discovery of group behavior – is not at issue in an FCPA violation where a single company engages in the bribery or other improper conduct. Other than certain individuals who are criminally liable, providing a leniency offer to the company for an FCPA violation, may or may not result in the prosecution of other significant actors.

International Efforts Against Bribery and Corruption

If we are to think about this issue in terms of incentive structures and deterrence, one glaring omission in current enforcement activities is prosecutions of the bribe-takers themselves – the "supply side" of bribery. If the bribe-takers are prosecuted abroad, there will be less interest and incentive for individuals and/or companies to engage in activities prohibited by the FCPA. In the earliest days of FCPA enforcement, the DOJ occasionally sought to apply the FCPA to foreign officials. For example, in 1990, the DOJ charged two Canadian officials, Castle and Lowry, with conspiring to violate the FCPA, but the courts rejected this theory, holding that a foreign official could not be held liable for conspiring to violate a statute that he could not be charged with violating directly. Subsequently, in 1994 in the GE case, the U.S. charged Rami Dotan, the Israeli general who received the bribes, with conspiracy to violate the FCPA's books and records provisions. Dotan was subsequently prosecuted in Israel and never stood trial in the United States. Since then, until last year, there have been no FCPA cases involving foreign officials. In 2009, in two separate cases, the DOJ charged the foreign officials who allegedly received bribes from U.S. individuals with assorted crimes other than the FCPA.

At its inception, the FCPA was the only statute of its kind anywhere in the world[10], and accordingly was susceptible to being viewed as a unilateral and almost quixotic American effort to stem the flow of corporate funds into the coffers of corrupt foreign officials. Today, in contrast, the FCPA's underlying anti-corruption objective has garnered broad international acceptance.

Mirroring this development, the FCPA itself has taken on a correspondingly global scope. The FCPA's anti-bribery provisions no longer apply solely to American companies and individuals. Rather, as amended in 1998, the FCPA now also prohibits foreign individuals and business entities from using the instrumentalities of domestic interstate commerce to facilitate the payment of a foreign bribe while on American soil.[11] Additionally, the FCPA now applies globally to the actions of American individuals and businesses, making it unlawful for them or their agents to engage in the conduct proscribed by the FCPA while outside the United States, irrespective of whether they make use of the instrumentalities of domestic interstate commerce in the process.[12]

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[10] Testimony of Paul V. Gerlach, SEC Associate Director of Enforcement, before the House Subcommittee on Finance and Hazardous Materials, Sept. 10, 1998, *available at* http://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt.

[11] *See* 15 U.S.C. § 78dd-3(a).

[12] *See* 15 U.S.C. § 78dd-1(g); 15 U.S.C. § 78dd-2(i).

International efforts against bribery and corruption need to increase so that more than a handful of countries actively prosecute bribery and bribe takers need to be prosecuted. We need to put more emphasis on helping other countries improve their enforcement programs. The OECD Antibribery Convention requires parties to make promising, offering, or giving a bribe to an official of another government a crime. Although 38 countries have ratified the convention, Transparency International reports that as of the end of 2009 only seven – Denmark, Germany, Italy, Norway, Switzerland, the United Kingdom, and the United States are actively enforcing this provision. Another nine -- Argentina, Belgium, Finland, France, Japan, South Korea,, the Netherlands, Spain and Sweden are making some effort to enforce it; and 20 -- *Australia, Austria, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa and Turkey* have taken few if any steps to enforce the convention.[13]

When it comes to the prosecution of officials who accepted bribes from transnational companies, there has been even less activity.[14] In the last 30 years, only three countries – South Korea, Italy, and Argentina – have prosecuted more than five officials for accepting a bribe. Another ten – South Africa, Lesotho, India, Canada, Russia, Norway, Brazil, Bangladesh, Germany and China – have prosecuted three to five individuals; the U.S., Mexico, Indonesia, the Czech Republic, and Afghanistan have each prosecuted two, and 17 countries – Slovenia, Rwanda, Nigeria, Namibia, Montenegro, Malaysia, Macedonia, Liberia, Hungary, Greece, Ghana, Ethiopia, Egypt, Costa Rica, Columbia, Chile, and Austria have each prosecuted one.

But the tide is turning and there is growing international attention and cooperation. Indeed, I'm participating in a conference sponsored by the World Bank next week. The "International Corruption Hunters Alliance" recognizes the importance of globally aligned efforts to resolve corruption cases, but there are several obstacles to global cooperation. First, there is a lack of mechanisms for reaching a comprehensive resolution between a company that has admitted wrongdoing and the many jurisdictions affected, and second, the failure of "victim" countries to prosecute those who took the bribes. It is this failure to prosecute bribe-takers that severely hampers international enforcement, since public officials know they can demand bribes with impunity and there is little deterrence.

The World Bank faces challenges in its efforts to deter corruption in the projects that it finances and the Bank has established regional networks of anti-corruption enforcement personnel in borrowing countries. The December meeting in Washington DC will bring network members together with authorities from countries that have prosecuted bribe payers, private sector representatives, and members of international organizations, to create a global enforcement alliance. This high-level meeting is an important and crucial step to establishing a policy framework for global settlements and fines, establishing a restitution fund, and also for establishing a course for key parallel investigations, bi-lateral cooperation and mutual assistance and information and expertise sharing.

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[13] Transparency International, Progress Report 2010: Enforcement of the OECD Antibribery Convention, July 2010, *available at* http://www.transparency.org/publications/publications/conventions/oecd_report_2010.

[14] TRACE, Global Enforcement Report 2010, *available at* https://secure.traceinternational.org/documents/TRACEGlobalEnforcementReport2010.pdf.

The United States has been at the forefront of this area of enforcement and it is time that we contribute to and learn from others in an increasingly complex global economy that sees corporations and individuals doing business across borders on a daily basis. There is an urgent need for a balanced global enforcement program. I commend the World Bank for its efforts. The Network is now made up of 120 officials from 31 countries.[15] The strings attached to funds from multilateral development banks rightly include compliance with robust anti-corruption measures and ongoing monitoring by the Bank. Interestingly, the World Bank Group[16] has recently developed a Voluntary Disclosure Program to allow entities and individuals to come forward and admit to wrongdoing and disclose the results of an internal investigation.

The aggressive and extra-territorial enforcement of the FCPA by the United States might have caused substantial international friction in an earlier era, in which the FCPA truly stood alone in criminalizing bribery of officials in other states. The landscape has changed dramatically on the international front, however, as demonstrated by the recent adoption of several international accords on the subject of cross-border bribery.

1. The OECD Convention On Combating Bribery (1999)

This Convention entered into force in February 1999 and now has been ratified by 38 countries, including the United States, Canada, and most EU member states.[17] In principal part, the OECD Convention requires state parties to "take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[18] The Convention also requires parties to establish criminal penalties for aiding and abetting foreign bribery, and for attempts and conspiracies to commit acts of bribery.[19] Further demonstrating the FCPA's international influence, the OECD convention also requires parties to adopt or maintain "laws and regulations regarding the maintenance of books and records" and other accounting statements "to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions" and other techniques commonly used "for the purpose of bribing foreign public officials or [] hiding such bribery."[20] While the OECD Convention leaves parties with substantial scope to design their own penalties and enforcement mechanisms, it calls for tough penalties.

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15 Annual Integrity Report, Integrity Vice Presidency, The World Bank Group 12 (2010), *available at* http://siteresources.worldbank.org/INTDOII/Resources/INT_AnnualReport_web.pdf.

16 The World Bank Group is made up of two development institutions owned by 187 member countries — the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

17 *See* http://www.oecd.org/dataoecd/59/13/1898632.pdf (listing parties and ratification dates).

18 *See* OECD Convention, Art. 1, § 1. The full English text of the Convention is *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

19 *See id.* § 2.

20 *See id.* § 8.

Highlights from the Working Group on Bribery enforcement data collected as of May 2010 include[21]:

- 148 individuals and 77 entities have been sanctioned under criminal proceedings for foreign bribery in 13 Parties between the time the Convention entered into force in 1999 and the end of 2009.

- At least 40 of the sanctioned individuals were sentenced to prison for foreign bribery.

- Approximately 280 investigations are ongoing in 21 Parties to the Anti-Bribery Convention.

2. The United Nations Convention Against Corruption

On October 31, 2003, the UN General Assembly adopted the UN Convention Against Corruption, an international accord which entered into force on December 14, 2005.[22] The Convention covers a broad range of topics relating to the task of combating corruption, including the bribery of domestic public officials, commercial bribery, money laundering, and embezzlement. In addition, the Convention, like the FCPA, condemns the practice of bribing foreign public officials, and calls on parties to establish criminal offenses prohibiting the intentional offer, promise or extension of any "undue advantage" to a "foreign public official or an official of a public international organization" in order to induce the official to act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business."[23] The UN Convention also calls on parties to prohibit the keeping of off-the-books accounts and accounting falsification, thus mirroring the FCPA's books and records provisions.[24] And in another echo of the FCPA, the Convention requires on parties to extend jurisdiction over offenses committed within its territory, and provides that they may exercise jurisdiction over any violation committed by any "national" or "habitual resident" of the signatory. All told, these provisions so substantially adopt the FCPA's model of combating foreign bribery that the Justice Department took the position before Congress that "[t]he Convention effectively requires all States Parties to adopt a "Foreign Corrupt Practices Act" of their own."[25]

Judge Sporkin has additionally suggested the establishment of a country-by-country list of agents that have been vetted and audited by an independent international auditing group. Each country would require that the agents on the list agree to certain restrictions (e.g. avoid using proceeds to pay any member of government or other third party to obtain business, cooperate in any investigation by U.S. and international authorities) and countries would only allow the use of such approved local agents. This would provide transparency and accountability and directly

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[21] *See* http://www.oecd.org/document/3/0,3343,en_2649_34859_45452483_1_1_1_1,00.html.

[22] *See* http://www.unodc.org/unodc/crime_convention_corruption.html. The full text of the UN Convention is available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

[23] *See* UN Convention, Art. 16, §1.

[24] *See* UN Convention, Art. 12, § 3.

[25] *See* Statement of Bruce C. Swartz, Deputy Assistant Attorney General, Before the Committee on Foreign Relations of the United States Senate, June 21, 2006, *available at* http://www.senate.gov/~foreign/testimony/2006/SwartzTestimony060621.pdf.

target one of the most important conduits for FCPA violations – the use of agents. Additionally, the international auditing group would evaluate each contract to determine whether the contract was awarded fairly and "listed governments" would be incentivized to participate by gaining eligibility to obtain certain benefits from the World Bank and other world financial institutions as well as the countries where the contracting companies are themselves domiciled.

Conclusion

Companies are actively trying to comply with the FCPA by implementing and improving compliance programs. We need to encourage companies to continue to engage in proactive and preemptive action. An emphasis on global cooperation and efforts toward a limited amnesty program will create the necessary incentives to combat corrupt activity. Companies are willing to undertake timely, costly and international internal investigations, but they need to do so in an environment that allows them to have predictability with respect to the government's subsequent actions.

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