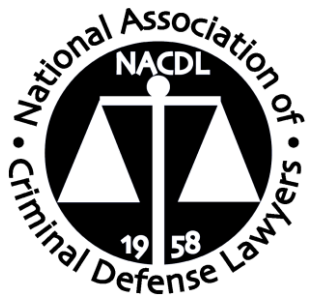

Written Testimony of
Shana-Tara Regon
Director of White Collar Crime Policy

on behalf of the

National Association of Criminal Defense Lawyers

Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Foreign Corrupt Practices Act"

June 14, 2011

SHANA-TARA REGON, ESQ., is the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL). In that capacity, she focuses on monitoring and attempting to prevent overcriminalization, overfederalization, and the erosion of *mens rea* in our federal criminal laws. She also works to maintain the sanctity of the attorney-client privilege and to prevent the further erosion of civil liberties in our criminal justice system. She also coordinates NACDL's strategic partnership with other organizations on multiple federal legislative and agency initiatives. Prior to joining NACDL, Ms. Regon practiced as a white collar defense lawyer at Shipman & Goodwin, LLP in Hartford, CT representing individual and corporate clients in state and federal civil and criminal investigations. She received her J.D., *magna cum laude*, from Western New England College School of Law, where she was a Note Editor for the Law Review. Following law school, she clerked for Justice Joette Katz of the Connecticut Supreme Court. Ms. Regon is a former President of the District of Connecticut's Chapter of the Federal Bar Association and a former pupil of the Oliver Ellsworth Inn of Court. She is admitted to practice in state and federal courts in Connecticut, Massachusetts, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,000 direct members— and 80 state and local affiliate organizations with another 28,000 members— include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

My name is Shana-Tara Regon, and I am the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers (NACDL). With over 10,000 members, NACDL is the country's largest organization of criminal defense lawyers. It works to advance the criminal defense bar's goals of ensuring justice and due process for those accused of crimes. Prior to my policy position at NACDL, I was a practicing criminal defense attorney in Hartford, Connecticut, with experience in representing individuals and companies in white collar criminal and civil enforcement matters. I greatly appreciate the opportunity to testify on behalf of NACDL about an issue of increasing concern among NACDL members, the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA").

The FCPA prohibits American companies and their employees and agents from giving "anything of value" to "foreign officials" in order to obtain or retain business. Despite its more than 30-year history, there is vast disagreement and uncertainty about the meaning of many of the key provisions of the FCPA. Published judicial decisions interpreting it are sparse, perhaps because the FCPA was not vigorously enforced until recently. In addition, enforcement authorities largely focused their FCPA investigations on corporations, which generally cannot undertake the life-or-death risk inherent in aggressively defending a felony criminal case by forcing rulings on key points of law, much less taking the case to trial and through to appeal.

Because there has been so little judicial scrutiny of FCPA enforcement theories, right now the FCPA essentially means whatever the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) say it means. For example, and perhaps most significantly, DOJ has used the law as if it were virtually a strict liability statute—meaning that actual knowledge of wrongdoing does not need to be proved. Such an application is inconsistent with the great weight of criminal justice jurisprudence and notions of fundamental fairness. In addition, because the reach of the FCPA is so vast and its provisions so amorphous, DOJ now oversees and regulates virtually all American companies and individuals seeking to do business abroad in ways those who created the FCPA surely never intended or envisioned.

The purpose of the FCPA is laudable—it was originally designed to prohibit U.S. companies and individuals from offering bribes to foreign government officials for the purpose of unfairly obtaining business opportunities. But explicit commercial bribery is not the only kind of situation in which the FCPA has been applied. Because the law vaguely prohibits giving "anything of value," it can unfortunately be applied to criminalize all kinds of perfectly legitimate business activities. In addition to the expansive view of what kinds of conduct can lead to criminal exposure under the FCPA, is the question of who qualifies as a "foreign official." In cases where the conduct involves payments to individuals working in the executive, legislative, or judicial branches of their governments, determining whether the recipient is a "foreign official" is not difficult. But recent prosecutions have involved payments to mid-level employees of "state-owned companies"—that is, payments to employees who generally do not fit a layperson's view of a "foreign official."[1] This expansive definition of "foreign official"

[1] For example, in a recent California prosecution, *United States v. Carson*, No. 8:09-cr-77-JVS (C.D. Cal.), the government has alleged FCPA violations based on payments by employees of an American company to mid-level officers of state-owned oil, nuclear, and power companies in China, Korea, Malaysia, and United Arab Emirates. The government defends such prosecutions on the ground that the FCPA defines a "foreign official" as an "officer or employee of a foreign government" or "any department, agency, or instrumentality thereof." Thus, the argument

makes doing business in many areas of the world, especially where government-owned enterprises are common, automatically rife with potential criminal exposure.

Take this example: A U.S. company is trying to win a contract with a partially state-owned Chinese hospital to provide it with rubber gloves. In an effort to create goodwill and foster a business relationship between the parties, managers of the U.S. company take their Chinese counterparts out to dinner in order to talk about a potential deal. Maybe they pay for the car service in order to pick every one up and drive them home again. Are these FCPA violations? Perhaps they fly the Chinese managers to the U.S. for a site visit to the rubber glove factory, and provide them with a hotel room during their stay. Is that a violation? What if they take their guests to visit a famous landmark or tourist destination located near their factory? What about a small gift when, months into the negotiations, one of the Chinese managers announces the birth of his son? The truth is, U.S. companies do not have any real way of knowing whether any of these activities could expose them to criminal liability under the FCPA; right now, a careful criminal defense lawyer would advise her client that it depends entirely on the opinions of the DOJ or SEC at a particular moment in time.[2]

It is also worth emphasizing that, although the statute contains a "willfulness" requirement in an attempt to limit an individual's liability for violating the anti-bribery provisions of the FCPA, as in other areas of white collar law, the government has increasingly relied on the "willful blindness" doctrine as a substitute for proving willfulness and knowledge in FCPA prosecutions. Properly construed, the "willful blindness" doctrine merely allows a finding of "knowledge" and "willfulness" in a situation where the evidence shows the defendant "actually knew but . . . refrained from obtaining final confirmation . . . ."[3] Nonetheless, both inside and outside the FCPA context, this doctrine has often been extended to cases where "no actual knowledge existed," but where a jury could determine from the evidence "the defendant had not tried hard enough to learn the truth."[4] The practical effect of this doctrine is that the CEO of an American company can be held personally, criminally liable for the actions of his

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goes, state-owned companies are "instrumentalities" of foreign governments, and their employees (even low level ones) are "foreign officials" within the meaning of the Act.

[2] In 1988, Congress amended the FCPA to require DOJ to issue opinions in response to questions regarding whether prospective conduct would conform with DOJ's enforcement policies. Unfortunately, this opinion procedure has not provided the business community with the clarity or guidance that Congress may have intended. Only three opinions were issued in 2010 and only one opinion was issued in 2009. There are numerous reasons why this process does not provide sufficient guidance to persons wishing to be compliant with the law. First, the opinion process only expresses the opinion of DOJ, not the SEC, who is also charged with enforcing the FCPA. Second, the opinions do not create legal precedence for anyone else; in other words, a company cannot rely upon an opinion granted to another company, even if the essential facts or conduct is the same. Third, the opinions released by DOJ are so explicitly detailed that details of a potential business dealing no longer remain confidential, which can affect not only the parties involved, but the entire marketplace.

[3] *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002).

[4] *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000).

employee half way across the world—whether he knew about them or not. This doctrine dangerously eviscerates the *mens rea* protections Congress meant for the statute to provide.[5]

As things stand now, U.S. companies and individuals are at a severe competitive disadvantage, while simultaneously at risk of criminal prosecution, because the contours of this law are vague and overly broad. NACDL is not advocating that American companies or individuals be permitted to bribe officials in other countries in order to get business done. Commercial corruption is a very real, very insidious problem in the global marketplace and advocating for reform in the FCPA context is absolutely not advocating for commercial bribery. But here is the reality: Right now, American companies, large and small, have spent billions of dollars on sophisticated compliance programs in an effort to ferret out those kinds of situations and, more importantly, to prevent them from happening in the first place. Because no one can ascertain with any degree of confidence what kinds of conduct are safe, however, companies are over-complying at great cost. If a company finds out that one of its local employees in Nigeria may have made a $20 payment to help get a permit to park a delivery truck in front of the company's building, that company may feel compelled to hire expensive outside counsel to do a thorough investigation into how that situation occurred and whether it has ever occurred in the past, as well as to provide it with advice as to how to prevent that sort of conduct from occurring again. The next step, for most companies, is to voluntarily reveal what it has discovered during its investigation. In return for being so diligent in its effort to disclose the conduct and prevent it from reoccurring, the company will willingly pay to DOJ whatever DOJ wants by way of a fine in order to avoid having to go to trial and risk a criminal prosecution. The company might agree to pay for an internal corporate monitor; it will agree to being audited—all of this costing the company millions of dollars in actual costs, not to mention the cost attributable to business interruptions.

In exchange for spending millions on compliance programs in good faith efforts to be compliant with FCPA law, U.S. companies are suffering with what has now become an unduly inhospitable regulatory environment. Most Americans are not trying to break the law; they are not looking for permission to bribe foreign officials. But they are looking for some clarity in the law as to what is prohibited and what is not. Is paying for a $100 meal for an executive at a company owned by a foreign government a felony? What about a birthday gift to a business colleague? What about a charitable contribution to a business contact's favorite charity? While it is true that the government has yet to prosecute someone for a $100 dinner, nothing in the statute prevents them from doing so, nothing in their own enforcement policies or procedures prevents them from doing so, and so any criminal defense lawyer wishing to avoid committing legal malpractice is forced into the position of telling their client that such routine business activities *may* be unlawful. That, in turn, is leading to a cessation of a wide array of legitimate business activity. American businesspeople need fairness in enforcement when they are already doing whatever they can to ferret out and prevent violations of the law. Further punishing American

[5] The erosion of *mens rea*, or criminal intent, requirements in federal criminal law has been an issue of increasing concern for NACDL. *See* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) *available at* www.nacdl.org/withoutintent, as well as NACDL's prior Congressional testimony on the subject, available at: http://www.nacdl.org/public.nsf/WhiteCollar/Letters_and_Testimony.

businesses who are acting in good faith and throwing in jail supervisors who had no way of knowing about a payment half a world away could not have been what Congress intended thirty years ago when it drafted this law. Nor can that be a good-sense approach in this difficult economic climate that has cost many Americans their jobs and imperiled our nation's status in the global economy.

Defining broad categories of conduct as criminal will not eliminate all wrongdoing and criminalizing vast swaths of activity will not make America a better place. Indeed, for the first 100 years of our history, we had no federal prisons (except to house soldiers) and we started off with only three federal crimes—treason, piracy and counterfeiting.[6] Now we have over 4,450 federal criminal laws on the books, plus so many additional criminal provisions hidden in the federal regulatory scheme that no one has yet been able to count them. The average American is likely unaware of most of the criminal laws that could subject him or her to prosecution by the government. Many federal criminal statutes are duplicative of state criminal laws, and many more are duplicative of each other. Further, these federal laws are sometimes written broadly, with vague terms, and supported by questionable constitutional authority.

The FCPA is emblematic of the serious problem of overcriminalization. While it seeks to prevent and redress serious misconduct, its language and application have led to unintended consequences. NACDL appreciates your efforts to consider and address these issues and we join many other organizations, from both the left and the right, in the call for some much-needed commonsense reform in this area, particularly reforms that will strengthen the *mens rea* requirements of the statute and bring clarity, uniformity and fairness to its enforcement.

[6] Peter J. Henning, *Misguided Federalism*, 68 Mo. L. Rev. 389, 414 (2003); *see also* Brandon L. Bigelow, *The Commerce Clause and Criminal Law*, 41 B.C. L. Rev. 913, 931-932 (2000).