Administrative Procedure and Foreign Antibribery Enforcement: Restoring Balance through Procedural Transparency

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I. Introduction

Fighting public corruption is one of the most important law enforcement priorities of the U.S. government. In addition to fighting corruption domestically, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) aggressively pursue and punish individuals and companies who bribe or attempt to bribe government officials in other countries pursuant to the Foreign Corrupt Practices Act of 1977 (FCPA).

In many respects, the United States has been a global leader in the fight against corruption. For approximately twenty years, the United States was the only country that even had a statute criminalizing bribery of foreign government officials. The Organisation for Economic Co-operation and Development (OECD) has lauded the U.S. government for spearheading the global effort to eliminate public corruption around the world by encouraging governments around the world to disincentivize public bribery. Indeed, the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is modeled after the FCPA.

However, the FCPA as it is currently interpreted by the DOJ and SEC has been the object of growing criticism in recent years. For example, in 2010 the United States Chamber of Commerce

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the country’s largest business lobbying group, attacked the current FCPA enforcement climate and proposed amendments to the statute in a report entitled “Restoring Balance.” Represented by former Attorney General Michael Mukasey, the COC has argued that good faith efforts to comply with the law are often unsuccessful and that these amendments are necessary to “secure clarity” with respect to DOJ enforcement policy.

The FCPA has also come under increasing scholarly criticism. For example, Professor Andy Spalding has argued that the current enforcement climate is damaging developing economies by creating a de facto sanctions regime contrary to the statute’s intent. Additionally, Professor Mike Koehler has even called the current enforcement regime a “façade” because the SEC and the DOJ are pursuing “dubious” and “untested” theories of prosecution with very little judicial supervision.

This criticism is largely in response to a recent increase in enforcement activity. Although the FCPA was largely unenforced from the time it was enacted in 1977 until the mid-2000s, the DOJ and SEC have begun assessing record civil and criminal penalties against companies and individuals. Recent prosecutions have resulted in the criminal convictions of the cofounder of a well-known handbag designer, a nuclear physicist, and a number of other corporate employees and small business owners alike. A host of Fortune 500 companies including household name corporations and financial institutions have either already paid millions in fines, penalties and disgorgement or are currently under investigation by

6. See Weissman & Smith, supra note 3.
12. SHEARMAN & STERLING, supra note 10, at 104.
the DOJ, the SEC, or both. As the lead FCPA enforcement agency, the DOJ has announced that it has no intention of slowing down the pace of FCPA prosecutions.

Of course, the COC’s criticism has been received by some with a healthy degree of skepticism. For example, one commentator observed that “considering... how new this uptick in enforcement has been, it is possible businesses are reacting not to the alleged unpredictability of the statute but to actual enforcement of a statute long unenforced.” To a certain extent, this may be true considering some of the odious activity alleged in the DOJ and SEC charging documents. As this Note explains, however, the counterpoint is that the enforcement agencies could quell these complaints by responding in a meaningful and transparent way to the COC’s and others’ arguments that complying with the statute is difficult.

Whatever the cause, now that the implications of the current aggressive enforcement regime have become apparent, the COC and others are calling on Congress to amend the FCPA because of a perceived climate of uncertainty. The primary objective of these calls to reform is to level the playing field for U.S. businesses and to clarify just how to comply with the antibribery provisions of the FCPA. Although there has been at least one congressional hearing on the matter since June of 2011, the DOJ emphatically opposes any amendments that would lessen their enforcement discretion, and there is little hope that Congress would do anything to curtail its enforcement discretion.

13. See id. at v.


16. See, e.g., U.S. DEP’T OF JUSTICE, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-754.html. In the Control Components Case, the company and employees of the California-based valve manufacturer pleaded guilty to making over 200 payments in over 30 countries in violation of the FCPA “by paying bribes to officials and employees of various state-owned companies as well as foreign and domestic private companies.”

17. See Weissman & Smith, supra note 3.

18. Id. at 11.

19. See Richard Craig Smith, Paul Simon & Anne Elkins Murray, House Hearing
The DOJ responded in November 2011 to this criticism by publicly making a commitment to release "detailed new guidance on the [FCPA’s] criminal and civil enforcement provisions." As explained below, because the DOJ is not required to be procedurally transparent, this guidance document, if the DOJ does issue it, is not likely to satisfy the COC’s criticism. It is also not likely to respond to the critique of scholars and practitioners who oppose the current enforcement policy.

Meaningful guidance produced in a procedurally transparent manner would arguably enable companies operating internationally to better comply with the FCPA. This is important because foreign investment by U.S. companies arguably acts as a deterrent to strengthening a corrupt regime’s stronghold on its citizenry if done in a way that encourages governmental transparency and decreases demand for corrupt payments. In order to decrease the demand for bribes, then, the U.S. government should pursue a policy of encouraging foreign investment while simultaneously encouraging governmental transparency. Therefore, this Note argues that responding to the critique of the current DOJ FCPA enforcement policy in a meaningful and transparent way would encourage U.S. companies to invest in developing countries in a responsible way.

This Note begins with an introduction to the text of the antibribery provisions, followed by a summary of two of the COC’s key criticisms of those provisions as they are currently interpreted by the DOJ. It then examines the procedural law governing the DOJ’s enforcement policy formulation to demonstrate that the Department has consistently chosen the least transparent means available to it to formulate its enforcement policy despite the fact that Congress envisioned a much more transparent enforcement scheme. This Note finds that statutory amendments are necessary to require the DOJ to take notice of, and respond in a meaningful way to, the legitimate criticism of its current enforcement policy. Finally, the Note concludes by briefly discussing administrative developments in the United Kingdom surrounding that country’s...
UK Bribery Act 2010 as a potential procedural benchmark for Congress to better guide the DOJ procedurally in formulating its enforcement policy.

II. Enforcement of The FCPA Antibribery Provisions

A. The Antibribery Provisions

The FCPA’s antibribery provisions are found in three “parallel provisions” of the Securities and Exchange Act of 1934. The first provision applies to foreign and domestic issuers “who have registered securities with or are required to file reports with the [SEC].” The second provision is applicable to “domestic concerns, i.e. U.S. citizens, nationals and residents as well as corporations, partnerships, associations and other entities that have their principle places of business in the United States or are organized under U.S. law.” The final section of the antibribery provisions applies to persons other than issuers or domestic concerns who act “in furtherance of” a corrupt payment “while within the territory of the United States.” “Each of these sections applies not only to the persons indicated but also to officers, directors, employees, agents and stockholders acting on their behalf.”

The antibribery provisions of the FCPA make certain payments to “foreign officials” made with the purpose of obtaining or retaining business a crime and subject violators to criminal and civil penalties, including fines and imprisonment. As noted above, the DOJ is the lead agency charged with the responsibility of formulating the enforcement policy of the criminal antibribery provisions.

The FCPA also requires issuers of U.S. stock to maintain accounting procedures and internal controls sufficient to prevent improper payments from being misleadingly reported in the issuer’s

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27. Id.
books and records. Parallel amendments to the Internal Revenue Code have furthermore attached tax disadvantages to the making of corrupt payments. While these different components make up the totality of the current FCPA statutory scheme, this Note focuses on the procedural law surrounding the DOJ’s enforcement of the criminal antibribery provisions.

B. DOJ’s Aggressive Interpretations of the Antibribery Provisions

The FCPA grants the DOJ wide administrative latitude with respect to the FCPA’s antibribery provisions. The DOJ announces its interpretations through: (1) the enforcement actions it chooses to bring; (2) nonbinding interpretive guidance documents; and (3) an informal advisory opinion process that is not prospectively binding on the DOJ. There is very little judicial oversight of the DOJ’s enforcement policy. Businesses claim that they are rarely in a position to litigate an FCPA enforcement action or adverse advisory opinion for a number of reasons, including the costs of the litigation and the reputational harm that goes along with litigating against a bribery charge. Additionally, the risk of lengthy prison terms for individual defendants has led most to seek favorable terms from the government rather than face the expense and uncertainty of a trial. Consequently, commentators have expressed concern that the DOJ effectively controls the outcome of the FCPA enforcement actions it initiates. This is so, critics argue, because the DOJ’s current enforcement regime procedurally prevents parties from challenging the DOJ’s untested interpretation of the FCPA’s antibribery provisions.

In virtually every corporate criminal antibribery case brought by the DOJ, the resolution of the matter is negotiated privately between the DOJ and the persons or entities being prosecuted by the DOJ with what Professor Koehler calls a “rubber stamp” supervisory function played by the courts. Indeed, the COC states, “[m]any commentators have expressed concern that the DOJ effectively serves as both

29. VAGTS ET AL., supra note 22, at 309.
30. Id.
31. See SHEARMAN & STERLING, supra note 10, at 6.
32. See Weissman & Smith, supra note 3, at 5.
33. Id. at 9-10.
34. See, e.g., Koehler, supra note 9, at 936.
35. See Weissman & Smith, supra note 3, at 3.
36. Koehler, supra note 9, at 936.
prosecutor and judge in the FCPA context.\textsuperscript{37} As discussed below, these procedural choices lead to a lack of transparency in the DOJ's anti-bribery enforcement policy formulation and prosecution.

1. Successor Liability

Although the statute is silent on the matter, the DOJ has interpreted the anti-bribery provisions to apply to a company that acquires or merges with another company even in cases where the alleged acts took place prior to the merger or acquisition and were unknown to the acquiring company. A company may seek to limit this risk by conducting due diligence prior to, or, in certain circumstances, immediately following, an acquisition or merger.\textsuperscript{38} However, the COC asserts that the DOJ currently does not view any level of due diligence as a legal defense if issues arise post-acquisition or merger that were not detected.\textsuperscript{39} As a result, the COC asserts, any potential violations discovered after the transaction may subject the acquiring company to criminal liability, even if it conducted exhaustive due diligence.

In the FCPA context, this successor liability interpretation has never been tested in a court.\textsuperscript{40} According to the COC, the DOJ appears to have first announced that a company can be subject to criminal successor liability under the anti-bribery provisions in connection with the issuance of an advisory opinion.\textsuperscript{41} During pre-acquisition due diligence, the acquiring company discovered that the target may have violated the FCPA pre-acquisition and sought to mitigate the consequences of this prior conduct by seeking an advisory opinion on the matter from the DOJ.\textsuperscript{42} In the public Opinion Procedure Release that accompanied the advisory opinion, the DOJ outlined a series of steps that the company could take to avoid successor liability.\textsuperscript{43} These included cooperating with the DOJ and SEC in ongoing investigations, disclosure of any additional violations discovered post-acquisition, and establishing an FCPA
As explained below, these advisory opinions are only binding on the DOJ as between the requesting party, and even then only to a limited extent. Therefore, although the DOJ announced in this advisory opinion that it would not pursue the acquiring company under a successor liability theory, the due diligence guidelines it issued are of little precedential value.

In a later advisory opinion release, the DOJ modified its stance to allege that an acquiring company may be liable even where “adequate” due diligence may be impossible. In that Opinion Procedure Release, the DOJ provided its opinion to a company inquiring about the necessary amount of post-acquisition due diligence on a UK target company. This transaction was complicated by conflicting privacy standards in the UK and the fact that the proposed transaction was a hostile takeover. A non-U.S. competitor had submitted a bid that did not require the same level of due diligence because it was not subject to the FCPA. The DOJ required the U.S. company to conduct due diligence “on a scale equivalent to a vast internal investigation in order to avoid prosecution by the DOJ” in connection with any of the target’s pre-acquisition conduct. Among other things, the DOJ required that the acquiring company retain external consultants, conduct a rigorous and invasive review of the company’s correspondence and financial records and conduct interviews of the target’s employees. Furthermore, the acquiring company was required to disclose the progress of the investigation subject to a rigorous 180-day post-acquisition time scale during which the company was required to report any potential violations to the DOJ. The DOJ further explained that it would pursue enforcement actions for ongoing violations by the target company not uncovered during the first 180 days of due diligence, as well as prior violations by the target company disclosed to the DOJ to the extent that such violations

44. Id.
46. Id.
47. Id.
48. Id.
49. Weissman & Smith, supra note 3, at 16.
50. DOJ Release 2008-02, supra note 45.
51. Id.
were not “investigated to conclusion within one year of closing.”

Finally, the DOJ added a footnote in the advisory opinion prospectively “discouraging” future companies seeking a release of FCPA liability from entering into pre-closing confidentiality agreements. The U.S. company ultimately decided to abandon the transaction and the target was acquired by the competing non-U.S. company.


Another ambiguity in the antibribery provisions is the question of who, exactly, qualifies as a “foreign official.” The antibribery provisions define a “foreign official” loosely as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.” The antibribery provisions, however, do not define the types of entities that qualify as “instrumentalities.” This ambiguity has come to mean that there is a broad range of employees of foreign entities who may be considered by the DOJ as “foreign officials” for purposes of the antibribery provisions.

According to the COC, the current “expansive” interpretation of “instrumentality” has not been subject to judicial scrutiny, and is “unlikely to be tested in the near future.” Companies seeking to determine which entities qualify are therefore left to glean the extent of this interpretation from previous enforcement actions. For example, under the current enforcement regime, the DOJ has pursued criminal prosecution of four construction companies in connection with payments made to employees of a joint venture that included an energy company owned by the government of a foreign country. The alleged “instrumentality” was therefore a joint

52. Id.
53. Id.
56. See Weissman & Smith, supra note 3, at 25.
venture consisting of a state-owned energy company that held a minority interest, and a consortium of private multinational energy companies, which collectively owned a majority share. The DOJ and SEC combined have assessed approximately $1.5 billion in criminal and civil penalties related to the prosecution of the private companies.

The COC argues that this expansive interpretation to include entities only "tangentially related to a foreign government" is "detrimental to American business interests" because "[w]ithout a clear understanding of what companies are considered 'instrumentalities,' companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship." The Chamber argues, therefore, that the FCPA should be modified to clarify the definition of "instrumentality" by specifying, inter alia, the threshold degree of ownership of a company necessary to qualify the employees of an entity as "foreign officials." As explained below, Congress should guide the DOJ's hand in clarifying this definition in part because the DOJ has used procedurally non-transparent means to communicate to those subject to the FCPA who qualifies as an "instrumentality" and thus a "foreign official" for purposes of the FCPA.

III. The Procedural Framework for FCPA Enforcement Policy Formulation

A. The FCPA and Administrative Procedure

As the FCPA is currently drafted, Congress has granted the Department wide administrative latitude with respect to enforcement of the antibribery provisions. However, Congress also envisioned that in formulating its enforcement policy, the DOJ would seek guidance and input from the business community and other administrative agencies through public notice and comment procedures. Unfortunately, the DOJ has skirted these procedures in favor of less transparent means of formulating its enforcement policy.

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58. Id.
59. Id.
60. See Weissman & Smith, supra note 3, at 27.
No company has challenged an FCPA enforcement action in over twenty years.\textsuperscript{61} There is very little incentive for companies to litigate against the Department if approached with an anti-corruption allegation. As Professor Koehler explains, "[a]s a practical matter, to challenge a DOJ legal interpretation in an FCPA enforcement action, a company would first need to be criminally indicted, something no member of a board of directors is going to let happen regardless of the ultimate criminal fine or penalty the DOJ is seeking."\textsuperscript{62}

For better or worse, it is a reality of the modern U.S. government that broad authority to prosecute and interpret laws has been given to administrative agencies not directly accountable to outside political influence. This section addresses how the Department has historically not been amenable to FCPA policy formulation through public participation and comment, and has instead pursued its enforcement regime with little regard to the legitimate criticism of those subject to this criminal statute. As seen through the Department's previous decision not to issue interpretive guidance after a statutorily mandated notice and comment procedure as well as its decision to issue only nonbinding policy statements and advisory opinions with binding effect only on the parties involved, the Department has consistently chosen the least transparent means to express its current thinking on the statute.

\textbf{B. DOJ Discretion in Choice of Procedure to Formulate Enforcement Policy}

Although there are a number of problematic issues related to the current enforcement regime, one particularly troubling aspect is how the Department announces its current enforcement policy. The DOJ communicates its FCPA antibribery provision enforcement policy in three principle ways: (1) through its choice of which enforcement actions it brings and the documents it makes public with respect to those resolution vehicles; (2) through interpretive guidance documents it has released from time to time; and (3) through its Opinion Procedure, a unique advisory opinion process by which companies can ask the DOJ whether prospective conduct would, in the Department's opinion, violate the antibribery

\textsuperscript{61} Koehler, \textit{supra} note 9, at 927.
\textsuperscript{62} Id. at 963-64.
provisions of the FCPA. Such an interpretive regime is inadequate and provides little reassurance that efforts to comply with the law will mean that the Department will not pursue enforcement action in situations where the company has made a good faith effort not to violate the antibribery provisions.

1. DOJ Enforcement Action Resolution Vehicles

Since corporate FCPA prosecutions hardly ever go to trial, the DOJ settles FCPA prosecutions through the DOJ’s array of enforcement action resolution vehicles. The DOJ has wide latitude over which resolution vehicle it will use in a particular matter. According to Professor Koehler, this agency discretion has created a “façade” of FCPA enforcement, whereby key parts of the antibribery provisions essentially mean whatever the DOJ says they mean. Furthermore, these resolution vehicles lack transparency because they are the product of “negotiations” between the DOJ and the entity being prosecuted.

The primary resolution vehicles the DOJ uses are: (1) Non-Prosecution Agreements (NPAs); (2) Deferred-Prosecution Agreements (DPAs); and (3) plea agreements. Although the nature of the terms of each agreement is ultimately unique and depend on the facts alleged, any of the three resolution vehicles may be accompanied by monetary penalties and agreements to undertake further remedial measures such as hiring an independent compliance monitor for an extended period.

The “Principles of Prosecution” section of the Attorney General’s Manual governs the Department’s use of these resolution vehicles. The Principles of Prosecution state that: “[i]n certain instances, it may be appropriate . . . to resolve a corporate criminal case by means other than indictment” and that NPAs and DPAs “occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”

63. See DOJ Layperson’s Guide, supra note 28, at 3; Koehler, supra note 9, at 927
64. Koehler, supra note 9, at 934.
65. Id. at 935.
66. Id. at 909.
67. Id.
68. Id.
70. Id.
other words, then, it would appear the DOJ uses NPAs and DPAs when it believes that a company should be prosecuted and punished, but not actually adjudicated guilty of the alleged offense.

There is little procedural protection available to those subject to these agreements unless the company formally contests the charges and submits to a criminal indictment. Indeed, the Principles of Prosecution state that the Principles "provide only internal [DOJ] guidance" and are not intended to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."71 As a former DOJ prosecutor explains, the government sees any sign of contesting the charge as "a reflection that the company's claimed contrition is not genuine."72

NPAs are not filed with a court and are not directly subject to judicial scrutiny or approval.73 Courts, therefore, generally do not review the statement of facts to determine if there is sufficient evidence to satisfy the elements of the antibribery provisions.74 Because a DPA is generally filed with a court, these agreements could theoretically be subject to judicial scrutiny. However, as Professor Koehler explains, a Government Accountability Office report found that judges generally do not provide much oversight with respect to these agreements.75 Furthermore, the factual allegations in the charging document filed with the court in a DPA are "often bare-bones and replete with legal conclusions."76

Finally, Professor Koehler explains that, although corporate pleas are subject to judicial scrutiny in theory, judges commonly "rubber stamp" the plea deal negotiated by the DOJ and a business entity.77 Even in cases where a company faces criminal conviction, it is still within its best interest not to attempt to assert any potentially valid legal defense. As the federal sentencing guidelines state,

71. Id.
73. Koehler, supra note 9, at 934, 937.
74. Id. at 935.
76. Koehler, supra note 9, at 934.
77 Id. at 939.
“affirmative acceptance of responsibility” is a consideration in sentencing.\textsuperscript{78} Thus, if a company were to contest the Department’s determination of law based on the facts before an adversarial tribunal, it would face a potentially more serious penalty for its audacity.

This is not to argue that every DPA, NPA or plea agreement does not state a legal claim against a particular defendant or that the DOJ is not justified in pursuing enforcement action against these companies. The primary flaw of these resolution vehicles is that there is no binding procedure on the government to take into account valid contentions, such as whether employees of a joint venture in which a state-owned entity has a minority stake qualify as “instrumentalities” for purposes of the antibribery provisions. Further judicial involvement in this process, as envisioned by the new UK Bribery Act, would help to add transparency to the settlement process and enable corporate defendants to put forth these counterpoints without fear of DOJ retribution.

2. DOJ Opinion Procedure

In response to a statutory mandate established by Congress pursuant to the 1988 amendments to the FCPA, the DOJ established the FCPA Opinion Procedure by issuance of the Opinion Procedure Regulations (OPR) in 1992.\textsuperscript{79} This Opinion Procedure was based upon the “FCPA Review Procedure” established by the Department in 1980 on its own initiative to “minimize the perception of uncertainty regarding the Act.”\textsuperscript{80}

The OPR added two procedural safeguards not envisioned in the procedure the DOJ established. First, Congress mandated that a favorable advisory opinion have the legal effect of creating a “rebuttable presumption” that the proposed conduct is in compliance with the antibribery provisions.\textsuperscript{81} Furthermore, Congress mandated that the DOJ does not have the discretion to refuse to review a request for an advisory opinion, as it did under

\textsuperscript{78} See U.S. Sentencing Guidelines Manual § 8C2.5(g) (2011).
\textsuperscript{79} 28 C.F.R. § 80 (1992).
\textsuperscript{80} DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 12-1 (1997).
the Review Procedure. The 1988 amendments also mandated that the DOJ issue an opinion within 30 days after a request is deemed complete. In contrast, the Department only had to make a "reasonable effort" to respond within thirty days under the Review Procedure.

These advisory opinions have covered a range of topics, from complex corporate transactions to somewhat more straightforward travel and entertainment expenditures rendered largely moot by the 1988 amendments. In 2008, the Deputy Chief for the Fraud Section of the DOJ touted the unique nature of the FCPA Opinion Procedure, remarking that in virtually no other enforcement area does the DOJ provide such opinions and emphasized that they are especially valuable for "more sophisticated questions." However, there is reluctance among the business community to use this procedure because of the "inquisitiveness, skepticism, and even aggressiveness that characterize a prosecutor's approach to circumstances that are often fraught with suspect ambiguity."

The OPR provide that the applicant is under an "affirmative obligation to make full and true disclosure with respect to the conduct" that is the subject of the request. The DOJ may request additional information within thirty days of the opinion request if it feels that the information originally provided was insufficient. This process may be repeated until the DOJ is satisfied with the information provided. Finally, the OPR provide that the DOJ has the power to conduct "whatever independent investigation it believes appropriate" in connection with the request, opening up the requestor and the business affiliates associated with the request to potential prosecutorial scrutiny in complex transactional

82. Id.
83. Id.
84. Id.
85. Id. at 12-4.
88. 28 C.F.R. § 80.6 (2006).
89. 28 C.F.R. § 80.7 (2006).
90. Id.
91. Id.
scenarios involving foreign privacy and anti-takeover laws.\footnote{92} Ultimately, this scrutiny and the DOJ's involvement may lead to a failed transaction or a criminal investigation into the prior dealings of the parties to the transaction.\footnote{93}

At the conclusion of the process, the DOJ issues its advisory opinion in writing.\footnote{94} Under the OPR, the Department also reserves the right, but is not obligated to, issue a public release describing "the identity of the requesting issuer or domestic concern, the identity of the foreign country in which the proposed conduct is to take place, the general nature and circumstances of the proposed conduct, and the action taken by the [DOJ] in response to the [request]."\footnote{95} The OPR provide that an advisory opinion issued to a party has no application to any party that does not join in the request.\footnote{96} As a result, others not party to the request may not rely on the opinion as establishing a rebuttable presumption that its conduct did not violate the FCPA.

As discussed in Part II, supra, the DOJ has used its Opinion Procedure to announce aggressive interpretive theories such as successor liability, but has refused to bind itself to the due diligence procedures outlined in that release as sufficient to prevent successor liability in other circumstances it deems to be factually distinguishable. Furthermore although the release purports to have no binding legal effect on conduct not specified in the release, the DOJ stated prospectively that it "discourages" bidders in hostile takeovers from entering into confidentiality agreements compliant with foreign takeover law.\footnote{97}

The OPR are subject to certain judicially-enforced procedural protections by virtue of the fact that the FCPA requires\footnote{98} that the procedure comply with the Administrative Procedure Act (APA).\footnote{99} However, in the case of the OPR, these procedural requirements are minimal and do very little to require the Department to conduct itself in a transparent manner when issuing the advisory opinions.

\footnote{92} See e.g., FCPA Opinion Procedure Release 2008-02, supra note 45.  
\footnote{93} WITTEN ET AL., supra note 87, at 11-3.  
\footnote{94} 28 C.F.R. § 80.9 (2006).  
\footnote{96} 28 C.F.R. § 80.11 (2006).  
\footnote{97} See DOJ Release 2008-02, supra note 45.  
\footnote{98} 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).  
\footnote{99} 5 U.S.C. § 500 et seq.
Where, as with the Opinion Procedure, Congress has specified that the APA is applicable in the organic statute, the APA provides that every agency "final disposition" is either a "rule" or an "order."\(^{100}\) Agency "orders" are somewhat ambiguously defined as "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking."\(^{101}\) Where, as with the issuance of the FCPA advisory opinion, the agency's action "imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process," the agency's action is considered "final."\(^{102}\)

Advisory opinions like the ones issued pursuant to the OPR "that constitute final and authoritative statements of position by the agencies to which Congress [has] entrusted the full task of administering and interpreting the underlying statutes" have been held by the D.C. Circuit to qualify as "orders" for purposes of the APA.\(^{103}\) Furthermore, the FCPA explicitly provides that the advisory opinions issued are subject to the APA's reviewability provisions.\(^{104}\) Consequently, the Department's decision to render a favorable determination resulting in a rebuttable presumption accorded to a party as a result of the Opinion Procedure is sufficient to render the issuance of the advisory opinion an "order" for purposes of the APA.

Although the APA refers to every process of producing an order as "adjudication," the degree of procedural restriction that the statute imposes on the agency with respect to the order depends largely on which portions of the APA Congress intended to impose on the agency. "The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules."\(^{105}\) Where the Due Process Clause is not implicated and an agency's governing statute contains no specific procedural mandates, the

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100. PETER STRAUSS, TODD RAKOFF, CYNTHIA FARINA & GILLIAN METZGER, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 51 (11th ed. 2011).
104. 15 U.S.C. §§ 78dd-1(e), 78-dd2(f) (the "procedure shall be subject to the provisions of chapter 7 of [the APA]").
APA establishes the maximum procedural requirements a reviewing court may impose on agencies. Adjudications required by the organic statute "to be determined on the record after opportunity for an agency hearing" are subject to a more extensive framework of trial-type evidentiary and recordkeeping requirements. However, the broad catch-all of "informal adjudication" (which the APA terms as "ancillary matters") is not subject to these requirements.

It is unclear exactly when the APA's formal adjudication provisions are triggered. Given, however, that the FCPA provides that the Attorney General is responsible for establishing the Opinion Procedure in its entirety without reference to any hearing, the formal adjudication provisions do not apply. There is no particular provision of the APA that governs the broad category of informal adjudication because the category of agency decisionmaking that qualified as informal adjudication was thought by the drafters to be too broad a category to encapsulate in a general statute.

Although particularly sparse and generally thought to be poorly drafted, the Supreme Court has held that the procedural requirements in section 555 entitled "Ancillary Matters" apply to informal adjudication. As applied to the Opinion Procedure, there is very little that guides the agency's hand procedurally in carrying out this informal adjudication other than arguably permitting a requestor to be represented by counsel and requiring the agency to give a "brief statement" for a denial. As a result, the Department has established a procedure whereby it is able to stall a transaction by asking for further information ad infinitum. Furthermore, the outcome of the procedure is the product of private negotiations between the DOJ and the requesting parties. Finally, the DOJ is not bound to explain its reasoning beyond making conclusory statements of new statutory interpretations like

109. STRAUSS ET AL., supra note 100, at 275.
111. STRAUSS ET AL., supra note 100, at 375.
112. Id.
114. 5 U.S.C. § 555.
successor liability.

The Supreme Court has held that prospective policy formulation through agency adjudication is acceptable, and that the choice between rulemaking and adjudication lies in the first instance with the agency’s discretion.\textsuperscript{115} This is especially so where the agency “has reason to proceed with caution, developing its standards in a case-by-case manner...”\textsuperscript{116} However, given the particular nonbinding and informal nature of the OPR advisory opinions, it is difficult to understand why the DOJ would make such an important interpretive decision in such a procedurally non-transparent manner.

3. Guidance Document

As discussed in Part I, the DOJ announced that it will be issuing “detailed” new guidance on the FCPA at the beginning of 2012\textsuperscript{117} for the first time since the law was enacted in 1977.\textsuperscript{118} As of the date of the publication of this Note, this guidance has not been issued. In any event, critics have argued that this new guidance document is likely not to be helpful for companies seeking to comply with the antibribery provisions because it will not bind the DOJ and will provide little supplemental interpretive guidance beyond what is already publicly available in the settlement documents or on the DOJ’s website.\textsuperscript{119}

Congress previously amended the FCPA to require the Department to determine through notice and comment whether this kind of guidance document would be useful in 1988 long before the current spike in enforcement activity.\textsuperscript{120} In the Department’s words, “[t]he [1988 amendments] directed the Attorney General to provide guidance concerning the [DOJ’s] enforcement policy with respect to the [FCPA] to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the

\begin{itemize}
\item \textsuperscript{116} Id. at 295.
\item \textsuperscript{117} U.S. DEP’T OF JUSTICE, Breuer speech, supra note 14.
\item \textsuperscript{120} Omnibus Trade and Competitiveness Act of 1988, supra note 81.
\end{itemize}
FCPA." After a statutorily mandated APA-compliant notice and comment period allowing for public participation, the DOJ declined to issue such guidance, citing its belief that it would be unnecessary. Since the uptick in enforcement, however, businesses have begun requesting that the Department release meaningful interpretive guidance and announce its enforcement policy in a more predictable and transparent way. Currently, the only guidance available is "limited to responses to requests under the [OPR] and to general explanations of compliance responsibilities and potential liabilities under the FCPA." In addition, the DOJ has issued a six-page brochure informally called the Lay Person's Guide that provides "general information" and is "not authoritative."

Part of the fatal flaw of the DOJ's current guidance document effort is that it is not governed by the APA's informal rulemaking procedure that requires the agency address the views of interested persons before issuing the guidance. In contrast, the 1988 amendments envisioned a process by which the DOJ would collaborate with a number of other administrative agencies, including the Department of Commerce, the United States Trade Representative, the State Department, the SEC and the Treasury Department. Additionally, the 1988 amendments envisioned the Department addressing the views of concerned parties from the business community to issue "guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the [DOJ's] present enforcement policy, the Attorney General determines would be in conformance with [the FCPA]." Furthermore, the 1988 amendments required that the DOJ issue "general precautionary procedures which domestic concerns may

122. 55 Fed. Reg. 28694-02 (July 12, 1990) ("Notice is given that the Attorney General has determined that no guidelines are necessary.").  
123. SIDLEY AUSTIN LLP, supra note 118.  
125. Id. ("This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.").  
127. Id.
use on a voluntary basis to conform their conduct to the [DOJ's] present enforcement policy regarding [the FCPA].

The 1988 amendments envisioned these "guidelines" and "procedures" to be issued pursuant to the APA's "informal rulemaking" process. This process, governed by APA section 553, requires that the agency issue public notice and request for comment in the Federal Register and then give "interested persons" an opportunity to participate in the policy formulation through submission of written data, views, or arguments. After considering the relevant matter presented, the agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose."

Furthermore, by implication of the APA's reviewability provisions, Congress intended the documents issued pursuant to the 1988 amendments' mandate to be binding on the agency. Ultimately, the 1988 amendments gave the DOJ the discretion to determine whether such guidelines were necessary. Because they had the discretion to do so, the DOJ determined after the statutorily mandated period of notice and comment that such procedures and guidelines were not necessary and declined to issue the guidance.

In contrast, now that the country's largest business lobbying group is advocating for statutory amendments to make the law more clear, the DOJ has decided to announce at a speaking engagement that it plans to issue a type of guidance document that is neither subject to Section 553 public participation requirements in its production nor binding on the agency after its issuance. This means that the DOJ, if it does issue the guidance document, does not have to respond to significant comments from those affected by the law. The DOJ is also free to change its mind and not issue the guidance document at all.

128. Id.
129. Id. ("The Attorney General shall issue the guidelines... in accordance with the provisions of [the APA]...").
130. 5 U.S.C. § 553.
131. Id.
132. 5 U.S.C. § 701 et seq.
IV. Comparison of the Administrative Regime
Under the UK Anti-Bribery Act 2010

On April 8, 2010, the UK Bribery Act 2010 was granted royal assent and came into force on July 1, 2011. Richard Alderman, head of the Serious Fraud Office (SFO), the UK’s anticorruption DOJ counterpart, recently explained that one of the major differences between the SFO’s administration of the Bribery Act and the DOJ’s administration of the FCPA is that the SFO has much less discretion in its enforcement policy formulation. For example, the SFO is not permitted to enter into resolution vehicles like deferred prosecution agreements and the judiciary has a much greater role in any antibribery prosecution. This includes judicial control in the assessment of penalties and approval of any settlement agreements. As Alderman said, “[j]udicial involvement whether in civil or criminal outcomes is very important. It ensures transparency in the system and leads to public confidence. The SFO would not envisage any change to judicial involvement in our cases.”

In addition to this judicial oversight, Section 9 of the Act provided that the UK Secretary of State “must publish guidance about procedures that relevant commercial organisations can put into place to prevent persons associated with them from bribing . . . .” In response, the Ministry of Justice published an extensive guidance document that was subject to a public notice and comment period that included circulating a draft “consultation paper” to interested parties and holding “open discussion events” to hear interested persons’ views. The guidance document responds publicly to the questions posed to it, explaining its decisionmaking procedures.
process in coming to a determination about the Ministry's "principles-based" approach to determining whether a company's compliance program meets sufficient standards to be eligible for the Act's "compliance defence."

It is not clear how the UK authorities' enforcement regime will look in the future, but Mr. Alderman has stated that the SFO is committed to transparency.141 Although the UK's foreign antibribery enforcement regime is in its infancy, the SFO and its coordinate agencies are off to a good start. Indeed, compared to the DOJ's consistent practice of choosing the least transparent means to formulate its enforcement policy, the relevant UK government entities have not shut out the judiciary from the enforcement phase or the public from the policy making process.

V. Conclusion

At every turn, the DOJ has made a conscious decision to use the most nontransparent procedural means possible to formulate its FCPA antibribery provision enforcement policy. At minimum, Congress should require the Department to explain its enforcement policy decisionmaking. It may well be that the DOJ has good explanations for its current enforcement policy, but the lack of transparency at the DOJ calls this into question. Those subject to the criminal antibribery provisions deserve more than conclusory statements that the DOJ opposes changes that would "weaken" the law. Considering the growing chorus of professional and scholarly criticism of the current pace of FCPA enforcement and the record criminal penalties the DOJ is assessing with little judicial supervision, Congress would do well to look across the Pond for guidance on how to make the DOJ's enforcement policy formulation more transparent.

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