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A COMMON LANGUAGE TO REMEDY DISTORTED FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT STATISTICS

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Abstract

The Foreign Corrupt Practices Act ("FCPA") has emerged during the past decade as a niche practice area for lawyers, accountants, and other compliance professionals. At present, however, the FCPA's conversational waters are muddied because this niche practice area (often referred to as FCPA Inc.) lacks a lingua franca, or common language. Rather, various FCPA Inc. participants have adopted creative and haphazard counting methods that infect the quality and reliability of FCPA enforcement and

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related statistics of interest to many in the legal and business communities.

To clear up the FCPA conversation, this Article proposes an FCPA common language regarding the basic issue of what is an FCPA enforcement action. The FCPA common language proposed will improve the quality and reliability of FCPA statistics and thus allow a more cogent conversation to take place regarding FCPA issues.

I. INTRODUCTION

The Foreign Corrupt Practices Act ("FCPA") has emerged during the past decade as a niche practice area for lawyers, accountants, and other compliance professionals (hereinafter "FCPA Inc.").[1] At present, however, the FCPA's conversational waters are muddied because FCPA Inc. lacks a lingua franca, or common language. To paraphrase a famous movie line: "What we've got here is failure to communicate."[2] Indeed, various FCPA Inc. participants have adopted creative and haphazard counting methods that infect the quality and reliability of FCPA enforcement and related statistics of interest to many in this new era of FCPA enforcement.

This Article clears up the muddy conversational waters by proposing an FCPA common language that will improve the quality and reliability of FCPA statistics. Prior to diving into FCPA specifics, Part I of this Article highlights the general purpose and importance of a common language. In short, a common language has a binding effect on defined groups and facilitates the efficient and effective communication of knowledge and information. Part II of this Article demonstrates the need for an FCPA common language by: (i) discussing the emergence of FCPA Inc.; (ii) demonstrating through visual and other evidence the current lack of a common language in this niche industry; and (iii) highlighting the many negative effects resulting from the lack of an FCPA common language. To clear up the FCPA conversation, Part III of this Article proposes an FCPA common language regarding the basic issue of what is an FCPA enforcement action.

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1. The author coined the term "FCPA Inc." in April 2010. *Mike Koehler Takes on FCPA Inc*, CORP. CRIME REP. (Apr. 12, 2010), http://www.corporatecrimereporter.com/fcpainc041210.htm. While perhaps viewed by some as a derogatory term, it is not intended to be. Rather, as detailed in Part II, FCPA Inc. is a shorthand term used to describe a vibrant, niche industry consisting of numerous market participants, not just lawyers.

2. COOL HAND LUKE (Jalem Productions 1967).

The FCPA common language proposed in this Article will improve the quality and reliability of FCPA statistics and thus allow a more cogent conversation to take place regarding FCPA issues.

II. THE PURPOSE AND IMPORTANCE OF A COMMON LANGUAGE

Throughout human history, language has brought people together and allowed information and knowledge to be efficiently and effectively communicated and understood by many. Conversely, throughout human history, the lack of a common language has divided people, caused confusion, and prevented information and knowledge from being effectively and efficiently communicated and understood by many.

A common language is important not only for the development of a civil society and interpersonal relationships with others, but also to members of specific professions. Indeed, the term lingua franca—or common language—was first used during the Middle Ages and largely developed to facilitate trade and commercial relationships between people of different native languages.[3] Since then, the development of a common language among members of specific professions or pursuits (such as various skilled trades, healthcare, sports, religion, and politics) has facilitated effective and efficient communication of knowledge and information.[4] Indeed, the establishment and acceptance of a common language is a sign of maturity in many professions.[5]

For instance, the practice of law is often guided by a common language. Indeed, many of the struggles of first-year law students center on learning the unique language of the law and the various terms of art that define the profession. Yet, once learned, this common language binds an entire profession and facilitates effective and efficient communication and understanding of topics across generations and backgrounds.

Just as the general practice of law is often guided by a common language, so too are specific legal practices. For instance, Delaware law has become a common language for corporate practitioners,[6] and

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3. *See* Amanda Briney, *Lingua Franca: An Overview of Lingua Franca, Pidgins, and Creole*, http://geography.about.com/od/culturalgeography/a/linguafranca.htm (last visited Feb. 10, 2016).

4. *See* Kimberly Tyson, *The Importance of Developing a Common Language*, DR. KIMBERLY'S LITERACY BLOG (Apr. 10, 2013), http://www.learningunlimitedllc.com/2013/04/common-language/.

5. *See* Meridel I. Gatterman, *Separated by a Common Language: Its Time to Develop Chiropractic Nomenclature*, DYNAMIC CHIROPRACTIC, http://www.dynamicchiropractic.com/mpacms/dc/article.php?id=40373 (last visited Feb. 10, 2016).

6. *See* Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 893 (2014) (advancing and testing "a

"Incoterms" (international commercial terms) "have become an essential part of the daily language of trade," providing a common language for lawyers advising clients in connection with international business transactions.[7]

However, just as the lack of a common language can divide people, cause confusion, and prevent effective and efficient communication of information and knowledge, the lack of a common language can also create confusion in specific legal practices. The lack of a common language in a specific legal practice is particularly problematic as various recipients of legal information—from clients and potential clients, to policymakers, to the media and civil society participants—likely assume that the legal practice is bound by a common language.

Specific legal practices are not immune from the negative effects resulting from the lack of a common language. For instance, Professor Kyle Graham has chronicled the increased use of the term "overcharging" in the criminal law enforcement context to describe the behavior of criminal prosecutors.[8] However, as Professor Graham notes, many commentators who have used the term "either have failed to explain precisely what they mean by 'overcharging,' or have used the same word to describe different types of charging practices."[9]

As detailed more fully below, similar deficiencies infect most conversations regarding FCPA enforcement statistics.

III. THE NEED FOR AN FCPA COMMON LANGUAGE

Prior to proposing an FCPA common language, this Part first highlights the need for an FCPA common language. The ability of a common language to bind a specific industry assumes, of course, a specific industry in need of binding actually exists. Thus, this Part first highlights the emergence and existence of a niche industry known as FCPA Inc. Next, this Part demonstrates through visual and other evidence the current lack of a common language in FCPA Inc. and explores reasons for the lack of a common language—including the business incentives FCPA Inc. participants have in adopting creative

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lingua franca explanation for a firm's decision to domicile in Delaware rather than in its home state" and demonstrating that a firm "will choose Delaware to provide in-state and out-of-state investors a legal language that all can speak").

7. *The Incoterms® Rules*, INT'L CHAMBER OF COM., http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules (last visited Feb. 10, 2016).

8. *See generally* Kyle Graham, Commentary, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014).

9. *Id.* at 702.

counting methods that yield high FCPA enforcement statistics, yet paint an inaccurate and unreliable portrait of FCPA enforcement. Finally, this Part highlights the many negative and wide-ranging effects resulting from the lack of a common FCPA language.

A. The Emergence of FCPA Inc.

The FCPA was enacted in 1977, however it has only been in the last decade that the FCPA has become a defined niche practice for lawyers, accountants, and other compliance professionals. For instance, a visit to the website of nearly all national law firms will reveal FCPA practice groups, whether titled "FCPA and International Anti-Corruption"[10] or "Anti-Corruption and Foreign Corrupt Practices Act"[11] or sub-practice groups within practice groups such as "Compliance and Enforcement"[12] or "White Collar Defense and Investigations."[13] Emblematic of the emergence of this niche practice, and how FCPA enforcement and compliance impact business organizations across a broad spectrum, regional law firms have also established FCPA practice groups,[14] as have boutique law firms[15] and solo legal practitioners.[16] Regarding the FCPA practice, it has been noted that there are "newcomers all clamoring for FCPA . . . business," some of whom "discover they can spell FCPA and it's suddenly on their resume."[17]

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10. *FCPA & International Anti-Corruption*, MILLER & CHEVALIER CHARTERED, http://www.millerchevalier.com/OurPractices/International/FCPAInternationalAntiCorruption (last visited Feb. 10, 2016).

11. *Anti-Corruption & Foreign Corrupt Practices Act (FCPA)*, SHEARMAN & STERLING LLP, http://www.shearman.com/en/services/practices/anticorruption--foreign-corrupt-practices-act-fcpa (last visited Feb. 10, 2016).

12. *Compliance and Enforcement*, WILLKIE FARR & GALLAGHER LLP, http://www.willkie.com/services/practices/litigation/compliance-enforcement (last visited Feb. 10, 2016).

13. *White Collar Defense and Investigation*, GIBSON, DUNN & CRUTCHER LLP, http://www.gibsondunn.com/practices/pages/BCI_FCPA.aspx (last visited Feb. 10, 2016).

14. *E.g.*, *FCPA & International Anti-Corruption Overview*, TAFT STETTINIUS & HOLLISTER LLP, http://www.taftlaw.com/practices/86-fcpa-and-international-anti-corruption (last visited Feb. 10, 2016); *Foreign Corrupt Practices Act (FCPA)*, WALLER LANSDEN DORTCH & DAVIS, LLP, http://www.wallerlaw.com/Services/Government-Investigations-and-White-Collar-Defense/Foreign-Corrupt-Practices-Act-FCPA (last visited Feb. 10, 2016).

15. *E.g.*, *The FCPA Boutique Law Firm*, STEINMAN & RODGERS LLP, http://steinmanrodgers.com/ (last visited Feb. 10, 2016); *Our Services*, VOLKOV L. GROUP, http://www.volkovlaw.com/our-services/ (last visited Feb. 10, 2016).

16. *E.g.*, *FCPA Anti-Corruption Compliance*, ADVANCED COMPLIANCE SOLUTIONS, http://www.advancedcompliancesol.com/services/fcpa-anti-corruption-compliance/ (last visited Feb. 10, 2016).

17. Sue Reisinger, *TRACE Launches World's First Accreditation Program for FCPA Compliance*, CORP. COUNS. (Feb. 4, 2011), http://www.corpcounsel.com/id=1202480253168?

It is not just law firms that are clamoring for FCPA business. Largely a function of the FCPA's books and records and internal controls provisions, the national accounting firms[18] and many regional accounting firms also have vibrant FCPA practices.[19] In addition, compliance and consulting firms,[20] analytics firms,[21] conference firms,[22] training firms,[23] news websites,[24] and insurance companies[25] are all selling FCPA-related products—information or services. Indeed, it has been noted:

> It is getting pretty crowded these days out in the Anti-Corruption Compliance space. There are more and more companies, consultants, software providers and other entities offering to provide the right mix of information and data needed to support a due diligence review of a third-party, joint venture partner or acquisition target. These companies, consultants and investigators are at the infancy of this new and sophisticated industry. Just look on the Internet for information and you will be overwhelmed.[26]

FCPA Inc. is also a very lucrative industry. For instance, a *Washington Post* article titled "Cashing In on Corruption" observed:

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keywords=trace+fcpa&publication=CC+Corporate+Counsel (quoting Alexandra Wrage, TRACE President).

18. *E.g.*, *Corporate Compliance, FCPA and UK Bribery Act*, EY, http://www.ey.com/SK/en/Services/Assurance/Fraud-Investigation---Dispute-Services/Corporate-compliance--FCPA-and-UK-Bribery-Act (last visited Feb. 10, 2016); *Understand the Foreign Corrupt Practices Act*, PWC, http://www.pwc.com/us/ en/forensic-services/fcpa.jhtml (last visited Feb. 10, 2016).

19. *E.g.*, *Monitoring FCPA Compliance*, GRANT THORNTON LLP (Jan. 2, 2013), http://www.grantthornton.com/issues/library/case-studies/advisory/2013/BAS-case-study-2013-third-party-integrity.aspx.

20. *E.g.*, RED FLAG GROUP, https://www.redflaggroup.com/ (last visited Feb. 10, 2016).

21. *E.g.*, *Don't Get Bitten by the FCPA*, ACL, http://marketing.acl.com/cp/20140108-ACL-FCPA-eBook.aspx?utm_source=ACL.com&utm_medium=Banner&utm_campaign=ACL-FCPA-eBook (last visited Feb. 10, 2016).

22. *E.g.*, *Anti-Corruption/FCPA*, AM. CONF. INST., http://www.americanconference.com/anticor_fcpa (last visited Feb. 10, 2016).

23. *E.g.*, *Anti-Corruption/FCPA*, CLICK 4 COMPLIANCE, http://www.click4compliance.com/courses-demos/anti-corruption-fcpa (last visited Feb. 10, 2016).

24. *E.g.*, *Just Anti-Corruption*, GLOBAL INVESTIGATIONS REV., http://globalinvestigationsreview.com/justanticorruption (last visited Feb. 10, 2016).

25. *E.g.*, *Financial and Professional Liability*, MARSH & MCLENNAN COMPANIES, http://usa.marsh.com/ProductsServices/MarshSolutions/ID/5042/Insurance-Coverage-for-FCPA-Investigation-Costs.aspx (last visited Feb. 10, 2016).

26. Michael Volkov, *The First Step in Any Due Diligence Inquiry*, VOLKOV L. GROUP (Dec. 13, 2011), http://blog.volkovlaw.com/2011/12/the-first-step-in-any-due-diligence-inquiry/.

"FCPA business is booming, a welcome growth area for Washington law offices . . . . [S]haring in the bonanza[are] accounting firms, forensic computer specialists and a growing army of compliance consultants."[27]

A *Newsweek* article titled "Going After Graft" noted:

> With prosecutions likely to continue—the FBI has doubled the number of agents tasked to FCPA cases—business is responding in kind. Law firms are competing for top FCPA talent, banks financing international deals are insisting on anti-bribery stipulations in contracts, and a new cottage industry of experts has emerged, offering country-by-country advice on gifts and local laws.[28]

A *Forbes* article titled "The Bribery Racket" observed that this new era of FCPA enforcement is "good business for law firms," "good business for accounting firms," and "good business for consulting firms, [and] the media."[29]

A *Wall Street Journal* article titled "FCPA Inc: The Business of Bribery" observed that the FCPA is "one of the few sort of crown-jewel practices right now."[30] Indeed, the former chief of the DOJ's Fraud section stated: "If you get two of these [FCPA investigations] a year as a partner, you're pretty much set."[31]

The emergence and rapid rise of FCPA Inc. caused the *Wall Street Journal* to ask whether the FCPA is "[j]ust a [f]ull-[e]mployment [a]ct for the [p]rivate [b]ar?"[32] Even the judiciary has noticed the rise of FCPA Inc. For instance, in sentencing an FCPA individual defendant, a judge noted: "I know it's a growth industry, isn't it, the Foreign Corrupt Practices Act? It's keeping a lot of white collar lawyers busy; is that fair?"[33]

The rapid emergence of this niche industry has largely resulted from the general increase in FCPA enforcement. In recent years, FCPA

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27. Steven Pearlstein, *Cashing In on Corruption*, WASH. POST, Apr. 25, 2008, at D01.

28. Andrew Bast, *Going After Graft*, NEWSWEEK, Nov. 1, 2010, at 8.

29. Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010, 12:00 AM), http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html.

30. Joe Palazzolo, *FCPA Inc: The Business of Bribery—Corruption Probes Are Profit Center for Big Law Firms*, WALL ST. J., Oct. 2, 2012, at B1.

31. *Id.*

32. Ashby Jones, *Is the FCPA Just a Full-Employment Act for the Private Bar?*, WALL ST. J.: L. BLOG (May 7, 2010, 6:08 PM), http://blogs.wsj.com/law/2010/05/07/the-fcpa-little-more-than-a-full-employment-act-for-the-private-bar/.

33. Richard L. Cassin, *'It's a Growth Industry, Isn't It?,'* FCPA BLOG (Jan. 12, 2012, 9:00 AM), http://www.fcpablog.com/blog/2012/1/12/its-a-growth-industry-isnt-it.html.

enforcement has become a top priority of the U.S. government. Indeed, of the nearly nine hundred federal statutes the DOJ Criminal Division enforces, the FCPA is one of the DOJ's "top priorities," and the DOJ has stated that its "focus and resolve in the FCPA area will not abate."[34] The DOJ has a specific FCPA Unit, and in 2010 declared "a new era of FCPA enforcement," emphasizing that "we are here to stay."[35] Likewise, in 2010 the SEC, which also enforces the FCPA as to publicly traded companies and associated persons, created a specialized FCPA Unit—one of only five specialized units at the SEC—and declared that the FCPA would be a "vital part" of its overall enforcement program.[36] The SEC stated that the FCPA Unit would "be more proactive in [its] enforcement of the FCPA," including through "targeted sweeps and sector-wide investigations."[37]

While this general increase in FCPA enforcement has several practical, as well as provocative, reasons that are beyond the scope of this Article,[38] it is undisputed that many market participants are active players in the vibrant, niche industry appropriately called FCPA Inc. In short, FCPA Inc. is a mature industry, yet as highlighted in the next Section, this industry lacks a sign of maturity—a common language—typically found in other mature industries.

As discussed in the next Section, this lack of a common language muddies the waters of many FCPA conversations in this new era.

B. The Current Lack of a Common FCPA Language

This Section demonstrates through visual and other evidence the current lack of a common FCPA language regarding the basic issue of what is an FCPA enforcement action.

It has been said that a picture is worth a thousand words. Thus, rather than write 4000 words explaining the current lack of a common

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34. Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Criminal Div., Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf.

35. Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Criminal Div., Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt.

36. Cheryl J. Scarboro, Chief of the Foreign Corrupt Practices Act Unit, U.S. Sec. & Exch. Comm'n, Remarks at the News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), http://www.sec.gov/news/speech/2010/spch011310newsconf.htm.

37. *Id.*

38. *See generally A Debate Regarding the General Upward Trend of FCPA Enforcement Actions*, FCPA PROFESSOR (Feb. 27, 2014), http://www.fcpaprofessor.com/upwardtrend.

FCPA language, this Section begins with four figures which, taken together, provide visual proof of the current lack of a common language. Each of the four figures below were included in law firm client alerts or publications during the first quarter of 2014.

Figure 1[39]

2005		2006		2007	
DOJ	SEC	DOJ	SEC	DOJ	SEC
7	5	7	8	18	20

2008		2009		2010	
DOJ	SEC	DOJ	SEC	DOJ	SEC
20	13	26	14	48	26

2011		2012		2013	
DOJ	SEC	DOJ	SEC	DOJ	SEC
23	25	13	12	15	12

39. Stuart M. Altman & Natalie T. Sinicrope, *Foreign Corrupt Practices Act: 2013 in Review*, *in* GLOBAL BRIBERY AND CORRUPTION REVIEW 2013, at 4 (Stuart M. Altman & Michael Roberts eds., 2013), http://viewer.zmags.com/publication/71f81362#/71f81362/6.

Figure 2[40]

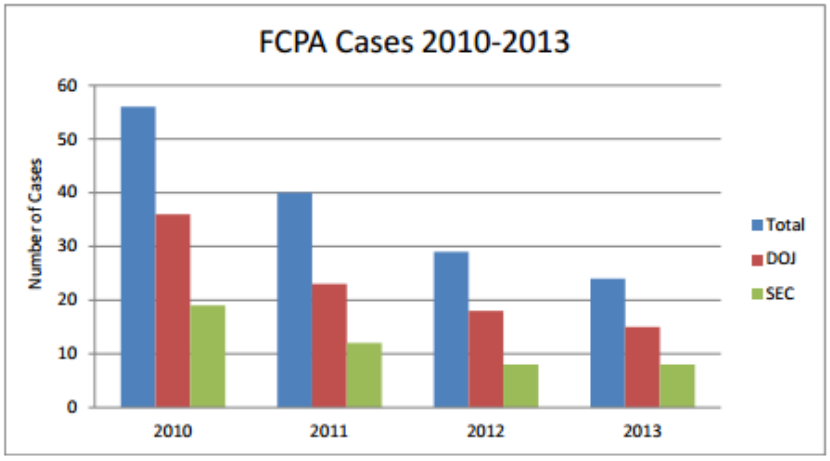
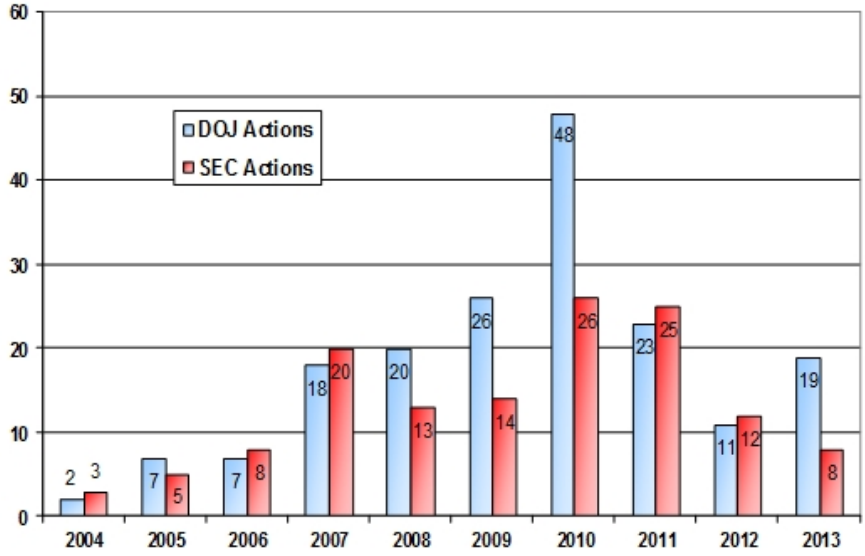


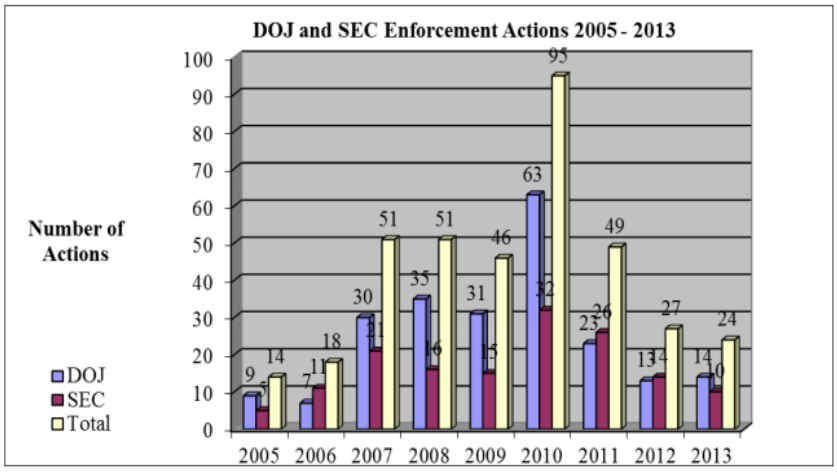
Figure 3[41]



40. BAKERHOSTETLER LLP, 2013 YEAR-END FOREIGN CORRUPT PRACTICES ACT UPDATE 1 (2014), http://www.bakerlaw.com/files/uploads/Documents/FCPA/Web-2013FCPAYearEnd.pdf.

41. *2013 Year-End FCPA Update*, GIBSON DUNN & CRUTCHER LLP 2 (2014), http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf.

Figure 4[42]



As demonstrated by the above figures, there are substantial differences in how even sophisticated FCPA Inc. participants answer the seemingly basic question: how many FCPA enforcement actions were there in any particular year?

For example:

- Figure 1 suggests twenty-seven FCPA enforcement actions in 2013 (fifteen DOJ actions and twelve SEC actions);
- Figure 2 suggests less than twenty-seven FCPA enforcement actions in 2013, including less than ten SEC actions;
- Figure 3, similar to Figure 1, suggests twenty-seven FCPA enforcement actions in 2013, but in contrast to Figure 1, suggests nineteen DOJ actions and eight SEC actions; and
- Figure 4 suggests twenty-four FCPA enforcement actions in 2013.

42. *Global Anti-Bribery Year-in-Review: 2013 Developments and Predictions for 2014*, WILMER CUTLER PICKERING HALE & DORR LLP 2 (2014), http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/FCPA%20YIR%20Alert_02%2004%2014.pdf.

While the above differences may seem minor, in certain years there are vast differences in FCPA Inc. enforcement action statistics. The most dramatic example concerns 2010 FCPA enforcement:

- Figure 1 suggests seventy-four FCPA enforcement actions (forty-eight DOJ actions and twenty-six SEC actions);
- Figure 2 suggests approximately fifty-five FCPA enforcement actions;
- Figure 3, consistent with Figure 1, suggests seventy-four FCPA enforcement actions; and
- Figure 4 suggests ninety-five FCPA enforcement actions (sixty-three DOJ actions and thirty-two SEC actions).

The current lack of a common FCPA language manifests itself not only visually but also in the narrative FCPA Inc. participants disseminate regarding enforcement statistics. So profound is the current lack of an FCPA common language, FCPA Inc. participants are unable to agree on another seemingly basic question: whether FCPA enforcement is up or down in any given year compared to prior years.

For instance:

- One FCPA Inc. publication stated: "The number of cases commenced under the FCPA by the DOJ and the SEC [in 2013] was slightly above pace from the previous year, providing evidence of the agencies' continued commitment to aggressive pursuit of FCPA cases."[43]

- Another FCPA Inc. publication stated: "The overall number of [FCPA] enforcement actions undertaken by the Department of Justice ('DOJ') and Securities and Exchange Commission ('SEC') [in 2013] declined for the fourth straight year . . . , but the DOJ is nonetheless actively investigating over 150 cases and the SEC over 100."[44]

- Another FCPA Inc. publication stated: "Overall enforcement totals for 2013 nearly matched the record numbers of previous years, and the DOJ and SEC have both indicated that enforcement efforts are only likely to

43. Altman & Sinicrope, *supra* note 39, at 3.
44. BAKERHOSTETLER LLP, *supra* note 40, at 1.

> get even more aggressive as the agencies pour more resources into FCPA investigations."[45]

- Another FCPA Inc. publication stated:

> Last year, we noted that 2012 had been "a fairly slow time" in terms of corporate enforcement actions, with twelve enforcement actions against corporations. 2013 was slower still, with only nine corporate enforcement actions. . . .
>
> . . . .
>
> In 2013, the government brought nine enforcement actions against corporations[—] . . . the lowest number in the past seven years, which had seen annual totals averaging thirteen cases per year since 2007. . . . The regulators, for their part, have swept aside any suggestions of waning enforcement, stating that both the DOJ and the SEC have a substantial pipeline of FCPA cases awaiting announcement.[46]

The above figures and narratives make clear that FCPA Inc. currently lacks a common language regarding the basic issue of what constitutes an FCPA enforcement action.

C. Reasons for the Lack of a Common FCPA Language

The next issue explored is what accounts for the divergent FCPA Inc. enforcement statistics. To state the obvious, the divergent statistics are the result of different counting methods by FCPA Inc. participants.

As highlighted below, a common thread in such counting methods is the discretionary choices by FCPA Inc. participants that play off various aspects of FCPA enforcement, such as: (i) the dual, and often overlapping, nature of FCPA enforcement between the DOJ and the SEC; (ii) the creative ways in which the enforcement agencies often resolve corporate FCPA enforcements; and (iii) the fact that certain corporate FCPA enforcement actions may also result in related individual enforcement actions.

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45. MAYER BROWN, FCPA UPDATE: YEAR-END 2013, at 1 (2014), http://www.mayerbrown.com/files/Publication/5d5ded07-f423-4416-8be8-f4fb9fa60d5b/Presentation/PublicationAttachment/0d1466e7-26a7-4583-ab1c-f73762e2eba6/UPDATE_FCPA_Update_2013_End-of-Year.pdf.

46. SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2–3 (2014), http://www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf.

While each factor is discussed separately below, the divergent statistics can be summarized by noting, as highlighted in greater detail in Part III of this Article, that most FCPA Inc. participants fail to follow the "core" approach to FCPA enforcement statistics, a commonly accepted approach to tracking enforcement statistics in other areas, as well as an approach endorsed by the DOJ in the FCPA context. In analyzing the discretionary choices of most FCPA Inc. participants in presenting FCPA enforcement statistics, it must be acknowledged that FCPA Inc. participants have business incentives to adopt creative counting methods that yield high FCPA enforcement statistics.

Prior to highlighting the creative and haphazard counting methods of many FCPA Inc. participants, it is important to understand how the FCPA is a law much broader than its name suggests.

1. The FCPA Is a Law Much Broader than Its Name Suggests

The FCPA has always been a law much broader than its name suggests. As its name suggests, the FCPA includes so-called "anti-bribery provisions," which generally prohibit the corrupt offering or promising of anything of value to a foreign official to obtain or retain business.[47]

However, what is *not* suggested by the name of the FCPA is that the law also contains so-called books, records, and internal controls provisions that are some of the most generic statutory provisions one will ever find. The provisions generally require that issuers shall: (i) maintain books and records, which, in reasonable detail, accurately and fairly reflect transactions and the disposition of assets (the books and records provisions) and (ii) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized, recorded, and accounted for (the internal controls provisions).[48]

The reason such generic statutory provisions are included in the FCPA is that during Congress's investigation and consideration of the so-called foreign corporate payments problem in the 1970s, congressional leaders were surprised to learn that existing corporate record-keeping and internal controls requirements were deficient in preventing the discovered payments.[49] Thus, the books and records and internal controls

47. *See* 15 U.S.C. § 78dd-1 (2012).

48. *Id.* § 78m(b)(2)(A)–(B). Issuers are companies—domestic and foreign—with shares registered on a U.S. exchange or otherwise required to make filings with the SEC. *See id.* § 78c(8).

49. *See generally Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities & Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. (1976).

provisions were intended to operate in tandem with the FCPA's more notable anti-bribery provisions. In most instances of issuer FCPA anti-bribery violations, the alleged improper payments are likely to be misrecorded somewhere on the issuer's books and records, and the enforcement agencies often take the position that such payments occurred because of insufficient internal controls.

However, not all FCPA books and records and internal controls violations involve *foreign bribery*. Indeed, because of the generic way in which the books and records and internal controls provisions are written, most "FCPA" enforcement actions do not involve allegations regarding *foreign conduct* and/or *bribery*. A DOJ enforcement action against FalconStor Software is an instructive example. In the enforcement action, the DOJ alleged that the company conspired to pay bribes to United States bank executives to obtain electronic storage licensing contracts.[50] FalconStor was also charged with conspiring to falsify its corporate books and records to cover up the bribery scheme.[51] According to the DOJ, "[t]he bribes, including the grants of the stock options and restricted shares, were recognized in FalconStor's books and records, but were falsely recorded as 'compensation to an advisor' or as 'employment bonuses.'"[52] An SEC enforcement action against Gold Standard Mining is an example of an FCPA enforcement action not involving *bribery*. In the enforcement action, the SEC alleged that the company "filed numerous reports about its purported Russian gold mining operations that were materially false and misleading."[53] Among other things, the SEC alleged that the company: "failed to devise and maintain a system of internal accounting controls"; "did not have a means to verify the amount of gold produced"; "did not have a means to determine the costs of producing the gold that was sold"; and "did not maintain records of inventory."[54]

Numerous other examples of so-called "non-FCPA FCPA enforcement actions" (i.e., enforcement actions that result in books and records and/or internal controls violations but do not include allegations of *foreign bribery*) could also be cited. Indeed, according to one estimate, there have

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50. Press Release, U.S. Attorney's Office, E. Dist. of N.Y., Long Island-based FalconStor Software Inc. Charged with Conspiring to Bribe J.P. Morgan Chase Executives and Related Securities Violations (June 27, 2012), http://www.justice.gov/archive/usao/nye/pr/2012/2012jun27.html.

51. *Id.*

52. *Id.*

53. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Gold Standard Mining Corp. and Others for False and Misleading Statements Concerning Russian Gold Mining Operations (July 3, 2012), https://www.sec.gov/litigation/litreleases/2012/lr22408.htm.

54. Complaint at 24, SEC v. Gold Standard Mining Corp., No. CV12-5662-PA(CWX) (C.D. Cal. June 29, 2012), 2012 WL 11896293.

been approximately 1200 "non-FCPA FCPA enforcement actions" since the FCPA's enactment in 1977.[55]

Further compounding the difficulty of tracking FCPA enforcement statistics is the fact that many corporate enforcement actions alleging *foreign bribery* technically only charge FCPA books, records, and internal controls violations—not violations of the FCPA's anti-bribery provisions. The reasons can be varied. For instance, the FCPA's anti-bribery provisions contain more exacting elements, including "corrupt" intent, compared to the generic books, records, and internal controls provisions.[56] In addition, anti-bribery charges can have wider-ranging collateral and reputational effects on a company (such as debarment from government contracting in the United States and elsewhere) compared to books and records and internal controls charges.[57] Thus, when exercising its discretion—as well as its leverage over business organizations—and/or to reward voluntary disclosure and/or cooperation, the enforcement agencies often allege facts clearly implicating the FCPA's anti-bribery provisions but may elect to resolve the matter by "only" charging books and records and internal controls violations.

Among the numerous examples which could be cited are recent FCPA enforcement actions against Stryker Corporation and Philips Electronics.

In the Stryker action, the SEC found:

> Stryker made approximately $2.2 million in unlawful payments to various government employees including public health care professionals (collectively, the "foreign officials") in Mexico, Poland, Romania, Argentina, and Greece. Stryker incorrectly described these expenses in the company's books and records as legitimate consulting and service contracts, travel expenses, charitable donations, or commissions, when in fact the payments were improperly made by Stryker to obtain or retain business.[58]

Likewise, in the Philips Electronics action, the SEC found:

> Philips has participated in public tenders to sell medical equipment to Polish healthcare facilities [and] . . . in at least 30 transactions, employees of Philips Poland made improper payments to public officials of Polish healthcare facilities to

55. SEARLE CIVIL JUSTICE INST., THE FOREIGN CORRUPT PRACTICES ACT: AN EMPIRICAL EXAMINATION OF ENFORCEMENT TRENDS 24 (2012).

56. *Compare* 15 U.S.C. § 78dd-1 (2012), *with id.* § 78m(b).

57. *See* 48 C.F.R. § 9.406-2 (2015).

58. Stryker Corp., Exchange Act Release No. 70751, 2013 WL 5757376 (Oct. 24, 2013).

> increase the likelihood that public tenders for the sale of medical equipment would be awarded to Philips.[59]

Notwithstanding its own findings, in both enforcement actions, the SEC found *only* violations of the FCPA's books and records and internal controls provisions and specifically cited the companies' voluntary disclosure and/or cooperation.[60]

Because of this common resolution dynamic, it would be improper to entirely exclude from FCPA enforcement statistics actions that only charge or reference books and records and internal controls violations.[61] Rather, as explained in Part III in more detail, enforcement actions charging or referencing books and records and internal controls violations should be included in FCPA enforcement statistics to the extent the underlying allegations concern foreign bribery. A suitable guidepost in this regard is whether an enforcement action is included on the DOJ or SEC website of FCPA enforcement matters.[62]

In short, the FCPA is a law much broader than its name suggests, and there are several non-substantive factors which often impact the actual charges in an FCPA enforcement action. While the above issues are important in terms of a proper understanding of the FCPA and its enforcement, such issues are not a significant factor contributing to divergent FCPA enforcement statistics.

Indeed, most FCPA Inc. participants are consistent in not including "non-FCPA FCPA enforcement actions" in FCPA enforcement statistics. Likewise, it is entirely proper to include books and records and internal controls only enforcement actions to the extent the underlying conduct concerns *foreign bribery*. Rather, the divergence in FCPA enforcement statistics is the result of discretionary choices by FCPA Inc. participants that play off various aspects of FCPA enforcement.

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59. Koninklijke Philips Elecs. N.V., Exchange Act Release No. 69327, 2013 WL 1384548 (Apr. 5, 2013).

60. *Id.*; Stryker Corp., Exchange Act Release No. 70751, *supra* note 58.

61. The term "charge or reference" is used because, as explained in Part III in more detail, many corporate FCPA enforcement actions are resolved via non-prosecution agreements (resolution vehicles which technically do not "charge" any violations), deferred prosecution agreements (resolution vehicles which technically charge FCPA violations but "defer" actual prosecution of those charges), or SEC administrative cease and desist orders (resolution vehicles which technically do not "charge" any violations).

62. *Related Enforcement Actions*, U.S. DEP'T JUST., http://www.justice.gov/criminal-fraud/related-enforcement-actions (last updated June 24, 2015); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified Oct. 5, 2015).

2. Discretionary Choices by FCPA Inc. Participants that Play Off Various Aspects of FCPA Enforcement and Yield High Enforcement Statistics

The main factor contributing to divergent FCPA enforcement statistics is the result of discretionary choices by FCPA Inc. participants that play off various aspects of FCPA enforcement. These aspects include the dual and often overlapping nature of FCPA enforcement between the DOJ and the SEC; the creative ways in which the DOJ often resolves corporate FCPA enforcements; and the fact that certain corporate FCPA enforcement actions may also result in related individual enforcement actions by the DOJ and/or the SEC. As highlighted below, many FCPA Inc. participants exploit such aspects of FCPA enforcement by adopting creative counting methods that yield high enforcement statistics, yet paint an inaccurate and unreliable portrait of FCPA enforcement.

Prior to discussing the various creative counting methods used by many FCPA Inc. participants, it must first be acknowledged that FCPA Inc. participants may have business incentives in adopting creative counting methods that yield high FCPA enforcement statistics. FCPA Inc. participants "sell" FCPA investigative and compliance services or related products and, to state the obvious, doing so against a backdrop of higher FCPA enforcement statistics is more desirable compared to lower FCPA enforcement statistics. For instance, the FCPA Inc. publications previously discussed all used words such as "active," "aggressive," and "substantial" in forecasting the future of FCPA enforcement activity.[63]

Highlighting the business incentives FCPA Inc. participants may have in presenting inflated FCPA enforcement statistics is likely to be viewed by some as provocative. However, it is no more provocative than highlighting the business incentives the oil industry has in suggesting that car owners change their oil every 3000 miles (even though the owner's manual for the vehicle suggests otherwise) or the business incentives the radar detection industry has in presenting speeding statistics.

Indeed, a candid FCPA commentator observed under the heading "Scare the Crap out of Them" as follows:

> Our dirty little secret, if this could rightly be called that, is that we practitioners vastly overstate the risk that the FCPA brings to companies. . . .
>
> . . . .

63. *See* sources cited *supra* notes 43–46 and accompanying text.

> . . . [T]he degree to which the industry that has popped up around the FCPA has an inherent interest in puffing up the underlying risk creates at the least an apparent bias. We all feed off it: risk equals fear equals action equals money for consultants, lawyers, compliance people (in the form of jobs, resources, and budgets), training suppliers, and everyone down the line. It's not a flattering equation.[64]

In short, recognizing the business incentives FCPA Inc. participants may have in presenting FCPA enforcement statistics is important to having an informed and sophisticated understanding of FCPA enforcement statistics as well as the urgent need for a common FCPA language.

a. The Dual and Often Overlapping Nature of the FCPA

The first creative counting method used by many FCPA Inc. participants is to exploit the dual and often overlapping nature of FCPA enforcement. The main reason that both the DOJ and the SEC have enforcement authority of certain FCPA violations is largely historical. Congressional deliberation and consideration of what would become the FCPA occurred in the aftermath of Watergate, and key congressional leaders distrusted the DOJ to enforce a politically sensitive law like the FCPA. For instance, Senator William Proxmire stated during a congressional hearing on what would become the FCPA:

> If we learned anything in the Watergate affair, we learned that the Department of Justice is not a department we can always rely on, especially when you have top influential corporate officials that are involved. They have a good record in some areas. They prosecute the hoodlums. They haven't got such a good record on white-collar crime.[65]

The above concern, combined with the fact that the SEC was the government agency most involved in discovery and investigation of the

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64. Howard M. Sklar, *Scare the Crap out of Them*, OPEN AIR BLOG (Nov. 28, 2011), https://openairblog.wordpress.com/2011/11/28/scare-the-crap-out-of-them/.

65. *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 15 (1976) (statement of Sen. William Proxmire, Chairman, S. Comm. on Banking, Hous. & Urban Affairs).

so-called foreign corporate payments problem, resulted in the FCPA having dual enforcers (the DOJ and the SEC) in certain instances.[66]

Given this overlap in enforcement, most FCPA enforcement actions against issuers (whether charging or referencing anti-bribery violations, books and records violations, internal controls violations, or some combination thereof) involve *both* a DOJ and an SEC enforcement action based on the *same* core allegations and announced on the *same* day. This overlap is best demonstrated in Figure 5, which lists all FCPA enforcement actions against issuers in 2013 and notes whether each action included a DOJ and/or SEC component.

Figure 5

Company	DOJ Component	SEC Component
Archer Daniels Midland[67]	X	X
Weatherford International[68]	X	X
Stryker[69]		X
Diebold[70]	X	X

66. As a general matter, the DOJ has criminal jurisdiction over "issuers," (i.e., foreign and domestic companies with shares registered on a U.S. exchange or otherwise required to make filings with the SEC); "domestic concerns," (i.e., any business entity with a principal place of business in the United States or organized under U.S. law and by U.S. citizens); and foreign companies and persons to the extent that a bribery scheme involved conduct "while in the territory of the United States." Generally, the SEC has civil jurisdiction only over "issuers" and associated persons and generally does not have jurisdiction over private companies or foreign companies that are not issuers.

67. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), http://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Archer-Daniels-Midland Company with FCPA Violations (Dec. 20, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139.

68. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), http://www.justice.gov/opa/pr/three-subsidiaries-weatherford-international-limited-agree-plead-guilty-fcpa-and-export; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694.

69. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262.

70. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), http://www.justice.gov/opa/pr/diebold-incorporated-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-252; Press Release, U.S.

Total[71]	X	X
Ralph Lauren[72]	X	X
Parker Drilling[73]	X	X
Philips Electronics[74]		X

As highlighted above, eight issuers resolved FCPA enforcement actions in 2013 and seventy-five percent of the actions involved both a DOJ and SEC component because of the dual and overlapping nature of FCPA enforcement.[75]

Sec. & Exch. Comm'n, SEC Charges Diebold with FCPA Violations (Oct. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273.

71. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006.

72. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty (Apr. 22, 2013), http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay; Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780.

73. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company (Apr. 16, 2013), http://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-current-and-former-executives-french-power-company; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Parker Drilling Company with Violating the Foreign Corrupt Practices Act (Apr. 16, 2013), http://www.sec.gov/litigation/litreleases/2013/lr22672.htm.

74. Koninklijke Philips Elecs. N.V., Exchange Act Release No. 69327, *supra* note 59.

75. As indicated in Figure 5, the overlap between the DOJ and the SEC's FCPA enforcement programs is not present in all enforcement actions. A reason why the SEC may bring an enforcement action against an issuer, but not the DOJ, is that the DOJ, as a criminal law enforcement agency, theoretically has a higher burden of proof in a criminal action compared to the SEC in a civil action. In addition, the DOJ has stated that it "has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence." CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 75 (2012) [hereinafter FCPA GUIDE]. Based on information in the FCPA Guide, it appears that factors motivating a so-called declination include voluntary disclosure and cooperation, effective remedial measures, and small improper payments. *Id.* at 77–79. In addition, the DOJ has separately stated that it has declined prosecutions when, among other things, "[a] single employee, and no other employee, was involved in the provision of improper payments" at issue, and "[t]he improper payments involved minimal funds compared to the overall business revenues." Letter from Ronald Welch, Assistant Attorney Gen., U.S. Dep't of Justice, to Sandy Adams, U.S. Congresswoman (Aug. 3, 2011) (on file with author).

However, most FCPA Inc. participants count, for instance, on a company level, the Archer Daniels Midland action as two enforcement actions instead of one core enforcement action. Similarly, most FCPA Inc. participants count, in the aggregate, the information in Figure 5 as evidencing fourteen enforcement actions instead of eight core enforcement actions. This counting method, observable not just in 2013 but in previous years as well, exploits the dual and often overlapping nature of FCPA enforcement to achieve higher FCPA enforcement statistics and thus significantly distorts FCPA enforcement statistics.

b. The Creative Ways in Which the DOJ Often Resolves Corporate FCPA Enforcement Actions

The second creative counting method used by many FCPA Inc. participants to achieve higher FCPA enforcement statistics is to exploit the creative ways in which the DOJ often resolves corporate FCPA enforcement actions.

One might think that the DOJ enforces criminal laws such as the FCPA by following the facts where the facts lead and by charging responsible corporate entities regardless of collateral consequences. Indeed, article 5 of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), to which the United States is a party, specifically states:

> **Enforcement**
>
> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[76]

Despite pledging allegiance to other aspects of the OECD Convention, the DOJ frequently breaches the letter and spirit of article 5 in many corporate FCPA enforcement actions by considering the identity of the

76. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 5, Dec. 17, 1997, 37 I.L.M. 1 (1998).

legal person (i.e., corporate entity involved) when deciding how to resolve an FCPA enforcement action.[77]

In this new era of FCPA enforcement, the overwhelming majority of corporate FCPA enforcements are the result of private negotiations between the DOJ and the company as to various aspects of the enforcement action, including what entity within the corporate hierarchy will take ultimate responsibility for the alleged conduct at issue. A former high-ranking DOJ FCPA enforcement attorney explained that the process often begins in reverse where the DOJ and the company agree on the end result (i.e., which corporate entity will accept responsibility) and then the negotiating parties work backwards to craft a resolution document that will be acceptable to both parties.[78]

Indeed, the "sausage making" metaphor[79] rightly applies to certain DOJ corporate FCPA enforcement actions as the alleged conduct at issue is "sliced and diced" in a way to yield resolution documents that avoid the potential collateral consequence of debarment from government contracting, both in the United States and elsewhere, as well as other negative collateral consequences.[80]

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77. *Picking and Choosing?*, FCPA PROFESSOR (Feb. 1, 2011), http://www.fcpaprofessor.com/picking-and-choosing.

78. This is informed by private conversation between the author and a former high-ranking DOJ FCPA enforcement attorney and further informed by the author's approximate decade-long FCPA practice career during which he negotiated resolutions to corporate FCPA enforcement actions.

79. The phrase, "[i]f you like laws and sausages, you should never watch either one being made," is attributed to former German Chancellor, Otto von Bismarck. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 190 (Suey Platt ed. 1989).

80. As stated in the DOJ/SEC-issued FCPA Guidance:

> In addition to the criminal and civil penalties . . . companies who violate the FCPA may face significant collateral consequences, including suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.
>
> . . . .
>
> Under federal guidelines governing procurement, an individual or company that violates the FCPA or other criminal statutes may be barred from doing business with the federal government. The Federal Acquisition Regulations (FAR) provide for the potential suspension or debarment of companies that contract with the government upon conviction of or civil judgment for bribery, falsification or destruction of records, the making of false statements, or "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." . . . .
>
> . . . .
>
> Although guilty pleas, DPAs, and NPAs do not result in automatic debarment from U.S. government contracting, committing a federal crime and the factual admissions underlying a resolution are factors that the independent debarment

In addition to debarment and other negative collateral consequence concerns, the actual specific outcome of many corporate FCPA enforcement actions is also often influenced by factors such as voluntary disclosure and cooperation in the DOJ's investigation. For instance, the DOJ has stated as follows:

> [I]f you do not voluntarily disclose your organization's conduct, and we discover it on our own, or through a competitor or a customer of yours, the result will not be the same. . . . [T]here is no doubt that a company that comes forward on its own will see a more favorable resolution than one that doesn't.[81]

FCPA enforcement actions against Daimler and Alcatel-Lucent are instructive examples for how corporate FCPA enforcement actions are often "sliced and diced" in a way acceptable to both negotiating parties.

The Daimler enforcement action included the following components:

- A DOJ criminal information against Daimler AG charging one count of conspiracy to violate the FCPA's books and records provisions and one count of violating those provisions.[82] The criminal information was based on allegations that the company engaged in a long-standing practice of paying bribes to foreign officials through a variety of mechanisms, including the use of corporate accounts such as cash desks, offshore bank accounts, deceptive pricing arrangements, and third-party intermediaries.[83] According to the information, Daimler

  > made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries—including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast,

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authorities may consider. Moreover, indictment alone can lead to suspension of the right to do business with the government. . . .

. . . .

Multilateral Development Banks (MDBs), like the World Bank, also have the ability to debar companies and individuals for corrupt practices.

FCPA GUIDE, *supra* note 75, at 69–70 (alteration in original).

81. Breuer, *supra* note 35.

82. Information, United States v. Daimler AG, No. 1:10-CR-00066-RJL (D.D.C. Mar. 22, 2010).

83. *Id.*

> Latvia, Nigeria, Russia, Serbia and Montenegro, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam, and others—to assist in securing contracts with government customers for the purchase of [Daimler] vehicles valued at hundreds of millions of dollars.[84]

The criminal information against Daimler AG was resolved via a deferred prosecution agreement.[85]

- The above conduct also served as the basis for separate DOJ FCPA enforcement actions against:
  - DaimlerChrysler Automotive Russia SAO (the entity pleaded guilty to a criminal information charging it with one count of conspiracy to violate the FCPA's anti-bribery provisions and one count of violating those provisions related to the alleged Russia conduct);[86]
  - Daimler Export and Trade Finance GmbH (the entity pleaded guilty to a criminal information charging it with one count of conspiracy to violate the FCPA's anti-bribery provisions and one count of violating those provisions relating to the alleged Croatia conduct);[87] and
  - DaimlerChrysler China Ltd. (the entity was charged with one count of conspiracy to violate the FCPA's anti-bribery provisions and one count of violating those provisions relating to the alleged China conduct and the

84. *Id.* at 3.

85. Deferred Prosecution Agreement, United States v. Daimler AG, No. 1:10-CR-00066-RJL (D.D.C. Mar. 24, 2010).

86. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010), http://www.justice.gov/opa/pr/daimler-ag-and-three-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and.

87. *Id.*

> criminal information was resolved via a deferred prosecution agreement).[88]
>
> • Moreover, the above conduct also served as the basis for an SEC enforcement action against Daimler AG.[89]

All of the enforcement actions were announced on the *same* day and based on the *same* alleged core conduct. The DOJ's sentencing memorandum in the enforcement action stated as follows concerning the structure of the resolution:

> In accordance with the Department's Principles of Federal Prosecution of Business Organizations, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Daimler's cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts, and in particular included European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.[90]

Many FCPA Inc. participants exploit the unique way in which the Daimler enforcement action was resolved by counting four separate DOJ enforcement actions. Picking up the additional SEC enforcement action based on the same core conduct, many FCPA Inc. participants count the Daimler enforcement action as five separate actions rather than one core enforcement action.

An FCPA enforcement action against Alcatel-Lucent further highlights how corporate FCPA resolutions are often "sliced and diced" in a way acceptable to both negotiating parties.

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88. *Id.*

89. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), https://www.sec.gov/news/press/2010/2010-51.htm.

90. Sentencing Memorandum at 12, United States v. Daimler AG, No. 1:10-CR-00063-RJL (D.D.C. Mar. 24, 2010).

The Alcatel-Lucent enforcement action included the following components:

- A DOJ criminal information against Alcatel-Lucent, S.A. charging one count of violating the FCPA's internal controls provisions of the FCPA and one count of violating the FCPA's books and records provisions.[91] The criminal information was based on allegations that the company paid millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia, and Taiwan.[92] In addition to the improper payments, the DOJ also alleged that the company violated the FCPA's internal controls and books and records provisions related to the hiring of third-party agents in Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali.[93] The criminal information against Alcatel-Lucent, S.A. was resolved via a deferred prosecution agreement.[94] The department and Alcatel-Lucent, S.A. agreed to resolve the charges by entering into a deferred prosecution agreement for a term of three years.[95]

- The above conduct also served as the basis for separate DOJ FCPA enforcement actions against:

    - Alcatel-Lucent France S.A. (the entity pleaded guilty to a criminal information charging it with conspiring to violate the FCPA's anti-bribery, books and records, and internal controls provisions related to the alleged Costa Rica, Honduras, Malaysia, and Taiwan conduct);[96]

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91. Information, United States v. Alcatel-Lucent, S.A., No. 1:10-cr-20907-KMM (S.D. Fla. Dec. 27, 2010).

92. *Id.*

93. *Id.*

94. Deferred Prosecution Agreement, United States v. Alcatel-Lucent, S.A., No. 1:10-cr-20907 (S.D. Fla. Feb. 22, 2011).

95. *Id.*

96. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act

- Alcatel-Lucent Trade International A.G. (the entity pleaded guilty to a criminal information charging it with conspiring to violate the FCPA's anti-bribery, books and records, and internal controls provisions related to the alleged Costa Rica, Honduras, Malaysia, and Taiwan conduct);[97] and

- Alcatel Centroamerica, S.A. (the entity pleaded guilty to a criminal information charging it with conspiring to violate the FCPA's anti-bribery, books and records, and internal controls provisions related to the alleged Costa Rica, Honduras, Malaysia, and Taiwan conduct).[98]

• Moreover, the above conduct also served as the basis for an SEC enforcement action against Alcatel-Lucent S.A.[99]

All of the enforcement actions were announced on the *same* day and based on the *same* alleged core conduct.[100] Similar to the Daimler enforcement action, the DOJ's sentencing memorandum stated as follows concerning the structure of the resolution:

> The DPA was reached with the parent company, Defendant Alcatel-Lucent, taking into consideration, among other things, Defendant Alcatel-Lucent's cooperation, assistance in conducting a global investigation, the remedial measures undertaken by Defendant Alcatel-Lucent . . . , and the company's continued commitment to cooperate with Department of Justice, SEC,

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Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt.

97. *Id.*

98. *Id.*

99. *Analyzing Alcatel-Lucent*, FCPA PROFESSOR (Jan. 6, 2011), http://www.fcpaprofessor.com/ analyzing-alcatel-lucent.

100. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *supra* note 96.

> foreign law enforcement authorities and agencies, and multilateral development banks.[101]

Many FCPA Inc. participants also exploit the unique way in which the Alcatel-Lucent enforcement action was resolved by counting four separate DOJ enforcement actions. Picking up the additional SEC enforcement action based on the same core conduct, many FCPA Inc. participants count the Alcatel-Lucent enforcement action as five separate actions rather than one core enforcement action.

In short, in most corporate FCPA enforcement actions, the alleged conduct is "sliced and diced" in a way that yields resolution documents to avoid the potential collateral consequence of debarment from government contracting and/or to reward voluntary disclosure and/or cooperation in the government's investigation. Using just the Daimler and Alcatel-Lucent enforcement actions as examples (and several others could also be cited), many FCPA Inc. participants count ten FCPA enforcement actions instead of two core enforcement actions. As a result, FCPA enforcement statistics are further distorted.

An additional creative way in which the DOJ has resolved certain corporate enforcement actions is by *not* charging FCPA violations even though the DOJ's allegations clearly implicate the FCPA. The most dramatic example involves the 2010 enforcement action against BAE Systems—an enticing action for inclusion in FCPA enforcement statistics given the $400 million settlement amount.[102]

For years, BAE Systems—a British defense contractor—had been under intense scrutiny concerning allegations that it had engaged in widespread bribery and corruption. In 2010, the DOJ announced the filing of a criminal information against BAE. Among other allegations, the information charged that BAE "serv[ed] as the prime contractor to the U.K. government following the conclusion of a Formal Understanding between the U.K. and the Kingdom of Saudi Arabia ('KSA')," in which BAE sold "several Tornado and Hawk aircraft[s], along with other military hardware, training and services" to the U.K. government, which sold the material and services to the Saudi government.[103] The

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101. Government's Memorandum in Support of the Proposed Plea Agreements and Deferred Prosecution Agreement at 20, United States v. Alcatel-Lucent, S.A., No. 1:10-cr-20907-MGC (S.D. Fla. May 23, 2011).

102. Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

103. Information at 12, United States v. BAE Sys., No. 1:10-cr-00035-JDB (D.D.C. Feb. 4, 2010).

information referred to these frequent arrangements as the "KSA Fighter Deals."[104]

In connection with these deals, the information alleged that "BAE provided substantial benefits to one KSA public official, who was in a position of influence regarding the KSA Fighter Deals (the 'KSA Official'), and to the KSA Official's associates."[105] According to the information, "BAE[] provided these benefits through various payment mechanisms both in the territorial jurisdiction of the U.S. and elsewhere."[106] This allegation is important from an FCPA perspective because the FCPA only applies to a company like BAE (a foreign company with no shares listed on a U.S. exchange) if conduct in furtherance of the bribery scheme has a U.S. nexus.[107]

The information contained additional allegations that clearly demonstrated that BAE's bribery scheme had a U.S. nexus. For instance, the information alleged that BAE "provided support services to [the] KSA Official while in the territory of the U.S." and that these benefits "included the purchase of travel and accommodations, security services, real estate, automobiles and personal items."[108] The information alleged that a single BAE employee during one year submitted over five million dollars in invoices for benefits provided to the KSA Official.[109]

The information also alleged that BAE "used intermediaries and shell entities to conceal payments to certain advisors who were assisting in the solicitation, promotion and otherwise endeavoring to secure the conclusion or maintenance of the KSA Fighter Deals."[110] Specifically, the information alleged that "in connection with the KSA Fighter Deals, BAE[] agreed to transfer sums totaling more than £10,000,000 and more than $9,000,000 to a bank account in Switzerland controlled by an intermediary."[111] According to the information, BAE "was aware that there was a high probability that the intermediary would transfer part of these payments to the KSA Official."[112] Though unnamed in the DOJ information, the Saudi intermediary is widely reported to be Saudi Prince

104. *Id.*
105. *Id.*
106. *Id.*
107. 15 U.S.C. § 78dd-3 (2012).
108. Information, *supra* note 103, at 13.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

Bandar bin Sultan—at the time the Saudi Ambassador to the United States.[113]

Despite the above allegations, the DOJ's criminal information against BAE merely charged one count of conspiracy;[114] *it lacked any FCPA anti-bribery charges*. Moreover, the conspiracy charge related only to "making certain false, inaccurate and incomplete statements to the U.S. government and failing to honor certain undertakings given to the U.S. government, thereby defrauding the United States" and "caus[ing] to be filed export license applications with [various U.S. government entities] that omitted a material fact" concerning fee and commission payments.[115] Among the false statements BAE is alleged to have made to the U.S. government is its commitment to not knowingly violate the FCPA.[116] That is the only mention of the FCPA in the information despite the above allegations concerning the KSA Fighter Deals facts that clearly implicate the FCPA's anti-bribery provisions.

Many FCPA Inc. participants blindly insert the BAE enforcement action into FCPA enforcement statistics even though the action did not involve *any actual FCPA charges*.[117] At $400 million, the BAE enforcement action is certainly enticing, as it would be (if it were an actual FCPA enforcement action) the fourth largest of all-time in terms of settlement amount.[118] Notwithstanding its attractiveness and its ability to juice FCPA enforcement statistics, if FCPA enforcement statistics are to mean anything, such statistics should only include enforcement actions that charge or reference *FCPA violations*. Such a proposition would seem straightforward; however, at this point in the Article, you should realize that anything seems to go when it comes to keeping FCPA enforcement statistics.

c. Separately Counting Individual Enforcement Actions Directly Related to Corporate Enforcement Actions

The third creative counting method adopted by many FCPA Inc. participants to achieve higher FCPA enforcement statistics is to

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113. David Leigh & Rob Evans, *BAE: Secret Papers Reveal Threats from Saudi Prince*, GUARDIAN (Feb. 15, 2008), http://www.theguardian.com/world/2008/feb/15/bae.armstrade.

114. Information, *supra* note 103, at 2.

115. *Id.* at 3.

116. *Id.* at 2.

117. *See, e.g.*, Richard L. Cassin, *Alcoa Lands 5th on Our Top Ten List*, FCPA BLOG (Jan. 10, 2014, 1:08 AM), http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html.

118. For a list of the top ten FCPA settlement amounts, see *FCPA 101*, FCPA PROFESSOR, http://www.fcpaprofessor.com/fcpa-101#q17 (last visited Feb. 10, 2016).

separately count individual enforcement actions directly related to corporate enforcement actions.

To state the obvious, a legal person can only violate the FCPA to the extent a natural person (such as an employee or agent) engages in conduct in violation of the FCPA.[119] Thus, it is not surprising that certain corporate FCPA enforcement actions also involve related individual enforcement actions based on the *same* core conduct alleged in the corporate enforcement action. Even though the individual enforcement action is based on the *same* core conduct alleged in the corporate enforcement action, many FCPA Inc. participants separately count the individual enforcement action. This creative counting method is similar to counting two speeding violations when a driver speeds—one for the driver and one for the car (i.e., the "entity" which the natural person speeder is driving).

FCPA enforcement actions against Control Components and various employees, as well as BizJet and various employees, are instructive examples for how many FCPA Inc. participants achieve higher FCPA enforcement statistics by separately counting individual enforcement actions directly related to corporate enforcement actions.

In the Control Components Inc. ("CCI") enforcement action, the DOJ alleged that the company engaged "in a decade-long scheme to secure contracts in [various] countries by paying bribes to officials and employees of various foreign state-owned companies as well as foreign and domestic private companies."[120] "According to the [DOJ criminal] information and plea agreement, . . . CCI violated the FCPA and the Travel Act by making corrupt payments to numerous officers and employees of state-owned and privately-owned customers around the world, including in China, Korea, Malaysia and the United Arab Emirates."[121] Directly related to the corporate enforcement action, the DOJ also brought criminal charges against the following former CCI employees:

- Mario Covino (former director of worldwide sales)
- Richard Morlock (former finance director)

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119. Sung-Hee Suh, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Address at the PLI's 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (Jan. 20, 2015), http://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities ("[C]orporations do not act criminally, but for the actions of individuals.").

120. Press Release, Office of Pub. Affairs, 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.

121. *Id.*

- Stuart Carson (former CEO)
- Hong Carson (former director of sales for China and Taiwan)
- Paul Cosgrove (former director of worldwide sales)
- David Edmonds (former vice president of worldwide customer service)
- Flavio Ricotti (former vice president and head of sales for Europe, Africa, and the Middle East)
- Han Yong Kim (former president of the Korean office)[122]

The above individual actions were based on the *same* core conduct alleged in the CCI enforcement action. Nevertheless, many FCPA Inc. participants count the CCI and related individual enforcement actions as nine FCPA enforcement actions instead of one core enforcement action. As a result, FCPA enforcement statistics are further distorted.

An FCPA enforcement action against BizJet International Sales and Services Inc. ("BizJet") and various employees further highlights how many FCPA Inc. participants achieve higher FCPA enforcement statistics by separately counting individual enforcement actions directly related to corporate enforcement actions.

In the BizJet enforcement action, the DOJ alleged that the company violated the FCPA by bribing foreign officials in various Latin American countries "to secure contracts to perform aircraft [maintenance] services for government agencies."[123] In addition to the corporate action, the DOJ also brought criminal charges against the following former BizJet employees:

- Bernd Kowalewski, (former president and CEO)
- Jald Jensen (former sales manager)

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122. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Former Executive at California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Jan. 8, 2009), http://www.justice.gov/opa/pr/2009/January/09-crm-016.html; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Former Finance Director of California Valve Company Pleads Guilty to Bribing Foreign Government Officials (Feb. 3, 2009), http://www.justice.gov/opa/pr/2009/February/09-crm-089.html; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Six Former Executives of California Valve Company Charged in $46 Million Foreign Bribery Conspiracy (Apr. 8, 2009), http://www.justice.gov/opa/pr/2009/April/09-crm-322.html.

123. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-321.html.

- Peter DuBois (former vice president of sales and marketing)
- Neal Uhl (former vice president of finance)[124]

The above individual actions were based on the *same* core conduct alleged in the BizJet enforcement action. Nevertheless, many FCPA Inc. participants count the BizJet and related individual enforcement actions as five FCPA enforcement actions instead of one core enforcement action. As a result, FCPA enforcement statistics are further distorted. FCPA enforcement statistics related to BizJet are further distorted as many FCPA Inc. participants also separately count a DOJ non-prosecution agreement against BizJet's indirect parent corporation Lufthansa Technik based on "the unlawful payments by BizJet."[125]

Many FCPA Inc. participants not only separately count DOJ individual enforcement actions directly related to corporate DOJ enforcement actions, but also SEC individual enforcement actions directly related to corporate SEC enforcement actions. The end result is a further distortion of FCPA enforcement statistics. The enforcement action against Magyar Telekom and various former employees is an instructive example.

In the Magyar Telekom enforcement action, the SEC alleged that the company "brib[ed] government and political party officials in Macedonia and Montenegro to win business and shut out competition in the telecommunications industry."[126] On the *same* day, the SEC also alleged that the following former employees also violated the FCPA:

- Elek Straub (former Chairman and CEO)
- Andras Balogh (former Director of Central Strategic Organization)
- Tamas Morvai (former Director of Business Development and Acquisitions)[127]

The above individual actions were based on the *same* core conduct alleged in the Magyar Telekom enforcement action. Nevertheless, many

124. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-388.html.

125. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *supra* note 123.

126. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), https://www.sec.gov/news/press/2011/2011-279.htm.

127. *Id.*

FCPA Inc. participants separately count the individual actions directly related to the corporate enforcement action. FCPA enforcement statistics related to Magyar Telekom are further distorted as many FCPA Inc. participants add the related DOJ enforcement action against Magyar Telekom based on the *same* core conduct alleged in the SEC action.[128] Similar to the BizJet enforcement action, many FCPA Inc. participants separately count a DOJ non-prosecution agreement against Magyar Telekom's parent corporation Deutsche Telekom based on the *same* core conduct.[129] In short, and using Magyar Telekom as just one example, many FCPA Inc. participants count six enforcement actions instead of one core enforcement action. As a result, FCPA enforcement statistics are further distorted.

As highlighted in this Part, many FCPA Inc. participants use various creative counting methods to achieve higher FCPA enforcement statistics. The numerous examples highlighted thus far have *only* inflated FCPA enforcement statistics by single digit ratios (i.e., one core enforcement action yields between six to nine enforcement actions based on the creative methods used). However, the aggregate effect of the various creative counting methods discussed above can lead to double digit ratios as demonstrated by the Siemens enforcement action and the Africa Sting enforcement action.

The Siemens enforcement action was a trifecta of sorts in that it involved dual and overlapping DOJ and SEC enforcement (not just once, but twice), "slicing and dicing" of the corporate enforcement action to yield resolution documents that avoided potential negative collateral consequences, and related individual enforcement actions directly related to the corporate enforcement action.

The Siemens enforcement action included the following components:

- A DOJ criminal information against Siemens AG charging violations of the FCPA's books and records and internal controls provisions.[130] The criminal information was based on allegations that the company "engaged in systematic efforts to falsify its corporate books and

128. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-mt-dt-press-release.pdf.

129. *Id.*

130. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

> records and knowingly failed to implement and circumvent existing internal controls."[131] According to the DOJ, "for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens."[132] In summary fashion, the DOJ stated:
>
> > As a result of Siemens AG's knowing failures in and circumvention of internal controls, . . . Siemens AG made payments totaling approximately $1.36 billion through various mechanisms. Of this amount, approximately $554.5 million was paid for unknown purposes, including approximately $341 million in direct payments to business consultants for unknown purposes. The remaining $805.5 million of this amount was intended in whole or in part as corrupt payments to foreign officials through the payment mechanisms, which included cash desks and slush funds.[133]

Despite engaging in bribery across the globe, Siemens AG was not charged with FCPA anti-bribery violations. Similar to the above-described Daimler enforcement action, the DOJ's sentencing memorandum stated:

> In accordance with the Department's Principles of Federal Prosecution of Business Organizations, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Siemens' cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the

131. *Id.*
132. *Id.*
133. *Id.*

> consideration of the risk of debarment and exclusion from government contracts.[134]

Instead, the DOJ carved out three separate DOJ FCPA enforcement actions against:

- Siemens S.A. (Argentina) (the entity pleaded guilty to a criminal information charging it with one count of conspiracy to violate the FCPA's books and records provisions in connection with a national identity card project in Argentina);
- Siemens Bangladesh Limited (the entity pleaded guilty to a criminal information charging it with one count of conspiracy to violate the FCPA's anti-bribery and books and records provisions in connection with a mobile telephone project in Bangladesh); and
- Siemens S.A. (Venezuela) (the entity pleaded guilty to a criminal information charging it with one count of conspiracy to violate the FCPA's anti-bribery and books and records provisions in connection with two metropolitan mass transit projects in Venezuela).[135]

In addition to the DOJ enforcement action against Siemens AG and related entities, on the *same* day, the SEC also brought an enforcement action against Siemens AG based on the *same* conduct alleged in the DOJ enforcement action.[136]

> The SEC allege[d] that Siemens paid bribes on such widespread transactions as the design and construction of metro transit lines in Venezuela, power plants in Israel, and refineries in Mexico. Siemens also used bribes to obtain such business as developing mobile telephone networks in Bangladesh, national identity cards in Argentina, and medical devices in Vietnam, China, and Russia.[137]

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134. Department's Sentencing Memorandum at 11, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf.

135. *Id.* at 10.

136. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm.

137. *Id.*

Many FCPA Inc. participants exploited the unique way in which the Siemens enforcement action was resolved by counting four separate DOJ enforcement actions. Picking up the additional SEC enforcement action based on the *same* core conduct, many FCPA Inc. participants count the Siemens enforcement action as five separate actions rather than one core action.

In addition to the above corporate action, thereafter, both the DOJ and SEC used the Argentina allegations in the Siemens enforcement action (a small slice of Siemens' bribery across the globe) to bring the following enforcement actions:

A DOJ action against:

- Uriel Sharef (a former member of Siemens AG's central executive committee)
- Herbert Steffen (a former CEO of Siemens Argentina)
- Andres Truppel (a former CFO of Siemens Argentina)
- Ulrich Bock (a former senior executive of Siemens Business Services)
- Stephan Signer (a former senior executive of Siemens Business Services)
- Eberhard Reichert (a former senior executive of Siemens Business Services)
- Carlos Sergi (an intermediary and agent of Siemens in connection with the alleged bribery scheme); and
- Miguel Czysch (an intermediary and agent of Siemens in connection with the alleged bribery scheme)[138]

On the *same* day, the SEC also brought an enforcement action against the following individuals based on the *same* alleged conduct:

- Uriel Sharef
- Herbert Steffen
- Andres Truppel
- Ulrich Bock
- Stephan Signer
- Carlos Sergi; and
- Bernd Regendantz (a former CFO of Siemens Business Services)[139]

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138. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1626.html.

Many FCPA Inc. participants count the above individual actions directly related to the Siemens AG enforcement action as fifteen additional enforcement actions. In short, and using Siemens as just one example, many FCPA Inc. participants count twenty FCPA enforcement actions even though all the enforcement actions were based, in whole or in part, on *one core set of allegations*. As a result, FCPA enforcement statistics are further distorted.

As inflated as many FCPA enforcement statistics are in connection with Siemens, it is not the most dramatic result of creative counting methods used by many FCPA Inc. participants to achieve higher FCPA enforcement statistics. This distinction belongs to the so-called "Africa Sting" enforcement action.

The Africa Sting enforcement action was a manufactured sting operation in which the FBI (with the assistance of an individual who had already pleaded guilty to real, unrelated FCPA offenses) posed as representatives of the Gabon Minister of Defense.[140] The DOJ brought criminal charges against the following twenty-two individuals in the military and law enforcement products industry:

- Daniel Alvirez
- Lee Tolleson
- Helmie Ashiblie
- Andrew Bigelow
- R. Patrick Caldwell
- Stephen Giordanella
- Yochanan Cohen
- Haim Geri
- Amaro Goncalves
- John Godsey
- Mark Morales
- Saul Mishkin
- John Mushriqui
- Jeana Mushriqui
- David Painter

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139. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011), http://www.sec.gov/news/press/2011/2011-263.htm.

140. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

- Lee M. Wares
- Pankesh Patel
- Ofer Paz
- Jonathan Spiller
- Israel Weisler
- Michael Sacks
- John Wier[141]

All of the individuals were charged on the *same* day and in connection with the *same* manufactured sting operation.[142] Nevertheless, many FCPA Inc. participants count the Africa Sting enforcement action as twenty-two separate enforcement actions instead of one core action. As a result, FCPA enforcement statistics are further distorted.

Using just the Siemens enforcement action and the Africa Sting enforcement action, the various creative counting methods used by many FCPA Inc. participants result in forty-two FCPA enforcement actions. The reality, however, is just *two core enforcement actions*. Indeed, the apparent "spike" in FCPA enforcement actions in 2010 observable in Figures 1–4 is largely the result of the Siemens individual enforcement action and the Africa Sting enforcement action occurring in 2010.[143]

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141. *Id.*

142. *Id.* The Africa Sting enforcement action proved disastrous for the DOJ. Given the number of individuals involved, the court established four groups of defendants. Mike Koehler, *What Percentage of DOJ FCPA Losses Is Acceptable?*, 90 CRIM. L. REP. 823 (2012). In the first Africa Sting trial, at the close of the DOJ's case, the judge "dismissed a substantive FCPA charge against one defendant, dismissed another substantive FCPA charge against another defendant, and dismissed the money laundering count against all defendants." *Id.* The judge also ultimately "declared a mistrial as to all remaining counts against all defendants." *Id.* In the second Africa Sting trial, at the close of the DOJ's case, the judge

> dismissed the conspiracy charge against all defendants. Because one defendant faced only that conspiracy charge, he was exonerated by [the] decision. The trial proceeded, the charges went to the jury, [and] the jury deliberated . . . [and] found two defendants not guilty. The jury hung as to the remaining defendants, and once again [the judge] declared a mistrial as to all remaining counts against the remaining three defendants.

Id. Two weeks later, after the jury foreman in the second trial published a guest post on *FCPA Professor* blasting various aspects of the DOJ's case, the DOJ "moved to dismiss with prejudice the criminal charges against all of the remaining Africa Sting defendants." *Id.* The "DOJ's filing stated 'continued prosecution of this case is not warranted under the circumstances.'" *Id.* The judge stated that "[t]his appears to be the end of a long and sad chapter in the annals of white collar criminal enforcement." *Id.* For more information, see generally *id.*

143. *See supra* Figures 1–4.

As highlighted in this Part, many FCPA Inc. participants have adopted creative counting methods that yield high FCPA enforcement statistics. However, these creative and haphazard counting methods have several negative effects.

D. The Negative Effects of a Lack of a Common Language

The lack of an FCPA common language would perhaps be of little consequence if the FCPA was an insignificant statute to business organizations engaged in international commerce. However, as previously highlighted, the FCPA has been deemed a high-priority statute by both the DOJ and the SEC in this declared "new era of FCPA enforcement."[144]

In short, the FCPA impacts all businesses and individuals engaged in international commerce. Indeed, various surveys suggest that the FCPA is a top-three risk identified by chief compliance officers and "one of three concerns costing big-company lawyers the most sleep."[145] This concern is warranted in part, but perhaps unduly heightened by the fear-inducing enforcement statistics published by many FCPA Inc. participants through the use of various creative counting methods.

Indeed, the lack of a common FCPA language has several negative effects as it impacts nearly every imaginable FCPA enforcement statistic relied upon by the business community in navigating this "new era of FCPA enforcement" and assessing and mitigating FCPA risk in the global marketplace. The negative effects of a lack of an FCPA common language further impact the quality of FCPA lawyering, the quality of FCPA reporting by the media, and the quality of empirical FCPA research.

Before discussing these various negative effects, it bears mentioning that the lack of a common language in a niche legal practice is particularly problematic as various recipients of legal information—from clients and potential clients, to policymakers, to the media and civil society participants—are likely to assume that a niche legal practice is bound by a common language.

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144. *See supra* Part II.A.

145. Ashby Jones, *Legal Maze's Murkiest Corners Worry Companies*, WALL ST. J. (Dec. 23, 2012, 7:31 PM), http://www.wsj.com/articles/SB10001424127887324731304578193950561507398; *see generally* PWC LLP, DEEPER INSIGHT FOR GREATER STRATEGIC VALUE: STATE OF COMPLIANCE (2013), https://www.pwc.com/us/en/risk-management/assets/pwc-soc-survey-2013-final.pdf.

Regarding expert statistics, it has been noted:

> Experts depend on the fact that you don't have the information they do. Or that you are so befuddled by the complexity of their operation that you wouldn't know what to do with the information if you had it. Or that you are so in awe of their expertise that you wouldn't dare challenge them.[146]

More specifically, Professor Marc Galanter highlighted in a seminal article concerning the casual use of legal statistics that such statistics are seldom subject to much examination. Professor Galanter observed: "Why do we tolerate a knowledge base about the legal system that is so thin and spotty? . . . Players in the legal policy arena . . . can with impunity disregard reliable information, make up dubious facts and repeat discredited fables. Anything goes, it seems."[147]

This Article has examined FCPA enforcement statistics and exposed the "anything goes, it seems" approach to tracking FCPA enforcement statistics by many FCPA Inc. participants. The negative effects of this lack of a common FCPA language start with a basic denominator problem.

1. The Denominator Problem

This new era of FCPA enforcement has resulted in an increased interest in FCPA enforcement statistics. Among other categories of statistics of interest to the business community are the following:

- How many FCPA enforcement actions are there in a given year and compared to prior years?
- Which industry has been the subject of the most FCPA enforcement actions?
- What country has been the location of the most FCPA enforcement actions?

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146. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 67 (2005).

147. Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 99–100 (1993). Others have commented that Galanter's article "should be required reading not only for those who work on anticorruption, but on any topic where people casually throw around statistics." Matthew Stephenson, *More on the "News from Nowhere" Problem in Anticorruption Research*, GLOBAL ANTICORRUPTION BLOG (Dec. 18, 2014), http://globalanticorruptionblog.com/2014/12/18/more-on-the-news-from-nowhere-problem-in-anticorruption-research.

- How many FCPA enforcement actions are resolved via non-prosecution or deferred prosecution agreements?
- How many corporate enforcement actions result in related individual actions against company employees?
- What is the average settlement amount of an FCPA enforcement?

Reliable statistics on the above categories best allow a business organization engaged in international commerce to, among other things: (i) prioritize FCPA compliance (among the many legal risks it faces); (ii) prioritize FCPA compliance internally within the organization to certain countries; and (iii) have an informed perspective on the consequences of violating the FCPA.

To state the obvious, calculating each of the above statistics is dependent on a common denominator representing the actual number of FCPA enforcement actions. To demonstrate how different denominators yield widely different enforcement statistics, consider the following two examples.

As previously highlighted, the Siemens corporate enforcement action involved: (i) a DOJ component against Siemens AG and three subsidiaries (in which Siemens AG paid a $448.5 million fine and the three subsidiaries each agreed to pay a $500,000 fine); and (ii) an SEC component against Siemens AG (in which it agreed to disgorge $350 million).[148] Assume that the Siemens corporate enforcement action comprised the entire universe of corporate FCPA enforcement actions in a given year. Using the various creative counting methods discussed above that play off the dual and overlapping nature of FCPA enforcement and the creative ways in which the DOJ often resolves corporate enforcement actions, the average fine/penalty amount of these purported five enforcement actions would be $160 million with a median fine/penalty amount of $500,000. However, this would be highly misleading because the Siemens corporate enforcement action was one core action that resulted in an $800 million settlement.

As previously highlighted, the so-called Africa Sting enforcement action involved criminal charges brought on the same day against twenty-two individuals for allegedly bribing the Gabon Minister of Defense.[149] If the Africa Sting action is counted as twenty-two enforcement actions, as most FCPA Inc. participants count it, the end result is that Gabon is near the top of the all-time list in terms of location

148. *See* sources cited *supra* notes 130–37 and accompanying text.
149. *See supra* notes 140–41 and accompanying text.

of FCPA violations. Such a statistic is highly misleading given that, other than the one core Africa Sting action (a manufactured and failed enforcement action at that), Gabon has been the location of only one other FCPA enforcement action in history.[150]

In short, as we all learned in introductory math, the denominator matters in calculating statistics, and the quality and reliability of nearly every imaginable FCPA enforcement statistic is dependent on a common denominator representing the actual number of FCPA enforcement actions.

2. The Quality of FCPA Lawyering

The lack of a common FCPA language impacts not only the business community that is subject to the FCPA, but also the quality of FCPA lawyering itself.

The FCPA legal practice, perhaps more so than any other current practice, is defined by "bargaining in the shadow of law"—more specifically, bargaining in the shadow of settled enforcement actions and the terms and conditions contained therein.[151] As alluded to above, non-prosecution and deferred prosecution agreements ("NPA"s and "DPA"s)—resolved behind closed doors in Washington, D.C. between the DOJ and company counsel that are not subjected to any meaningful judicial scrutiny—dominate corporate FCPA enforcement in this new era. Indeed, "[s]ince 2010, 86% of corporate DOJ enforcement actions have involved either an NPA or DPA."[152] In recent years, the SEC has also begun to use NPAs and DPAs to resolve corporate FCPA enforcement actions as well as internal administrative actions not subjected to any judicial scrutiny.[153] Out-of-court settlements are so common in the FCPA context that in the FCPA's nearly forty year history, the DOJ has only twice been put to its burden of proof at trial by a business organization (and the DOJ ultimately lost both cases), and the SEC has never been put to its burden

150. *See Where the Bribes Are: Penalties in U.S. Government FCPA Cases Since 1977*, MINTZ GROUP, www.fcpamap.com (last updated Nov. 1, 2015).

151. For a discussion of the meaning of "bargaining in the shadow of the law" in another legal practice, see generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

152. *DOJ Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 8, 2015), http://www.fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review-5 (highlighting facts and figures from DOJ FCPA enforcement in 2014).

153. *SEC Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 6, 2015), http://www.fcpaprofessor.com/sec-enforcement-of-the-fcpa-year-in-review-4 (providing facts and figures from SEC enforcement in 2014).

of proof at trial by a business organization.[154] Given this dynamic, FCPA case law is sparse, and decisions of precedent as to FCPA substantive issues can be counted on one hand.[155]

What this means for FCPA lawyers is that FCPA enforcement statistics are a form of "big data" relied upon in representing clients in FCPA matters.[156] As part of the negotiation process that largely defines FCPA enforcement, FCPA counsel often attempt to compare and contrast their client, and its alleged behavior, with prior settled FCPA enforcement actions. FCPA enforcement statistics of a wide variety (i.e., the form of resolution, the average fine and penalty amount, and the specifics regarding post-enforcement action compliance obligations) are frequently used during the negotiation process prior to a resolution being reached. To state the obvious, the quality and reliability of the FCPA enforcement statistics in the FCPA lawyer's toolkit is again dependent on a common denominator representing the actual number of FCPA enforcement actions.

3. The Quality of FCPA Media Reporting

The lack of an FCPA common language would further be of little consequence but for the fact that FCPA enforcement statistics generate much publicity. Indeed, and emblematic of the business generation component of many FCPA Inc. statistics, industry participants often engage media relations firms to market the statistics to various media

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154. *Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says that "Dr. Lindsey and Mr. Lee Were Put Through a Severe Ordeal" and that Lindsey Manufacturing, a "Small, Once Highly Respected Enterprise . . . Placed in Jeopardy*," FCPA PROFESSOR (Dec. 1, 2011), http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente; *The SEC Has Never Prevailed in an FCPA Enforcement Action when Put to Its Ultimate Burden of Proof*, FCPA PROFESSOR (Mar. 5, 2014), http://www.fcpaprofessor.com/the-sec-has-never-prevailed-in-an-fcpa-enforcement-action-when-put-to-its-ultimate-burden-of-proof (discussing SEC enforcement actions that were dismissed at the motion to dismiss stage).

155. *See* United States v. Kozeny, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) (noting that there are "surprisingly few decisions throughout the country on the FCPA"), *aff'd*, 541 F.3d 166 (2d Cir. 2008). The only decisions of precedent as to FCPA substantive issues are: *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014) (including a foreign official element) and *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (including an obtain and retain business element). A third appellate decision, *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011), concerned fact-specific knowledge issues.

156. Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1399 (2015) ("A seismic shift is underway in the legal profession, whereby lawyers are increasingly supplementing their intuition and practice experience with insights gleaned from big (legal) data to inform their judgment.").

outlets with an invitation to the media along the following lines: "in case you might be interested in using some of the insights for your future reporting," we can arrange a conversation with an FCPA attorney.[157]

The problem with FCPA enforcement statistics inflated through creative counting methods is then further exacerbated when media outlets such as the *Wall Street Journal* simply carry forward the creative statistics to a broader audience.[158] Yet, it must be recognized that much of FCPA media reporting is done by FCPA Inc. participants themselves in search of convenient hooks to sell their own FCPA-related compliance products or services. For instance, the *Wall Street Journal* is owned by Dow Jones & Company, which has its own Risk and Compliance Division that offers "vital risk compliance data to regularly review third party relationships and comply with anti-money laundering (AML), anti-bribery and corruption (ABAC) and governmental sanctions regulations."[159] Likewise, Thomson Reuters, a large international news agency with multiple publications, offers Thomson Reuters Accelus, which markets and sells so-called "Enterprise Governance, Risk and Compliance Systems," including anti-bribery and corruption management.[160]

In short, many FCPA media sources have—just like the FCPA Inc. participants providing the original enforcement statistics—a vested business interest in making FCPA enforcement appear more robust than it actually is in this new era of enforcement. The end result is an FCPA "echo chamber" of sorts in which FCPA Inc. enforcement statistics are repeated by many media outlets (on the assumption that the statistics are of high quality and reliable), the audience of those media sources view the FCPA enforcement statistics as being high quality and reliable because they appear in apparent reputable sources, and then others interested in FCPA topics cite to the media sources for evidence that the statistics are true.

It has been noted: "Journalists need experts as badly as experts need journalists. Every day there are newspaper pages and television

157. As the founder and editor of a leading FCPA website (www.fcpaprofessor.com), the author has received several such e-mails. *See, e.g.*, E-mail from Madison Malloch-Brown, Edelman Corporate Affairs, to Mike Koehler, Assistant Professor, Southern Illinois University School of Law (Jan. 5, 2016, 1:32 PM) (on file with author).

158. *See, e.g.*, Christopher M. Matthews, Joe Palazzolo & Shira Ovide, *U.S. Probes Microsoft Bribery Allegations*, WALL ST. J. (Mar. 19, 2013, 6:15 PM), http://www.wsj.com/articles/SB10001424127887324392804578361971662214256?alg=y&mg=id-wsj.

159. *Risk and Compliance*, DOW JONES, http://new.dowjones.com/products/risk-compliance/ (last visited Nov. 27, 2015).

160. *About Us*, THOMSON REUTERS, https://risk.thomsonreuters.com/about (last visited Feb. 10, 2016).

newscasts to be filled, and an expert who can deliver a jarring piece of wisdom is always welcome. Working together, journalists and experts are the architects of much conventional wisdom."[161]

However, as has been exposed in this Article, sometimes the conventional wisdom is wrong.

4. The Quality of Empirical FCPA Research

In this new era of FCPA enforcement, there has been an increase in FCPA empirical research. Indeed, a search for the FCPA on the Social Science Research Network ("SSRN") highlights that forty-five out of the top fifty articles, in terms of SSRN downloads, have been published since 2009.[162] Many of these articles (written by law professors, economics professors, social scientists, and others) rely on enforcement statistics published by various FCPA Inc. participants in an attempt to measure various legal or non-legal facets of FCPA enforcement and, more broadly, bribery and corruption.[163]

To again state the obvious, the conclusions reached in much of this empirical FCPA research are dependent on the quality of data input, including the actual number of FCPA enforcement actions. Thus, the last but certainly not the least of the negative effects of the lack of an FCPA common language is undermining the quality of empirical FCPA research.

IV. AN FCPA COMMON LANGUAGE

It has been noted that "[t]he general study of business verbiage, however slippery and challenging, is extremely rewarding for those who believe that it is sometimes important to understand what other people are saying."[164]

This is precisely the goal of this Article. As highlighted above, despite being a niche practice area for lawyers, accountants, and other compliance professionals, FCPA Inc. currently lacks a common language.

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161. LEVITT & DUBNER, *supra* note 146, at 87.

162. SOC. SCI. RES. NETWORK, http://papers.ssrn.com/sol3/results.cfm (last visited Feb. 10, 2016) (providing article search results for "FCPA").

163. *See, e.g.*, Harrison G. Hong & Inessa Liskovich, Crime, Punishment and the Halo Effect of Corporate Social Responsibility, 29–30 (Dec. 16, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492202 (attempting to measure whether "more socially responsible" firms pay less than "the median fine[] for bribing" and relying on inflated FCPA Inc. data as to the number of actual FCPA enforcement actions).

164. Stanley Bing, *The New ABCs of Business*, WALL ST. J. (Apr. 12, 2014, 11:43 PM), http://www.wsj.com/articles/SB10001424052702303910404579487994053868548.

The end result is that the FCPA's conversational waters are muddied. To clear up the FCPA conversation, this Article concludes by proposing an FCPA common language regarding the basic issue of what is an FCPA enforcement action. The proposed common language consists of three conjunctive factors that will improve the quality and reliability of FCPA statistics and, thus, allow a more cogent conversation to take place regarding FCPA issues.

The first factor in determining whether an enforcement action is an FCPA enforcement action is the most basic. An FCPA enforcement action is an instance in which an enforcement agency (whether the DOJ or the SEC) charges or references that the FCPA (whether its anti-bribery, books and records, or internal controls provisions) has been violated. While this seems like a basic statement, as highlighted above, many FCPA Inc. participants include the BAE enforcement action in FCPA enforcement statistics even though the action did not involve any actual FCPA charges.[165] In short, if FCPA enforcement statistics are to mean anything, such statistics should only include enforcement actions that charge or reference FCPA violations.

The second factor in determining whether an enforcement action is an FCPA enforcement action relates to the basic fact highlighted above that the FCPA is a law much broader than its name suggests.[166] In other words, FCPA books and records and internal controls violations do not always involve allegations of *foreign* conduct and/or *bribery* (actions previously termed "non-FCPA FCPA enforcement actions"). While FCPA Inc. participants are generally consistent in not including such actions in FCPA enforcement statistics, the practice can vary and, thus, warrants consideration of the second factor. If an enforcement agency (whether the DOJ or the SEC) charges or references *only* violations of the FCPA books and records and/or internal controls provisions, the enforcement action is an FCPA enforcement action only to the extent the action is categorized as such by either the DOJ or the SEC on its FCPA websites.[167]

The third factor in determining whether an enforcement action is an FCPA enforcement action is the most important, as it adopts a specific counting method. As hinted at various times throughout this Article, high quality and reliable FCPA enforcement statistics are best kept by using a "core" approach. The core approach focuses on unique conduct at issue regardless of whether the conduct involves a DOJ or SEC enforcement

165. *See supra* notes 102–17 and accompanying text.

166. *See supra* Part III.C.1.

167. For a list of the DOJ FCPA enforcement actions, see *Related Enforcement Actions*, *supra* note 62. For a list of the SEC FCPA enforcement actions, see *SEC Enforcement Actions: FCPA Cases*, *supra* note 62.

action or both, regardless of whether a corporate enforcement action involves a parent company, a subsidiary, or both, and regardless of whether the DOJ and/or the SEC bring any related individual enforcement actions against company employees based on the same corporate conduct.

Unlike the FCPA Inc. creative counting methods highlighted above, the "core" approach to tracking FCPA enforcement statistics is not impacted by the dual and often overlapping nature of FCPA enforcement—the creative ways in which the DOJ often resolves corporate FCPA enforcement actions or individual enforcement actions brought that are directly related to corporate enforcement actions.

This Article highlighted only a small portion of FCPA enforcement actions in this new era. Yet, as Figure 6 illustrates, there is a substantial difference between the "core" approach and the creative counting methods of various FCPA Inc. participants.

Figure 6

Core Enforcement Action	**Enforcement Actions Per Creative Counting Methods**	**Difference Compared to the Core Approach**
Archer Daniels Midland	2	1
Weatherford International	2	1
Stryker	1	0
Diebold	2	1
Total	2	1
Ralph Lauren	2	1
Parker Drilling	2	1
Philips Electronics	1	0
Daimler	5	4
Alcatel-Lucent	5	4
Control Components	8	7
BizJet International	6	5
Magyar Telekom	6	5
Siemens	20	19
Africa Sting	22	21
		TOTAL: 71

The core approach is a mainstream approach to tracking enforcement statistics and should not be controversial in the least bit. Clearly the FCPA is not the only statute in which specific enforcement statistics are compiled, and the core approach is used to track other enforcement statistics.[168] In addition, while most FCPA Inc. participants have adopted various creative counting methods, not all have—certain FCPA Inc. participants currently utilize a "core" approach to tracking enforcement statistics.[169] Perhaps most importantly, the DOJ has endorsed the "core" approach to tracking FCPA enforcement statistics. As stated by the DOJ's FCPA Unit Chief:

> [T]he bottom line is, we don't count statistics the way I guess some of the people, whether it's the commentators or the media, or law firms and the like. . . . [W]e count slightly differently by the way, than a lot of people in the public. If you have a parent and two subs plead guilty, and the parent gets a DPA, we don't count that as three actions. That's one matter from our prospective, and I think internally it just makes sense for us.[170]

The DOJ is correct. The "core" approach to tracking FCPA enforcement statistics "makes sense" and yields the highest-quality and most reliable statistics.

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168. *See, e.g.*, Jason Hegland & Michael Klausner, *SEC Practice in Targeting and Penalizing Individual Defendants*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 3, 2013), http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants/#more-51424 (tracking SEC enforcement actions and providing a definition of a "case").

> We define a "case" in a specific way in order to organize the data. A case, as we use the term, is a set of one or more enforcement actions against a company and/or its executives and/or third parties such as accountants or underwriters for the same misstatement that led to a violation. Thus, if the SEC brings an action against ABC Co[.] and one or more separate actions against ABC Co.'s executives and its outside auditor, all for a misstatement in ABC Co.'s 2012 financial statements, we consider all those separate actions as one "case."

Id.

169. TRACE INT'L, GLOBAL ENFORCEMENT REPORT 2013, at 2–3 (2014) ("[W]hen a company and its employees or representatives face multiple investigations or cases in one country involving substantially the same conduct, only one enforcement action is counted in the GER . . . . An enforcement action in a country with multiple investigating authorities, such as the US, is also counted as one enforcement action in the GER . . . .").

170. Charles E. Duross, Deputy Chief of the Fraud Section, U.S. Dep't of Justice, Address at the 27th Annual National Institute on White Collar Crime (Mar. 7, 2013) (on file with author).

V. CONCLUSION

The quality and reliability of FCPA enforcement statistics is dependent on a common language. The common language proposed in this Article as to the basic issue of what is an FCPA enforcement action consists of three conjunctive factors:

1. An FCPA enforcement action is an instance in which an enforcement agency (whether the DOJ or the SEC) charges or references that the FCPA (whether its anti-bribery, books and records, or internal controls provisions) has been violated;
2. If an enforcement agency (whether the DOJ or the SEC) charges or references only violations of the FCPA books and records and/or internal controls provisions, the enforcement action is an FCPA enforcement action only to extent the action is categorized as such by either the DOJ or the SEC on their respective FCPA websites; and
3. As to conduct meeting the above criteria, the "core" approach should be used in quantifying the number of actual FCPA enforcement actions.

The above FCPA common language will improve the quality and reliability of FCPA statistics of interest to many in this new era of FCPA enforcement. In addition, the FCPA common language will improve the quality of FCPA lawyering, the quality of FCPA media reporting, and the quality of FCPA empirical research. In short, the FCPA common language will allow a more cogent conversation to take place regarding FCPA issues in this new era.