Proposed Reforms to the FCPA Part II:
Limiting Successor Liability, Adding a Willfulness Requirement and Limiting a Parent's Liability for Acts of a Subsidiary

In a Whitepaper entitled "*Restoring Balance-Proposed Amendments to the Foreign Corrupt Practices Act*", released earlier this month, authors Andrew Wiessmann and Alixandra Smith, writing on behalf of the US Chamber Institute for Legal Reform proposed amending the Foreign Corrupt Practices Act (FCPA), argued that the time is ripe to amend the FCPA to make the statute more equitable and its requirements clearer. They propose five (5) amendments to the FCPA which they argue would serve to improve the Act. In a prior post, we discussed two of those proposals, to create a compliance defense available to a company if it has an adequate compliance program, similar to the "*adequate procedures"* defense available under the UK Bribery Act and doing away with the doctrine of *respondeat superior* under the FCPA. This post will discuss, in greater specificity, three of their proposals: limiting successor liability, adding a willfulness requirement to the FCPA and limiting a corporate parent's liability for the actions of its subsidiaries.

I. Successor Liability

The authors argues that under the current enforcement regime, a company may be held criminally liable under the FCPA not only for its own actions, but for the actions of a company that it acquires or becomes associated with via a merger—even if those acts took place prior to the acquisition or merger and were entirely unknown to the acquiring company. They believe that this standard of criminal liability is "generally antithetical to the goals of the criminal law, including punishing culpable conduct or deterring offending behavior." Acknowledging that a company can reduce its risk by conducting due diligence prior to an acquisition or merger (or, in certain circumstances, immediately following an acquisition or merger); this however is not a legal defense. Therefore, even when an acquiring company has conducted exhaustive due diligence and immediately self-reported the suspected violations of the target company, it is still currently legally susceptible to criminal prosecution and severe penalties.

The authors argue that the FCPA should be amended so that a business, similarly to an individual, should not be held liable for the actions of another company with which it did not act in concert. However to able to get to this position, a company must engage in "sufficient due diligence" in investigating potential acquisition targets. The quantity and quality of sufficient diligence will vary depending on the inherent risks in a given merger or acquisition— e.g., whether the target company does significant business in regions that are known for corruption—and the size and complexity of the deal. The authors conclude by arguing that the Department Of Justice (DOJ) should provide this guidance and if followed, it would act as an absolute shield to such liability.

II. Adding a Willfulness Requirement

The authors alleges that there is an anomaly in the current FCPA statute: although the language of the FCPA limits an individual's liability for violations of the anti-bribery provisions to situations in which she has violated the act "willfully," there is no similar limitation for corporations. This omission substantially extends the scope of corporate criminal liability because it portends that a company will face criminal penalties for a violation of the FCPA even if it (and its employees) did not know that its conduct was unlawful or even wrong. They believe that the absence of a "willful" requirement opens the door for the government to threaten corporations—but not individuals through whom they act—with what is tantamount to strict liability for improper payments under the anti-bribery provisions of the FCPA.

The authors conclude that a "willfulness" requirement should be extended to corporate liability, at the very least to the anti-bribery provisions of the FCPA. This statutory modification would significantly reduce the potential for American companies to be criminally sanctioned for anti-bribery violations, particularly those of which the company had no direct knowledge or for which the company could not have anticipated that American law would apply. The statute should also preclude unknowing *de minimus* contact with the United States as a predicate for jurisdiction: the defendant should either have to know of such contact or the contact, if unknown, would have been foreseeable because it was substantial and meaningful to the bribery charged.

III. Limiting a Parent's Liability for Acts of a Subsidiary

Although acknowledging that the DOJ has not yet taken such action, the authors claims that the Securities and Exchange Commission (SEC) "routinely" charges parent companies with civil violations of the anti-bribery provisions based on actions taken by foreign subsidiaries of which the parent is entirely ignorant. Further this approach is contrary to the statutory language of the anti-bribery provisions, which—even if they do not require evidence of "willfulness"—do require evidence of knowledge and intent for liability. The authors believe that such a position taken by the SEC is contrary to the position taken by the drafters of the FCPA, who recognized the "inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill" and who made clear that an issuer or domestic concern should only be liable for the actions of a foreign subsidiary if the issuer or domestic concern engaged in bribery by acting "through" the subsidiary. This would seem to be at odds with the stated position that a parent corporation "may be held liable for the acts of [a] foreign subsidiary[y] [only] where they authorized, directed, or controlled the activity in question."

The authors conclude that because the scope of this potential liability is not definitively established, it is a source of significant concern for American companies with foreign subsidiaries. A parent's control of the corporate actions of a foreign subsidiary should not expose the company to liability under the anti-bribery provisions where it neither

directed, authorized nor even knew about the improper payments in question. Hence, a parent should not have such FCPA liability.

The inherent problem with each of these proposals is that none of them further the stated goals of the FCPA. The purposes for the bill were written into the Preamble to the original 1977 FCPA legislation. In this Preamble, Congress set out three clear policy goals for the enactment of the FCPA. First, was the public revelation that over 400 U.S. companies had paid over $300 million to bribe foreign governments, public officials and political parties. Such payments were not only "unethical" but also "counter to the moral expectations and values of the American public". Second was that the revelation of bribery, tended "to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations". Third was by enacting such resolute legislation, U.S. companies would be in a better position to resist demands to pay bribes made by corrupt foreign governments, their agents and representatives. Each of the three proposals would appear to provide mechanisms to escape liability, rather than the affirmative actions to prevent bribery and corruption. This is particularly so when one considers the initial proposal by the authors to provide an affirmative defense if a company has an adequate procedures type FCPA compliance program in place.

Today author Wiessmann was one of several speakers to appear before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, on a hearing entitled, "TIME CHANGE -- Examining Enforcement of the Foreign Corrupt Practices Act." It will be interesting to hear the DOJ's response and the tenor of the hearing and debate going forward.