The Government's Response
to the Proposed Affirmative FCPA Compliance Defense

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At the recent ACI 2012 National Conference on the U.S. Foreign Corrupt Practices Act, the U.S. Government provided a direct response to the U.S. Chamber of Commerce's affirmative compliance defense proposal. Over the last two years, since the Chamber issued its proposed amendments to the FCPA, the Chamber has advocated for "a defense that would permit companies to fight the imposition of criminal liability for FCPA violations[] if the individual employees or agents had circumvented compliance measures that were otherwise reasonable in identifying and preventing such violations." The government's response was direct and succinct.

Lanny Breuer, the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice, provided three reasons for why a compliance defense is not warranted.

1. Compliance is already taken into account in enforcement decisions. Mr. Breuer said that, pursuant to the Principles of Federal Prosecution of Business Organizations, there are nine factors that the government takes into account when determining whether to charge a corporation for FCPA violations. These include the nature and seriousness of the offense, the pervasiveness of wrongdoing within the company, the company's history of similar conduct, and the adequacy of remedies, such as civil or regulatory enforcement actions. One of the most important of these factors is the existence and effectiveness of the company's pre-existing compliance program. Mr. Breuer said that, if there were an absolute compliance defense instead, the government "would be forced to ignore the other eight factors." He said this "would run contrary to the principles we apply in every other area of criminal law."

2. A compliance defense creates a "race to the bottom." Mr. Breuer said that an absolute defense would lead companies to seek to implement only the minimum compliance measures necessary to establish the defense. His point suggests something that compliance practitioners inherently understand. Compliance measures must always be enhanced and adapted to meet new challenges. Compliance only works if it is a constant race for improvement, not an effort to meet the mere minimum. As one compliance officer recently told me, programs to prevent corruption are like programs to prevent hacking. Hackers always find new ways to get around security systems. Similarly, those who wish to pay bribes always look for ways around rules. This implies that efforts to do only the minimum would defeat the overall purpose of the FCPA.

3. Compliance is difficult to measure. Mr. Breuer said that parties would wind up litigating the existence of a compliance program, not the corruption itself. He

pointed to the Morgan Stanley declination as an example of how companies already get credit if they have strong programs in place. He added that compliance is not always easy to assess and that each case is different. He said that enforcement officials have to use their own best judgment when considering the specific facts to determine if compliance practices are adequate. Mr. Breuer is right that there is no "one size fits all" standard for compliance programs. Each program must be carefully calibrated to the size, risk, and operational profile of the company. Thus, it is impossible to apply one objective standard for assessing whether a specific program is sufficient to establish a defense.

UK Bribery Act Adequate Procedures. One of the key components of the Chamber's argument is the assertion that a compliance defense is already recognized by the United Kingdom under its Bribery Act of 2010. The Chamber states, "the comprehensive Bribery Act of 2010 recently passed by the British Parliament— Section 6 of which addresses bribes of foreign officials and closely tracks the FCPA—provides a specific defense to liability if a corporate entity can show that it has 'adequate procedures' in place to detect and deter improper conduct."

Ms. Kara Brockmeyer, the Chief of the SEC's FCPA Unit, addressed this point at the conference. She said that this argument relies on a fundamental misunderstanding of the defense under the UK Bribery Act. She said that the U.K.'s adequate procedures defense relates to anti-bribery provisions that verge on strict liability. For example, when a company's affiliated party is corrupt, a company will be liable whether or not it knew about the corruption, unless the company has a compliance program in place. She said that, if people want to amend the FCPA to give enforcement officials the advantage of strict liability, enforcement would be open to a compliance defense. But, under the current law, the government must prove corrupt intent, so a compliance program is not the "be all and end all."