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FCPA ENFORCEMENT AND COMPLIANCE UNDER TRUMP[†]

*Thomas R. Fox**

A. FCPA Enforcement Going Forward

Donald Trump has gone on the record as saying the Foreign Corrupt Practices Act (FCPA) is a “horrible law and it should be changed” and that it puts US businesses at a “huge disadvantage.” This statement was made in the context of allegations of facilitation payments by Wal-Mart in Mexico which reached as high \$24,000. Yet, even President-Elect Trump realized the invidiousness of bribery and corruption in the international business context as, in the same interview, as he said that other countries should clean up the corruption which occurs in their countries. What does all of this and a Trump administration mean for FCPA enforcement and, more importantly, FCPA compliance going forward?

I think it unlikely that a Trump administration will change much in the way of FCPA enforcement for several reasons: some political, some practical, some legal and one optical. On the political side, the FCPA is a key component in the international fight against terrorism. The direct link between corruption and terrorism is not only well-founded but has, unfortunately, been demonstrated again and again. Even low level corruption in the form of facilitation payments, which are exempted out of the FCPA, have been seen to directly lead to terrorism in the form of porous borders. While I doubt that businessman Trump understood the link between terrorism and corruption, I am certain that President Trump will either learn about this link very quickly or will be told multiple times by his security advisors. With his emphasis on US security from terrorism, the

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Trump Administration will not want to be seen as softening the war on terrorism by even making things easier for the bad guys.

Peter Henning, writing the New York Times (NYT) Dealbook column in a piece entitled “How Trump’s Presidency Will Change the Justice Dept. and SEC,” wrote, “The roots of the government’s crackdown on overseas corruption can be traced to the administration of George W. Bush, and it was continued aggressively by President Obama. Many of the cases involve foreign companies that have paid millions of dollars in fines, and they are a way to show the public that global enterprises are being overseen to ensure compliance with American law.”¹ Currently seven of the top 10 places on the Top 10 FCPA enforcement actions of all-time are held by foreign domiciled entities.² It is certainly in the US interest to prosecute companies which play unfairly and cheat, through bribery and corruption, against American companies. With Trump’s protectionist sentiments translated into policies, continued vigorous enforcement of the FCPA is right in line with such a trade policy.

Top Ten
1. Seimens (Germany)
2. Alstom (France)
3. Halliburton (US)
4. BAE (UK)
5. Vimpelcom (Dutch)
6. Total (France)
7. Alcoa (US)
8. Snamprogetti/ENI (Italy)
9. Technip (France)
10. JGC Corp (Japan)

The practical reasons that FCPA enforcement will not significantly change under a Trump administration relate to the unique prosecution and enforcement model which was developed and has now been memorialized in the Department

¹ Peter J. Henning, *How Trump’s Presidency Will Change the Justice Dept. and S.E.C.*, NEW YORK TIMES (Dec. 10, 2016), http://www.nytimes.com/2016/11/10/business/dealbook/how-trumps-presidency-will-change-the-justice-dept-and-sec.html?_r=1.

² Richard L. Cassin, *Och-Ziff takes fourth spot on our new Top Ten list*, THE FCPA BLOG (Dec. 10, 2016), <http://www.fcablog.com/blog/2016/10/4/och-ziff-takes-fourth-spot-on-our-new-top-ten-list.html>.

of Justice's (DOJ) Yates Memo³ and the FCPA Pilot Program.⁴ Under the Yates Memo for companies to receive any cooperation credit they must investigate and turn over information on potential culpable individuals. Under the FCPA Pilot Program, companies can receive up to a 50% discount off the bottom end of the range of penalties under the US Sentencing Guidelines. However, in practice since the announcement of the Pilot Program in April several companies have received full declinations to prosecute for robust internal investigations, self-disclosure and effective remediation.

The bottom line is that the current FCPA enforcement model leads to companies doing the hard work of leading the investigations into FCPA violations and handing those investigations over to the DOJ. This self-sustaining model benefits both companies and the government and no one administration will likely overturn an enforcement model that is so efficient. The Yates Memo directs government prosecutors to focus on individuals so they will do so going forward. Moreover, companies no more want criminals working in their midst than the government wants companies to violate the law. This current model of FCPA investigation and enforcement then benefits both a business goal and legal goal. In other words, it is a business response to a legal problem.

Equally important is the self-funding mechanism to the DOJ's FCPA investigation convention. As companies bear the costs of these FCPA investigations, the government does not have incur these expenditures. When the inevitable budget cuts come to the DOJ, one area which will not be impacted is FCPA enforcement. Henning noted, "The benefit of how the foreign bribery cases are pursued is that the cost is borne by the private sector. Although prosecutors proclaim they do not necessarily accept the findings of the law firms hired to ferret out misconduct inside a company, there have been few cases in which the government committed significant resources to investigate on its own."⁵ Even if the DOJ budget and resources are reduced, the financing of FCPA investigations is borne by companies and this will continue. While the Fraud Unit, FCPA Section could have its staff cut, that would only slow down

³ Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing*, U.S. DEPARTMENT OF JUSTICE (Dec. 10, 2016), <https://www.justice.gov/dag/file/769036/download>.

⁴ *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, U.S. DEPARTMENT OF JUSTICE (Dec. 10, 2016), <https://www.justice.gov/opa/file/838386/download>.

⁵ Peter J. Henning, *How Trump's Presidency Will Change the Justice Dept. and S.E.C.*, NEW YORK TIMES (Dec. 10, 2016), http://www.nytimes.com/2016/11/10/business/dealbook/how-trumps-presidency-will-change-the-justice-dept-and-sec.html?_r=1.

resolutions from their current pace. No one wants that to occur, certainly not businesses and not even President Trump.

Finally, is the legal reason. The FCPA will celebrating its 40th anniversary in the same year President-Elect Trump takes his oath of office. There is no serious practitioner or commentator who has called for the repeal of the FCPA. Those who have called for its lessening have been debunked as those who simply want to lessen the effectiveness of the world's leading anti-corruption law. In short, there is no clarion call to repeal the FCPA.

President-Elect Trump cannot overturn the law via Presidential fiat, the law can only be overturned by full Congressional hearing and legislation. To do so would make clear the true intention of those seeking to repeal the FCPA; they want to allow US companies to engage in bribery and corruption. The problem with this argument is that US companies obtaining business through illegal actions is not in the interest of the US or in the interests of US business engaged in commerce outside the US and even a GOP Congress recognizes this clear fact.

Finally, there is the optics. As Peter Henning noted, "It is unlikely that Mr. Trump would want to be seen as going soft on corruption after some of his rhetoric during the campaign, so the Foreign Corrupt Practices Act is likely to remain a featured player in white-collar enforcement."

B. How FCPA Compliance Profits American Businesses

Next I to turn to the effectiveness of the FCPA in assisting American business interests outside the United States and making America great when companies are in compliance with the law. I also want to show how FCPA compliance puts forward a much wider variety of US interests to make America great again and again. I begin with a quote from the memoirs of former Secretary of Defense Robert Gates, entitled "Duty: Memoirs of a Secretary at War":⁶

In a private meeting, the king [King Abdullah of Saudi Arabia] committed to a \$60 billion weapons deal including the purchase of eighty-four F-15's, the upgrade of seventy-15s already in the Saudi air force, twenty-four Apache helicopters, and seventy-two Blackhawk helicopters. His ministers and generals had pressed him hard to buy either Russian or French fighters, but I think he suspected that was because some of the money would end up in their pockets. He wanted all the Saudi money to go toward military equipment, not into Swiss

⁶ ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY OF WAR (2015).

bank accounts, and thus he wanted to buy from us. The king explicitly told me saw the huge purchase as an investment in a long-term strategic relationship with the United States, linking our militaries for decades to come.

How many ways that the FCPA makes America great are contained in the above quotation? I can identify at least 5: (1) US security interests are made great; (2) US foreign policy interests are made great; (3) US military interests are made great; (4) US economic interests are made great; and (5) the American goal of the rule of law in international business transactions is made great; all by compliance with the FCPA.

Candidate Trump seemed to suggest that US security makes America great, which included the fight against terrorism. This fight against terrorism has many different tools and the FCPA as one of them. But this citation from former Secretary of Defense Gates clearly shows several other ways America is made great by compliance with the FCPA. If it had not been for the effective FCPA-based compliance programs of the US aerospace and armament industry, the Saudi Arabian ministers may have been able to advise the King to buy something other than American, which is clearly antithetical to American business interests. But because bribing such ministers would violate US law and put the US companies under potential legal liability, the King had confidence that the US companies were not bribing his ministers to get the Saudi business. Simply put, FCPA compliance means that governments which purchase goods and services from America will get the value of those goods and services and not some version cheapened because some of the sales price was used to pay bribes to government officials.

Why? Because paying a bribe to a foreign governmental official creates an instant conflict of interest (COI) between the person authorizing the purchase by putting his own self-interest in giving the business to a company that has bribed him for the business. There is a clear *conflict of interest* by the bribe receiver because they are being paid to make a decision to award the business to a company which lines their pockets. Or, in the case of the Saudi ministers that the Saudi King referred to, their collective Swiss bank accounts.

The FCPA is a supply side focused law. It criminalizes the conduct of the bribe-giver and not the bribe-receiver. But because of this fact it means that US companies that comply with the law can help foster the US interests that I listed above and perhaps others that I have not identified. So just as I believe that FCPA compliance helps in the fight against terrorism, I also believe that FCPA

compliance helps to foster US foreign policy, US economic interests and US legal interests.

This is most clearly seen in Houston, Texas, which is generally recognized as the epi-center of FCPA enforcement. There have been more FCPA enforcement actions against companies based in Houston than in any other single city in the world. This is largely because Houston is the self-proclaimed energy capital of the world but this profusion of FCPA enforcement has also led to companies in Houston having some of the most mature compliance programs and it has also led to quite a bit of FCPA knowledge throughout businesses in the city. Nonetheless, the key is the business response to the issue has been the creation, implementation and then the *doing* of compliance. Buy American and the FCPA helps ensure that you get the full value of what you paid for.

FCPA compliance can be expressed through the formulation articulated by Stephen Martin, “Five Elements of an Effective Compliance Program”; leadership, performing a risk assessment, instituting standards and controls, then providing training and communication on those standards and controls and, finally, oversight of your compliance program.⁷ While both McNulty and Martin have written and spoken extensively on these elements to flesh them out, these basic concepts are usually quickly and easily understood. Further, and perhaps not said as often as it should be said, companies that have a robust compliance program are usually better run companies because of the controls that are in place.

While the world is not free of US companies that run afoul of the FCPA, to paraphrase Dick Cassin, there is certainly more anti-corruption compliance going on in the world, FCPA compliance does serve many interests of the US. Gates’ passage above makes clear that the FCPA is doing what it was intended to do and much more. But of even greater significance is that the King of Saudi Arabia recognized the effectiveness in a business context. President-Elect Trump should immediately understand just how powerful the FCPA is in making America great.

C. Doing Compliance Improves Business Efficiency

The compliance community need to understand now that it is not the end of the world or even the end of compliance. While I am fairly certain that FCPA

⁷ Stephen Martin, *Five Elements of an Effective Compliance Program*, CORPORATE COMPLIANCE, (Dec. 10, 2016) http://corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2014/507_3.pdf.

enforcement will continue I have no doubt that the compliance profession will continue to grow but flourish. The reason is that good compliance is good business and any process which helps businesses to be more efficient and do business more profitably it is not going to diminish in size or importance.

Just as the song went through multiple reviews, versions and was recorded by several artists before it attained its now iconic status, the compliance profession has evolved as well. John MacKessy, writing in the Finance Professionals' Post, in a piece entitled "Knowledge of Good and Evil: A Brief History of Compliance", noted that the FCPA and Environmental Protection Act (EPA) "prompted companies to develop internal resources that would actively monitor compliance with the laws, rules, and regulations of their industries."⁸ The next step in the evolution of the compliance profession was the defense procurement scandals from the 1980s, where the industries sales of "\$400 hammers and \$600 toilet seats" to the US government led to the Defense Industry Initiative (DII). This industry led initiative created "a set of principles endorsing ethical business practices and conduct" within the defense industry for its dealings with the US government.

The next step in the evolution of the compliance profession was the 1992 US Sentencing Guidelines which, for the first time, set out what the government would consider for credit in sentencing of organizations. Many tribute these 1992 Sentencing Guidelines for the creation of the modern compliance profession. These guidelines included credit for "the specific elements of an effective compliance and ethics program. Companies that embarked on such programs would be eligible for more lenient sentences. To qualify as "effective," a company's compliance program would not only have to establish standards and procedures to prevent and detect criminal conduct, but would have to actively promote a culture encouraging ethical conduct and compliance with the law. The emendation of those guidelines in 2004 reflected the need for corporate boards to demonstrate knowledge of compliance programs and fulfillment of oversight responsibilities as part of monitoring the effectiveness of companies' compliance and ethics programs."

The next major step was the financial accounting frauds and scandals of the late 1990s and early 2000s including Enron, WorldCom and Tyco. These scandals were so wide-ranging, with senior executive participation, if not

⁸ John MacKessy, *Knowledge of Good and Evil: A Brief History of Compliance*, THE FINANCE PROFESSIONAL'S POST (Dec. 10, 2016), <http://post.nyssa.org/nyssa-news/2010/05/a-brief-history-of-compliance.html>.

directing of the corporate fraud that a new legislative response was required and this response was the passage of the Sarbanes-Oxley Act of 2001 (SOX). Aaron Einhorn, writing in the *Denver Journal of International Law & Policy*, in an article entitled “The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code”⁹, said, “sections 302 and 404 of SOX together require corporate executives to state their responsibility for designing internal controls, to create such controls, to assess and evaluate these controls, and to draw conclusions about their effectiveness. . .” SOX specifically charges executive officers with internal controls duties.” Einhorn ends this section by noting, “internal controls have been transformed from a recitation of general duties lodged upon the corporation as a whole to a statement of specific duties imposed on corporate executives in particular.” This strengthened the compliance professional who was called upon to design these internal controls.

The next major legislation which enhanced the compliance function was the Dodd-Frank Act of 2010, passed in response to the 2008 financial crisis. MacKessy pointed to the downfalls of Bear Stearns and Lehman Brothers as drivers of more compliance because they both “demonstrated the degree to which external risk events can create a loss of confidence resulting in permanent reputational damage and impaired shareholder value.” The legal and legislative response has been that companies should design effective compliance programs which use risk based programs as a basis to design, create and implement effective compliance programs. Joe Howell,¹⁰ Executive Vice President (EVP) for Workiva Inc., has gone further, drawing a straight line from the FCPA to SOX to Dodd-Frank in the development of the compliance function.

All of this means compliance is not going away, no matter what the law enforcement priorities of the new administration. Companies understand that compliance and business ethics have a role in not only driving business strategies and initiatives but that more compliant companies are better run companies and at the end of the day more profitable because they have better controls. MacKessy ends his piece by stating the compliance programs “can provide multiple rewards—from risk mitigation, to reputational enhancement, to business strategy development.”

⁹ Aaron Einhorn, *The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 DENVER J. INT’L. & POL’Y 525 (2007).

¹⁰ Thomas R. Fox, *Joe Howell On The PCAOB, Audits And Compliance – Part I*, FCPA COMPLIANCE & ETHICS (Dec. 10, 2016), <http://fcpacompliance.com/2016/05/joe-howell-pcaob-audits-compliance-part/>.

The compliance profession is where the magic happens in a corporation. Whether it be specific tasks of making sales, vetting relationships or the spade work of creating policies and procedures, it is compliance that drives the discussion of how we should do business. The corporate compliance profession fulfills the business obligation in doing things the right way for, at the end, it will be the compliance profession which implements the requirements of compliance whether those requirements are anti-corruption laws such as the FCPA, the UK Bribery Act, Anti-Money Laundering (AML), export control, anti-trust regulations, or any other regulation that you can name. Equally importantly, the compliance profession is teaching corporations how to evaluate risks and the compliance profession leads that discussion. It is the compliance profession that is the most innovative in not only protecting corporations, but actually helping corporations do business, do business more efficiently, and do business more profitably.

All of this shows compliance has developed over many years and for many reasons. None of this is going away.

D. Doing Compliance Increase Return on Equity

Now I want to focus on the most bottom line of all business reasons, that being that compliance is good for business profitability. This is made clear each year, when Ethisphere announces the companies that are on the list of the World's Most Ethical Companies. The key thing about this list is not that they are more ethical, it is that they have put financial and compliance controls in place to make them run. And, because they are better run, they perform better on average than the S&P 500 for each year. Companies are on this list because they have robust finance internal controls that include compliance internal controls. Robust internal controls around compliance do not slow you down but allow you to go faster and move more safely into high-risk countries.

This was aptly proven by Paul M. Healy and George Serafeim, in a paper they issued in the *Accounting Review*, entitled "An Analysis of Firms' Self-Reported Anticorruption Efforts."¹¹ In this paper, the authors looked at the issue of not simply profitability of companies, which had more robust anti-corruption compliance programs, but also what was the direct effect on their return on equity (ROE) in countries that were perceived to have a high incidence of corruption, under the Transparency International - Corruption Perceptions Index

¹¹ Paul M. Healy and George Serafeim, *An Analysis of Firms' Self-Reported Anticorruption Efforts*, 91 *The Accountability Review* 489–511 (2016).

(TI-CPI). Although the piece was very math heavy, it yielded some very interesting results.

The first finding was that companies with good governance tended to have more robust compliance programs. The authors noted, “Managers of firms with independent and engaged board oversight may take anticorruption laws and enforcement seriously and adopt/enforce policies to deter corruption.” Conversely, they noted, “some investors, boards, and managers may jointly view corruption as an unavoidable cost of doing business in certain parts of the world, yet engage in cheap talk in an effort to reduce regulatory costs.” This good governance was more than simply tone at the top. It was also measured by board independence and board oversight of a company’s compliance program.

Not surprisingly, in countries where there is a low risk for corruption, there was not much difference in the sales growth for companies with robust anti-corruption compliance programs and those businesses feature in the authors’ “cheap talk” category. However, when it came to growth in countries that had a high propensity of corruption, there was a dramatic difference.

While it was laid out in table form, the authors’ explained, “Using the across-firm segment classification, the estimates imply that for the median sample company, a 10 percent increase in sales in low corruption geographic segments increases ROE by 17 basis points ($0.10 * 1.738$), whereas a 10 percent increase in sales in high corruption segments decreases ROE by 7 basis points ($0.10 * 0.733$). Using the within firm geographic segment classification, the estimates imply that a 10 percent increase in sales in low corruption geographic segments increases ROE by 14 basis points, whereas a comparable sales increase in high corruption segments decreases ROE by 10 basis points. Therefore, the effect on company ROE from increasing sales in high versus low corruption segments is -24 basis points.”

So, translating that into a language for the lawyer or compliance practitioner, it means there is a negative relation between investments and a company’s return on that investment in high countries where the company did not have an effective compliance program. This is true even in the face of increased sales growth. For firms that had as high as 10% growth in high-risk countries, if they did not have a robust compliance program in place, the negative ROE was between 24 to 30%. As the authors stated, “for firms with high residual anticorruption ratings and sales growth in corrupt geographic segments is positive and significant . . . Firms with high residual ratings that grow sales in high corruption geographic segments, therefore, do so without lowering their ROE”.

Having been raised in an academic household, when quantitative types say the following, “The magnitudes of the estimated coefficients are economically interesting”; it is a HUGE deal. These findings are equally large and important for the compliance profession going forward. First, the authors demonstrate companies with more robust compliance programs are from countries that have more robust enforcement and monitoring by government authorities and regulators. Second, the more robust your compliance program is the lower your sales growth may be but the higher your overall return in a high-risk country will be going forward. Finally, even if a company sustains high sales growth in a high-risk country, if it does not have a robust compliance program, the sales will drop off dramatically and may well lead to negative ROE.

If you are worried that the Trump administration will gut compliance, I would point you and any such person to this paper. The evidence documented in this paper and the authors conclusions not only prove that *doing compliance* does not hurt business; they prove that it makes companies more profitable. I have long advocated that compliance programs are business solutions to legal problems. Ethisphere has demonstrated year after year, that companies which are actually *doing compliance* are more profitable on average than S&P 500 companies. Now Healy and Serafeim have done the research to show that companies, which are domiciled in countries which have robust anti-corruption laws in place and which have robust compliance programs, obtain a higher ROE.

The bottom line is that compliance is good for business. That is another reason that compliance is not going away.

E. Doing Compliance Improves Business Processes

A final reason that the compliance profession is not going away under a Trump administration is driven by the business response to the legal requirements of laws such as the FCPA. But more than simply the business response, it is the evolution of compliance programs from both the business and legal enforcement perspective. Just as compliance programs sprang up, grew and began to evolve and mature in the middle of the last decade; the sophistication of the regulators has also increased. This is most clearly seen this in the appointment of the DOJ Compliance Counsel, Hui Chen.

With her initial public remarks, in November 2015, at the New York University Program on Corporate Compliance and Enforcement,¹² Chen provided insight into how she would consider the effectiveness of a compliance program. Her key point was companies should operationalize their compliance program by tying it to functional disciplines within your company. This means that Human Resources (HR), Payment, Audit, Vendor Management and similar corporate disciplines should be involved in the operation of your compliance program in their respective areas of influence. Then in April 2016 under the remediation prong, with the initiation of the DOJ Pilot Program around FCPA enforcement, the DOJ once again emphasized the operationalization of a company's compliance program as a key metric in determining benefits under the program. You must actually be *doing* compliance going forward.

This evolution in the DOJ's thinking and its sophistication of compliance program analysis is in clear response to how the market initially responded to the requirement to have a compliance program back in the 2004-time frame. More recently, each Deferred Prosecution Agreement (DPA), in Schedule C under the details of a *best practices* compliance program, has required the company to take "into account relevant developments in the field and evolving international and industry standards" in upgrading their compliance program. This requirement has led companies to keep abreast of best practices and continually evolve their compliance program forward. The DOJ in turn, has upped its game and now requires companies to operationalize compliance.

Compliance is a service within your organization, yet under the operationalized model, compliance is a profit generator for a business. Just as law departments generate business by doing transactions, compliance can be viewed as delivering services not only to the business unit but also third parties with whom the company does business. This means not only traditional transaction partners such as sales agents, representatives and distributors but also joint venture (JV) partners, teaming partners and others. Compliance can deliver compliance related services to these third parties as a profit center.

Doing compliance means doing business. There are multiple types of risks in a business; operational, regulatory and reputational, just to name a few. The effort to measure and then manage each of these risks can be led by the compliance function. The more efficiently these risks are measured (i.e. assessed) the more easily and efficiently these risks can be managed. This means

¹² NYU School of Law, *Roundtable Discussion with Andrew Weissmann and Hui Chen*, YOUTUBE (Dec. 10, 2016), <https://www.youtube.com/watch?v=pRTGZmmbc5o>.

that the business is not faced with a binary 1/0 or Go/No Go decision on risk but if compliance moved into measuring and the managing risk through the operationalization of compliance into the business unit; the process would help you to do business more efficiently and with greater profitability.

Compliance is a platform to make your company not only a better run organization but can also demonstrate the thoughtfulness and effectiveness of your compliance program should a regulator ever come knocking. This is because if you operationalize compliance into the fabric of your organization, compliance internal controls will touch every aspect of the employment experience in a way that is not obtrusive and will not slow down what you are trying to achieve.

Take compliance as a platform in HR. At every point in talent management, HR can insert compliance into the cycle. Those points include the pre-employment interview and screening, the interview process with progressively higher senior management, the initial on-boarding process, the quarterly, semi-annual or annual performance review, annual bonus review, assessment and award, promotions and even exiting of an employee. The platform of compliance can record each of these touch points and you now have an internal control burned into HR which is a compliance internal control. Further, if there is any attempt to circumvent or over-ride one of these HR internal controls involving the hiring of a son or daughter of a foreign governmental official, a red flag can be raised and sent to the compliance function for further review.

This point was made abundantly clear in the recent JP Morgan Chase FCPA enforcement action¹³ around the company's "Sons and Daughters Hiring Program" which targeted hiring family members of prominent Chinese government officials in order to obtain business from these same government officials. If HR had a program in place to identify family members under scrutiny, it would have allowed the company to consider such hires even in a potential high risk environment. Moreover, any hiring program which makes exceptions to all the hiring of family members who are not otherwise qualified; demonstrate behaviors which violate company policy or whose work performance is substandard is antithetical to the business interests of an organization.

¹³ *JP Morgan Securities (Asia Pacific) Limited Criminal Investigation*, U.S. DEPT. OF JUSTICE (Dec. 10, 2016), <https://www.justice.gov/opa/press-release/file/911206/download>.

Compliance is a marketing platform. Some attention has been paid to the use of compliance as a recruiting and hiring tool for millennials. One of the facts of their generation is they want to work at companies which are seen to be doing business ethically, all the while making money. Moreover, as Ethisphere demonstrates annually with its World's Most Ethical Company awards, businesses which win those awards, on average, exceed the New York Stock Exchange (NYSE) blue chip average for profitability. It will be interesting to see the results of ISO 37001 certification on financial profitability.

Compliance embraces public advocacy. The Volkswagen (VW) emissions-testing scandal is one of the largest corporate scandals of the past few years. One thing that makes the VW scandal so unique is that it is one of the few scandals where a company's actions were so transgressive they damaged the reputations of its competitors. As a response to the VW scandal, Ulrich Grillo, President of the German industry association BDI, recognized that compliance is the answer. He urged companies to check their management processes, including compliance and control systems. He suggested one of the key questions to ask should be "Are we doing everything right?" When you have the President of a national industrial association saying compliance is the answer, you need to sit up and take notice.

As we move from the legal based model of compliance to the more mature understandings that compliance may best well be thought of as a business process, we begin to see how compliance can fit seamlessly into a business. This integration will allow a business to move more nimbly and with greater acumen. Compliance has been driven largely by legal requirements. The enactment of the FCPA in 1977, the implementation of the 1992 US Sentencing Guidelines, the passage of Sarbanes-Oxley (SOX) in 2002 and Dodd-Frank in 2010 have all led to development and innovation in compliance. Now the DOJ is moving the bar again by talking about the operationalization of compliance and this development will continue to advance the corporate compliance function. When the regulators come to recognize and indeed advocate the business application of a legal solution, that solution will not go away but will continue to grow.

F. Conclusion

The US Foreign Corrupt Practices Act has been shown to be the world's leading tool in the fight against bribery and corruption. Any US company doing business outside the US is subject to the FCPA and must have an effective compliance program to be in compliance with the law. Yet this same law also

protects US companies overseas in variety of ways, such as providing clear protections that US companies do business ethically and without resorting to bribery and corruption. The law also fosters US foreign policy, economic and legal interests abroad.

Moreover, companies have long recognized that complying with anti-corruption laws increases profitability through more rigorous internal controls. Compliance internal controls are essentially financial internal controls and the more rigorous your internal controls, typically the more efficient and more profitable a company will be going forward. So in addition to furthering a plethora of US policy interests, FCPA enforcement has helped to make companies run better. Businesses have embraced compliance for not only themselves but requiring the same of those they do business with in the Supply Chain and sales side.

For these reasons and perhaps others, FCPA enforcement and the compliance profession should not be eviscerated by the incoming administration as it is not in either the US government's nor US business's interest to do so.