

**Searle Civil Justice Institute**

**THE FOREIGN CORRUPT PRACTICES ACT:  
AN EMPIRICAL EXAMINATION OF ENFORCEMENT TRENDS**

PRELIMINARY REPORT

September 2012

**Law & Economics Center**

**George Mason University School of Law**

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\* Mike Koehler, Assistant Professor, Southern Illinois University School of Law, also provided substantial input for this report, especially with respect to the analysis concerning the “foreign official” and “obtain or retain business” issues, and measuring the impact of deferred-prosecution agreements and non-prosecution agreements on FCPA enforcement.

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***Background***

In the 1970s, congressional investigations revealed that many U.S. firms were making direct and indirect payments to foreign government officials to obtain business. Concerns about these activities culminated in December 1977 with the passage of the Foreign Corrupt Practices Act (FCPA),<sup>1</sup> making the U.S. the first country to prohibit payments to foreign government officials to secure a business advantage.

For most of the FCPA's existence, enforcement actions were rare. In recent years, however, the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) (collectively, "the Agencies") have markedly increased their enforcement of the FCPA.

Not surprisingly, the increase in FCPA enforcement activity has sparked a vibrant legal and policy debate. Because nearly all FCPA cases settle, a lack of judicial scrutiny of the Agencies' legal theories has caused some to worry that enforcement is no longer moored to congressional intent. Some interest groups have pressed Congress to reform the FCPA, leading to congressional hearings.

***Searle Civil Justice Institute Task Force on the Foreign Corrupt Practices Act***

To examine more closely the recent trends in FCPA enforcement activity, including potential causal factors and economic consequences, the SCJI created the Foreign Corrupt Practices Act Task Force (Task Force). This Preliminary Report is the first phase of a larger project aimed at providing empirical analysis to policymakers, judges, academics, and agency officials as they consider reforms to the FCPA and enforcement policies. The research conducted for this Preliminary Report was directed at two efforts:

1. Data collection on FCPA enforcement actions and outcomes since its inception; and
2. Identifying trends and potential drivers of changes in the nature and scope of FCPA enforcement.

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<sup>1</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o.).

## ***Data and Methodology***

This Preliminary Report provides a descriptive analysis of FCPA enforcement over time and examines the extent to which the character of FCPA enforcement has changed over time. Its focus is on the impact of FCPA enforcement on businesses. Accordingly, the unit of analysis is an FCPA enforcement action that implicates a specific firm, involving a specific course of conduct. The data include actions against individual officers or employees in instances where the Agencies did not charge the firm itself with an FCPA violation, because such actions are likely to have economic consequences for the firm involved. On the other hand, to avoid over-counting, FCPA actions related to wholly owned subsidiaries that have no separate economic identity are grouped together as part of the same enforcement action.<sup>2</sup>

## ***Key Findings***

- **FCPA enforcement has increased markedly in recent years.**

- Beginning in the early 2000s, there has been a pronounced upward trend in the number of FCPA actions brought by the Agencies.

*From the FCPA's passage through 2004, the DOJ and SEC initiated 55 cases. From 2005-2011, the Agencies initiated 113 cases.<sup>3</sup>*

- Financial penalties paid by businesses also have risen significantly in recent years.

*The average inflation-adjusted corporate penalty from 1978-2004 was \$5.4 million, compared to \$60 million from 2005-2011, a more than ten-fold increase.<sup>4</sup>*

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<sup>2</sup> For example, the separate DOJ and SEC enforcement actions that concerned the same underlying conduct against Siemens AG, Siemens Argentina, and Siemens Bangladesh (as well as related individual enforcement actions) are counted as one enforcement action.

<sup>3</sup> Some cases in the sample are related to the same underlying conduct, although they affect multiple distinct economic entities. For example, 17 cases come from the "Africa Sting," in which FBI agents posed as Gabonese government officials to solicit bribes. 21 cases involve the Iraqi oil-for-food corruption scandal, and 8 of those cases involve FCPA bribery conduct in addition to the oil-for-food scandal.

<sup>4</sup> Median penalties are substantially lower than average penalties for both periods, suggesting that the averages are heavily influenced by large penalties at the upper end of the distribution. The relative difference in median penalties between the two periods, however, is similar to that for averages (\$0.2 million for 1978-2004, and \$7.8 million for 2005-2011), which indicates that outliers are not driving the difference in averages.

- Enforcement against individuals has been on the rise too.

*From 1978-2004, the Agencies charged 136 people. From 2005-2011 the Agencies charged 145 people. This increase, however, may be an artifact of increased FCPA enforcement generally, rather than evidence of an increased focus on individuals.<sup>5</sup>*

- **Commentators have focused on the Fifth Circuit’s ruling in *United States v. Kay*,<sup>6</sup> and the uncertainty surrounding the scope of the term “foreign official,”<sup>7</sup> as key drivers of increased FCPA enforcement. The character of recent enforcement is consistent with these explanations.**

- The percentage of cases involving payments for a benefit other than government procurement contracts has almost doubled since 2004.

*Consistent with the ruling in Kay expanding the potential scope of FCPA enforcement, the percentage of cases involving payments to secure an economic advantage other than direct government business has risen from 24 percent during the 1978-2004 period, to 43 percent from 2005-2011 (54 percent excluding Africa Sting cases).<sup>8</sup>*

- The percentage of FCPA cases involving payments to non-traditional government officials also has almost doubled since 2004.

*Actions involving non-traditional government actors (e.g., employees of state-owned enterprises) comprise 31 percent of cases from 1978-2004, but 55 percent of cases from 2005-2011 (66 percent excluding Africa Sting cases).*

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<sup>5</sup> Enforcement *rates* against individuals, for example, have declined in recent years: from 1978-2004, the Agencies charged at least one individual in 80 percent of their cases, compared with only 48 percent of their cases from 2005-2011. Further, the Agencies charged an average of about 3 individuals per case from 1978-2004, compared to an average of about 1 person per case from 2005-2011.

<sup>6</sup> 738 F.3d 738, 749 (5th Cir. 2004).

<sup>7</sup> The lack of clarity in the term “foreign official” derives from its definition including officers, employees, and persons acting on behalf of “government instrumentalities.” Because the FCPA does not define “instrumentality,” and its meaning has not been subject to judicial interpretation, the scope of “instrumentality,” and thus “foreign official,” remains unclear.

<sup>8</sup> Enforcement actions that do not involve government procurement can involve, for example, obtaining a foreign license, permit or certification, or seeking a favorable business environment.

- **The percentage of cases involving foreign firms has risen sharply since the early 2000s.**

*From 1978-2004, 15 percent of FCPA actions involved foreign firms, compared to 29 percent from 2005-2011. One likely explanatory factor behind this rise is the 1998 Amendments to the FCPA, which gave the Agencies greater jurisdiction over non-U.S. entities.*

- **In late 2004, the DOJ began using deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to resolve corporate FCPA actions. Some have argued that the availability of these settlement vehicles may encourage the DOJ to pursue more cases than it otherwise would, thus contributing to the rise in FCPA enforcement.**

*Coinciding with the overall rise in FCPA enforcement, since 2004, the DOJ has resolved 75 percent of all corporate FCPA actions with either a DPA or an NPA. Given the available data, however, it is unclear whether DPAs and NPAs are merely substitute legal resolution mechanisms for actions that would have been brought, or alternatively, whether their use has contributed to the increase in FCPA enforcement.*

- **FCPA actions often concern business conduct in countries that are relatively more corrupt as measured by the Transparency International corruption index.**
- **The data do not suggest that U.S. involvement in foreign markets, as measured by real U.S. exports and real U.S. foreign aid, is a key driver of enhanced FCPA enforcement.**
- **The composition of industries, as well as the mix between public and private companies, subject to FCPA enforcement actions appears relatively constant over time.**

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