PANEL 3: THE FCPA AND THE UK BRIBERY ACT

MODERATOR: Kevin Davis
PANELISTS: David Raskin, Sara Moss
Lee Dunst, Karen Patton Seymour

AUDREY STERN: We are going to start our third panel now, on the FCPA and UK Bribery Act, and I'm just going to hand it right on over to Professor Davis to begin. Thank you.

PROFESSOR KEVIN DAVIS: Thank you very much Audrey, and thank you to all of you for showing up and staying late on a rainy Friday afternoon. It's always nice to see that people are interested in these kinds of topics. I guess I should begin by introducing our panelists. Their bios are in your program, so I won't dwell on them at length. But I should say just a couple of words about the composition of the panel as a whole, because someone, when they saw the lineup, said, "Oh, well there's quite the defense bias there, because we have a general counsel and three defense lawyers on the panel." But it turns out that everyone, including the general counsel, as I discovered recently, has experience on the other side, on the government side, including very, very recent experiences—as recent as November I guess, in the case of one of our panelists. So hopefully views won't be too biased. So I thought I should get that out as well. So the four panelists are David Raskin—a partner at Clifford Chance. He's a litigator, does a lot of white collar work, and was, until November I gather, with the U.S. Attorney's Office here in the Southern District of New York. So he has only recently come over to the corporate side.

MR. DAVID RASKIN: Don't say the dark side.

PROFESSOR DAVIS: I was stumbling over dark side.

MR. RASKIN: I know you were.

PROFESSOR DAVIS: So next to him is Sara Moss who is general counsel of Estee Lauder, and also an executive vice president of the Estee Lauder Companies, and I should also mention that she is not just an alum of NYU Law School, but on our board of trustees. So it's a pleasure to have her here in a somewhat different capacity. Then moving over its Lee Dunst from Gibson, Dunn & Crutcher. He does white collar defense work, specializing most recently I gather, in FCPA matters, both at the litigation stage, and also in terms of advising on

compliance matters, and I think as you'll see, a lot of our discussion is going to be about the up-front risk assessment and that's now part of FCPA practice. And then finally, right beside me, is Karen Seymour, partner at Sullivan & Cromwell, is now head of their criminal defense and investigations group, which is self-explanatory, and I'm curious just what proportion of your work these days involves the FCPA as opposed to other criminal statutes. But of course, she's had two stints in government, most recently with being chief of the criminal division for the U.S. Attorney's Office for the Southern District of New York, and before that, a few years earlier, was also on the government side. So we've got a very distinguished panel. I didn't think it was appropriate to assume that everyone in the room knows a lot about the Foreign Corrupt Practices Act and the UK Bribery Act, so for those of you who have some familiarity with the subject matter, indulge me because I'm going to spend just two minutes setting up the basics so that we're all on the same page in the discussion that follows.

So as many of you know, the Foreign Corrupt Practices Act of 1977 criminalizes the payment of bribes to foreign public officials. It's been in force since 1977, but until recently I think it was fair to say that it had relatively little impact on the conduct of business. But since roughly 2006, the level of enforcement of the FCPA has increased dramatically from three, four, five cases per year, to 10, 15, 20 cases per year. And on top of that, FCPA liability now comes with really headline-grabbing sanctions. So Siemens, $800 million; Halliburton $580 million; Daimler, $180 million. That'll get people's attention right? And those figures don't include the fees, right? And I've read reports, which some of you will be able to corroborate better than I can, that the fees in a matter like Siemens were almost as much as the fine. So in the $800 million range. So all of that suggests that the FCPA is something that firms should pay attention to. It's also important of course for individual executives because the DOJ, perhaps in part in response to external pressure, has made it clear that it plans to go after individuals as well as firms, so there've been a number of individuals charged, and just last October we saw the longest ever FCPA sentence handed down of 15 years. So that's serious jail time, and I'm sure it gets the attention of a lot of individual clients. It certainly caught the attention of the Chamber of Commerce, which has lobbied for reforms to the FCPA, and

we can talk about those proposals toward the end of our session. And so something may happen there, but in the short-term I think it's reasonably clear that the level of enforcement activity, or perhaps the risk, will only tend to increase. I say that simply because on the other side of the Atlantic, the UK Bribery Act finally came into force in July of 2011. So there haven't been any corporate prosecutions yet for foreign bribery under the UK Bribery Act but they're sure to come because the jurisdictional scope of the Bribery Act is extremely broad. It applies to any firm that does business in the United Kingdom—to their worldwide activities that is. So that's one thing, and secondly it doesn't just cover bribery of public officials; it covers also commercial bribery,the payment of bribes to the agents of private firms. So for both those reasons, the UK Bribery Act has also caught the attention of a lot of multinational corporations.

So the point of this symposium is to discuss the implications of both the FCPA and the Bribery Act for business and business behavior. And we'll talk about both the legal risks that are associated with these pieces of legislation, and also, I hope, how business ought to participate, and the lawyers who represent them ought to participate, in the coming debates about potential reforms to the legislation. So that's where we're going. One thing I thought we should keep in mind though is that despite all the attention that these big fines have attracted, there is a chance that some of the risks associated with anti-corruption liability might be overblown. Not all cases result in fines of $800 million. The average fine last year was around $34 million, so that's, you know, still a large number, but for a substantial corporation it's not necessarily going to drive them into bankruptcy. And the Bribery Act is an unknown factor because it hasn't yet been enforced, but it does have a built in compliance defense that is designed to protect a lot of firms, assuming they act in good faith in trying to comply with the legislation. And finally, even if the legislation does create a lot of risk for firms, we have to keep in mind that it is there for a reason; it is designed to serve important purposes. For one thing it's the United States' way of contributing to a global fight against corruption, and it's probably a lot cheaper than foreign aid as a way of promoting global development. It also was enacted in part to avoid the embarrassment that was caused by revelations that U.S. firms were engaging in foreign

corrupt practices overseas, so it serves an important foreign policy purpose. And then finally, from a legal perspective, we have to keep in mind that the U.S. is now party to international treaties that bind it to have legislation more or less like the FCPA, and to enforce it vigorously. So that, I think, is also a set of considerations to keep in mind as we go forward.

Okay so that's the background. What I propose to do now is turn things over primarily to our panelists, and I'll just pose the questions. We thought we'd begin by talking about what this legislation means for the kinds of businesses that they advise. And starting with the sort of life cycle of a Foreign Corrupt Practices matter, just from the very beginning, when you first start talking to a board, or maybe people below the board level, about the risks that are associated with FCPA liability, what do you say? How do you assess the risks for a given firm, and how do you help them do that? And then we'll move on to the preventative measures and what happens if you find that they've sort of gone off-site. But let's start off at the risk assessment stage first, and I thought we'd lead off with Sara Moss and Lee Dunst to address those questions.

Ms. SARA MOSS: Thank you Professor Davis. I think there are two other statutes, if I could, that are relevant to a risk analysis and a compliance program. The first is the federal sentencing guidelines for organizations, and that was a statute enacted in, I believe, 1991 and amended, which lays out the factors for a judge to consider when sentencing a corporation. And those factors really say what a good compliance program is. There are seven factors, but all these factors go to having a real compliance program with a tone at the top that is communicated to all the employees; a code of conduct, if you will. It's a real compliance program. It's communicated, is enforced consistently and effectively, and steps are taken if criminal acts are found. So that is very— that is the backdrop I think for any good company as well as the other two statutes. The other statute I would refer to is the Dodd-Frank whistleblower statute, which as you probably know gives bounties for whistleblowers who come to the government and make fraud allegations, and if those are borne out, there's a bounty. That kind of changes the whole equation in lots of ways, but I would start with the sentencing guidelines for organizations in terms of a risk assessment because every good company needs a good compliance program, and that's irrespective of the FCPA or

the UK Bribery Act. And so the first thing that I do is I communicate our compliance program to our board. We have a code of conduct, we have education and training, we have modules that everyone must complete. Of course they have to sign the code of conduct, we have training on the code of conduct, we have computer modules, we have intranet messages from our CEO, we have intranet messages on the things that most concern us – gifts at Christmas time, et cetera. So that's part of a robust compliance program that includes, but is not limited to, the FCPA. So in terms of risk assessment, I think I would paint a broader picture, and that's just part of my job and part of what a good public company does. And I report to the board once a year on our compliance program, and they're actively engaged in it. Our directors are also directors at other public companies and we want the best of practices—the best practices in compliance programs. So there's a really good discussion, but we have a robust program and we consistently enforce it. I think that is critical. We've referred cases for prosecution around the world, and there have been prosecutions. Terminations are consistent for certain violations, so that is the broad canvas. As far as FCPA goes, I think the risk assessment is that we have to take extra steps in foreign countries, consistent with the kind of business that we do. So China's a big market for us now; Latin America is a big market. These are unknowns as far as the practices and the customs in the region, so we take special steps to educate our affiliates. Customs violations can be an area that's a red flag because our goods are imported, so we do internal audits; not just of customs, but of those affiliates. Agents are a risk factor, expense accounts, you know, kind of petty cash is a risk factor. And we look at those, we do internal audits, and again report back to the board on those areas specifically. I'll stop talking now but that's a general overview.

MR. LEE DUNST: Let me just comment, I'll sort of add to that about risk assessments because I work with many different clients, some who haven't had a problem yet, some who are in the middle of a problem, or some they've already had the problem with the government and now are trying to create an effective compliance program, and I think the most important thing at that outset is to conduct a robust risk assessment of the company. And what I always say to clients in this area is, you know, it's not one size fits all, and that you really have to

look at the company specifically, where you operate, and what kind of business you have. The notion of a risk assessment— I think measuring the sentencing guidelines is very important here because there's an expectation in the sentencing guidelines that companies are going to conduct a risk assessment and then conduct them periodically. It's not just, you know, one time you do it and then you have a static compliance program. It's a dynamic process, one that you have to examine on some kind of periodic basis, because the businesses change, and the global environment in which the company operates changes.

What I always suggest to clients when they're conducting a risk assessment is to look at a variety of factors. First is really to analyze what is your business, you know, where do you operate. One of the touchstones in this area is Transparency International's Corruption Perceptions Index. You can go find it on the Internet, and, you know, every year it seems to vary. Usually Denmark is number one for least corrupt, and then there are various countries who are unfortunately competing for the bottom of the list. That in many ways is the starting point, but at the same time, what I always suggest to clients is don't fixate on that. That's not the be-all and end-all. Everyone says if you look at all the enforcement activity in recent years, obviously China is a focus of a lot of enforcement activity, it's an area of significant exposure, but there are many other countries, too, and then some of my clients who operate in China really don't have significant risks because of the nature of the business. If you don't really interact extensively with government officials, then you don't really have an FCPA risk. So it's an analysis not just of geography, but then also what is the nature of the business, and who are you dealing with. I think agents is a significant area of risk, but another one which has gotten, in recent years, many of my clients into a potential problem is interacting with what they think are private companies, and then suddenly realizing early on, maybe later on, that it in fact is a company that is state-owned, and it leaves—and I'm sure we'll talk about this later in terms of things that are being discussed if that changes the FCPA—but under the terms of the FCPA, at least the way the DOJ interprets it, if you are a significantly state-owned company, your employees are considered public officials, and you come within the scope of the FCPA. So that's a significant area of exposure, and requires an added

analysis of many companies in conducting a risk assessment to really look at who your counterpart is, and do they have a government ownership interest. Similarly in many countries, Latin America and Asia in particular, the way many U.S. companies are going into those regions is through joint ventures. Similarly, if your joint venture partner is a government-owned entity, that can open you up to a potential situation. Further, if you're in a joint venture – and there have been some prosecutions under this theory – if you're in a joint venture situation, and the joint venture then, in turn, engages in some kind of improper conduct through an agent or vis-à-vis a public official, the company can have liability through that joint venture participation. So again it requires an added level of analysis of where your risks are and where your exposure is.

One last thing on this that I know in the work that I've done that I've found very useful is to speak to people at corporate, but then when you've got a company with far-flung enterprises worldwide, it's crucial as part of an effective risk assessment to touch base with the folks who have boots on the ground, because they really know. People at corporate know what's happening, but the people out in the field really know what's happening, both good and bad. I mean many times, again as I said, people look at the Corruption Perception Index and say, you know, well, a country is red, which means there's a risk here, but when we'll talk to people who are actually in the field they say let me explain to you how the business really operates, and the controls that they have in place. So I mean, that's really when we help clients with risk assessment, that risk assessment is at the front end of a process, that's really what we help focus them on. Don't get sucked into again sort of a one-size-fits-all or a notion that there are risks everywhere. I mean, it's a scary world, but it's not that dangerous. You can really navigate this, but you have to understand realistically where your risks are, and then analyze them in a manner where you identify the ones that are the most severe, and pose the issues that you really need to then structure your compliance program to then address.

PROFESSOR DAVIS: David?

MR. RASKIN: Yes, if I may, Professor, and thank you all for coming, and it's a pleasure to be here, particularly late on a Friday afternoon. You're all angels for sticking it out to listen to us. Just a couple of points to add to what we've heard al-

ready, all of which I agree with completely, and the first involves the perspective that a company should be taking when engaging in a risk assessment or endeavoring to improve a pre-existing anti-corruption policy. First and foremost, you want to prevent bribery whether DOJ catches you or not. Bribery is not good for business, and it's inconsistent with an ethical corporate environment, generally speaking, and I think we all know that. But the reality is you need a defensible compliance program and that's not just a policy, but a program that includes the careful steps that the company is going to take to implement those rules and regulations in the policy. You need a defensible program for the worst case scenario where you do end up having a problem in some far-flung subsidiary in some far-flung land, and you get a subpoena from my friends at the Department of Justice, or another agency, SEC maybe, and you have to defend the corporation's actions to prevent bribery. Now you can sit across the table from these folks and say, "No, we were really well-intentioned," but, in addition to that, having a policy in place that lays out exactly what the rules are, and allows you to establish that each relevant employee has read and certified that they will comply with the program, and lays out steps that are going to insure that best efforts are undertaken to implement the policy. Well, at that point the prosecutors or the enforcers are going to say this is a company that actually tried, and no company in the world can prevent everything, particularly the larger you get, and the further a company spreads its wings, it's very hard to know what's going on in each corner of the world. So to the extent that there's a policy you can be proud of, that is going to have a tremendously positive effect on the regulators. They're going to know the company tried, and in fact the guidelines that Sara mentioned and the guidelines in the U.S. Attorney's manual lay out as one of the key factors for determining whether a company should be required to plead guilty or get charged with an offense is whether there is a pre-existing policy in place and so on and so forth. And in putting that policy together, not to get too into the weeds here, given that context is important to show that the company has really thought the issues through, and this just dovetails off what Lee was saying. You want to examine exactly how the company does business, where are the hot spots, where are the risk areas and you want to have a policy that adapts to the way the company does busi-

ness. It's not sufficient simply to track the key words of the statute or the sentencing guidelines and check the boxes. To the extent the policy demonstrates on its face that the company really thought through the issues, it's going to reflect tremendously well, if and when, in the worst case scenario, the company needs it the most.

Ms. Moss: Can I just say one thing? I couldn't agree more, and, corporate culture really matters, so it's not just having a code of conduct because people check it and then you have no idea if they've read it. So having the education and the training and the tone of the top and the way we do business really matters. I'll just tell a quick anecdote about that; before this job I was general counsel with another public company and when Enron exploded, a lot of us general counsels were looking at our audit committees, looking at our procedures, making sure that we didn't have some of those same problems.

And the general counsel of one of the companies sent around an audit committee charter, just informally, to some other people, and I looked at it and said, "Wow, this is great," as did some other people of very well-known companies. And then the next message was this is Enron's audit committee. So I think you start with that, and again, I would say that you do a risk assessment but that's only on top of a really strong compliance program. One of the things that I do as well is I have a lawyer who's dedicated to each brand, region, and function in our company.

We have—women may know this—we have 29 brands in our company and they're global, they're global. But the lawyer who reports only to me is part of the, sort of, management team of each of those clients, and is, part of the operation of those regions, for example, or those brands. It does a few things; first of all, the lawyer can recognize red flags that other people may not. But also, a big part of the reason I did it was so that the clients would view the lawyers as part of their team as opposed to the enemy.

For example, in this respect, you know, gifts of modest value are generally allowed. I'm talking even within the U.S., let's say. What is a modest value? I mean, we actually put a number on it, but my point is that some of these, when you're trying to do the right thing, some of these questions are hard,

and I want to have lawyers who are accessible to the clients to talk about these things, to work it through together, to bring it to me if they need to, but not to be, you know, the enemy – far away physically or far away emotionally – and these are the same lawyers that give the code of conduct presentations and answer questions but are available. And I think it's worked very well.

PROFESSOR DAVIS: I don't know, Karen, if you have anything else to add, but I also would like to hear about two things—I'll pose the questions one at a time—in the acquisition context, if you could say a word or two about how the risk assessment works then. What do you look for when you've got a firm that's your target firm, the firm that you're buying, has been operating in high-risk areas? How do you go in and do the risk assessment when the people you're talking to may not have quite the same incentives to be forthcoming as they would if they were already part of your organization? So this, I'll give Karen the first shot at it, and then anyone else can chime in.

MS. KAREN PATTON SEYMOUR: Sure. M&A due diligence is an extremely important area, and that's because, in the criminal context with the FCPA, we've seen a number of times that the Department of Justice does not hesitate to hold the successor company liable for all of the sins of the acquired entity. So you really, if you are engaged in M&A activity and you're not doing thorough due diligence about FCPA violations, you're really acting quite foolishly because you are going to be held responsible in a very Draconian way, much more Draconian than in the civil context where people—there's actually balancing tests and it's not 100% clear that you would be held responsible for the acquired companies problems.

In this context, it's really virtually certain, so you're going to want to have a pretty extensive M&A due diligence checklist, and to go through things, again similar to the risk assessment. You're going to look at what kind of company it is, and all of the factors that Sara and some of the other panelists mentioned in terms of the kind of things that you would look at. You're going to apply that kind of assessment in this context as well.

We certainly have cases where the acquired company doesn't really want to share that information, and that really

should be a very significant red flag for the company in terms of going forward, because you're buying those problems. Not only past problems, but if they have a shabby compliance program or a culture where people have policies, paper policies, but they know that they don't really care about them, and it's just business as usual where you pay bribes, you've inherited that risk, and it's going to be very, very difficult for you to change that culture and integrate them into your company, which presumably has a better compliance program.

So it's very significant, it has to be done very thoroughly, and at times you have to walk from a transaction. The other thing that you can do if you are faced with FCPA risk and problems, and we've seen this in the case of BAE recently. They found in doing their due diligence in an acquisition that they were about to acquire a company that had very significant FCPA exposure. And what they did from the public press releases is that they did self-report to the government even before that transaction closed so that they engaged in dialogue, they started trying to do the remediation, and so by the time that transaction closed they still didn't have a deal which a lot of times our clients say settle your FCPA exposure and then we'll talk and we'll do the deal, but deals don't always happen that way, and the government is not always able to resolve matters as quickly as our clients sometimes would like. These cases can go on for years and years.

So in that matter, the FCPA settlement, which included a non-prosecution agreement against BAE for this conduct was in part because they had self-reported, had come clean, and worked very thoroughly to integrate the companies, and make sure that the new acquired company was fully integrated and had decent compliance programs. So there's ways to manage it, but it is by no means simple.

PROFESSOR DAVIS: I'd like to ask one more question about the risk assessment process which is how the Bribery Act changed things because Lee, when you're talking about the process, you almost had a checklist where you look at the activity, you look at the country and so forth, and the counterparty, figure out whether the counterparty was a public official because that's the scope of the FCPA. But I'm wondering whether you can skip that step now on account of the Bribery Act because even if the counterparty is not a public— or if the individual on the other side is not a public official, you could

still be liable under the Bribery Act. So I'm wondering how important that factor is now and whether we're moving closer to a world in which there actually is risk everywhere?

MR. DUNST: I think you're right, we're moving closer to a world where there's risk everywhere. The real question though with the UK Bribery Act, we're still as you said, we're still at the [inaudible] of this front station determine how is it really going to be enforced, to what extent is it—you know, is this really going to be an issue.

The starting out point with many of my clients is, "Okay, what's your nexus to the UK and what's the real connection there?" You know, under a broad reading of the statute, under the UK Bribery Act, you don't need much of a connection at all to the UK. It'll be a real question to see whether or not they really pursue that aggressive of a jurisdictional theory.

You know, when I work with clients and we try to make that risk assessment determination and how to structure your program, we look to see what are the UK based activities and what is the real connection to the UK and then make the determination from there. For the most part, the approach we are taking is, if you're meeting the FCPA standards, you're probably also going to meet the adequate procedure standards under the UK Bribery Act, and you'll probably be fine under both statutory regimes.

That being said, there are some key differences. One of them in particular is facilitating payments; it's obviously one of the major ones that's a permissible exception under the FCPA, and the UK Bribery Act has taken an extreme position that that's completely forbidden, which puts many companies into a difficult position as to how to structure their program and to look to the risks, because, you know, for many companies, facilitating payments are sort of a reality and there's no way you can get around it, so arguably you may be in technical violation of the UK Bribery Act, but we try to work with companies just to try to structure their programs in such a way that at least if they're engaging in facilitating payments that arguably could violate the UK Bribery Act, that at least you're minimizing them or keeping track of them, or at least approaching them from a compliance program approach, that at least you're limiting it and at least messaging from the company that you want to sort of limit this exposure.

MR. DUNST: I mean the example that I always use – well, actually the example that many of my clients use with me, and whether or not it actually happens I don't know – is the classic story that's been told to me many times: when you're standing at immigration in some far-flung country in the middle of the night, and you've presented your passport, and they're looking for your yellow fever card in there, and they say, "Well, you know, it looks like your yellow fever card has expired, so your option is to give me $50, or I'm happy to give you a shot of yellow fever right here out of this bowl that's full of 30 dirty syringes."

And what we generally tell our clients— and I've heard that story. Whether it's true or not, I don't know, but I've heard it from multiple clients over the years. That payment would be considered a facilitating payment. In essence, you're paying an official to do something that they're already required to do; some kind of ministerial act. Payments are low. That situation obviously is when we always tell clients, "Listen, it's a health safety issue; just pay the money and then, after the fact, advise your compliance program. Make sure you've kept track of it." So that's at least the classic example.

Ms. Moss: Yeah I think it's a tough question, and I kind of don't talk about facilitating payments because I think the line can be blurry, and I don't want my people making any payments. I mean customs for example, you know – what's a payment to do the malaria shot (or whatever it is)? What's the payment to get your goods in faster? I don't want that. So I think that's an issue.

I want to raise one other point on FCPA if I might, which is third party suppliers, and I think that can really be an issue, especially suppliers around the world. Do you have third party suppliers sign as part of your agreement that they comply with the Foreign Corrupt Practices Act? They do not engage in that kind of behavior, and if they don't you stop using them. You know, what do you do? What's the liability? Is it known or should have known? You know, at what point do you become liable with third party suppliers? And that's actually a tough issue I think.

AUDIENCE MEMBER: This is more of a law school theoretical question that's been bothering me for a long time on this FCPA and other legislation. The question, extraterritorially, is

how far can Congress go to punish what is purely foreign behavior, such as a broker or an agent who bribes a government official in China and you happen to be doing business with him?

I'm wondering whether that's been challenged and how far it's gone. I'm sure it has been and it's been lost, but I just was wondering what the cases would say about it?

MR. RASKIN: It hasn't been challenged in the FCPA context. One of the reasons panels like this are so interesting is there's very little case law at all on FCPA matters to a large extent because many of the actions are resolved via agreements with corporations. More and more DOJ and the SEC are charging individuals, and recently there was a large indictment of the executives from Siemens AG, the German conglomerate, who were involved in a culture of bribery 10 years ago and, in particular, with respect to a big government contract in Argentina.

But to your point, that was German officials bribing – German employees bribing officials in Argentina and the connection – there was a connection or nexus to the United States, but it was mainly money going through U.S. banks and one meeting in Florida. So I'm not answering your question because—

AUDIENCE MEMBER: No, I think you are because it hasn't been challenged, and I think it probably should be. And at some point you hit a due process level if you've got strict liability without scienter, without mens rea, you did business with a Chinese customs broker that was regularly paying off the chief of customs of Beijing or something like that, and if you can go to jail or be fined for it, I would think if the Supreme Court hasn't ruled on it, they may eventually say it's a due process violation.

MS. SEYMOUR: I can say I've litigated it on behalf of a foreign entity. There was a foreign company whose parent listed on the stock exchange here, but the subsidiary that entered into a joint venture that committed bribery, and a joint venture participant – not the subsidiary that we're talking about – had a meeting in the U.S. And the question is, "Was the parent and that subsidiary subject to bribery when all the bribery took place in Africa and had really nothing to do with the United States?"

The Department of Justice was very aggressive in that matter. I litigated, if you will, through a lot of advocacy and papers, arguing that there was a tenuous jurisdictional connection and that you couldn't expand jurisdiction to hold this subsidiary accountable merely on the ground that they were a joint venture participant, because that's enlarging through conspiracy more than what Congress ever wanted.

I really believed in the argument, I think I was legally on the right side of things. The Department of Justice would hear none of it. They said nope and they forced a resolution and they can't. You're saying forced a resolution, come on. For a corporate entity, it's more expedient to resolve the matter than to face litigation in court, and my client decided not to fight the matter in court and resolve the matter.

So I know they're untested. There's a lot of, I think, good arguments that companies or individuals can make in such a circumstance, and I think the legislative history, when you go back and really parse through it, you know, it extends to the case David was talking about where there's a meeting in the U.S. Okay, I think that's pretty clear that act is covered. But when you take concepts such as mailing in the U.S. or telephone calls or the use of U.S. dollars abroad, which technically pass through the U.S. I think you're on much more uncertain legal ground.

MR. DUNST: I'll just sort of add to that. I mean, I think historically what's driven this in large part with the DOJ and the SEC in terms of taking a very expansionist approach has been at least the notion that they've had that regulators outside the U.S. are not aggressively enforcing anticorruption laws, which was probably not an unfair assessment 10 years ago. But sort of as evidenced by the UK Bribery Act and statutes in many other countries, there's increasingly much more aggressive enforcement of local anticorruption laws. There's lots of focus on China in terms of being an area of extreme risk.

All we have to do is follow Google news alerts and sort of see what emanates out of China. That is not a place where you want to be arrested on bribery or corruption charges. The penalties are much more severe than here in the U.S. So I think there's an increasing regime outside the United States for aggressive anticorruption enforcement, and it'll be inter-

esting to see as we go along to what extent – if you have a situation as Karen was suggesting where your nexus to the U.S. is little more than you're a listed company, and it may be multiple levels down the subsidiary or joint venture – you may have a better argument in this environment or in the future to say, "You know, U.S. regulators, this is not your job, let the local regulators handle this. They're aware of it and they're dealing with it."

PROFESSOR DAVIS: I'd like to shift topics slightly actually, because we've spent a lot of time talking about the front end of the analysis, the risk assessment, what activities, which countries, which kind of counterparties might pose risk, and the nature of those risks; the risks of liability both in the U.S. and in other countries, including the host countries. But we should also talk about, I think, what happens when the risk actually materializes.

Something goes wrong, your client tells you that they've not only done something bad, but that it may actually come out. They probably can't cover it up. So I'm curious about how all of you deal with that scenario.

Ms. MOSS: Well I call all of them first.

Ms. SEYMOUR: I'll jump in. In fact I got a call right before I was coming up here – 100% serious – with a "we don't really know what happened, but here's what we hear" kind of thing. Because rarely do I have someone say, "Oh, we screwed up. This is what we did; it's really bad." To the contrary they say, "Well, I'm sure everything's fine, but we found this, and I'm a little concerned someone could say. . ." And it's all those kind of questions. Or, "I think it's fine," but you know that you say, "Look, we've got to dig a little bit deeper here; we've got to have a better sense of what's going on." And it depends on, you know— the allegations can come forward in so many ways. Companies have whistleblower complaint lines, and there may be funny calls, sort of anonymous tips. Sometimes you get letters.

In this instance it was a competitor who sent a letter at senior levels to an entity who called just before I came up here with some allegations, and they may have their own agenda. Who knows if it's true? But, you know, companies really have to look into these matters and respond. The degree of re-

sponse and the degree of investigation and fact finding will depend in large part on the nature of the allegation.

If it's about corruption and it appears detailed, or if it appears to be something other than the most frivolous thing, and even if— and I would say in this context even something that would appear, you know, frivolous by the kind of handwritten weird correspondence, you want to say, "Oh, no, that doesn't sound right." But you should still, I think, do some inquiry. But the more serious allegation, you need to look into it. You're going to raise that up certain levels, and certainly if there's allegations that management is involved, you're going to need to probably get that right to the board of directors. You're going to want an audit committee, special committee doing investigations.

So we could spend hours talking about these steps, but you're going to really need to dig into these problems so that you can figure out what the problem is, and be able to take steps—and there's a lot of steps we can talk about—to think about whether you're going to self-report this conduct, what actions you're going to take, if any, to correct the conduct going forward and remediate. Maybe there's employees who have to be fired. But you've got a big issue.

Ms. Moss: We get these kind of issues through a hotline, and we have an international hotline that we've outsourced so the people who answer it speak all the languages of the countries where we do business. And it can be anonymous, and often is—comes in to us. We get letters, often anonymous, and all sorts of other ways.

Any of these allegations comes to the ethics and compliance committee, which I chair with the CFO and the head of human resources and the head of internal audit. We always do an internal investigation. I mean often it's kind of an HR issue, but we still do an internal investigation or we give it to the HR person who will report back.

But sometimes it's just not so clear, so we initially, if we possibly can, do an internal investigation. If it's anything involving financial fraud or someone in management, we— first of all, I immediately report it to the head of the audit committee and let him know that we've gotten this allegation. And they're not that frequent, but the whistleblower statute I think makes it more frequent.

But, in any event, so if there's any substance or it's in a particularly sensitive area, we'll report it really contemporaneously to the head of the audit committee to do an internal investigation. Karen's exactly right—if there seems to be any substance, if it's financial we can get outside forensic accountants, or actually hire an outside law firm. And often the audit committee will have their own law firm and then somebody representing the company. I mean, depending on the nature of the allegation and whether there seems to be substance or not, you have to take all these steps actually pretty promptly. But it's also true that we keep a record of the allegations and our response, and what we've done. And again, to me that goes back to the sentencing guidelines, you know, so we can demonstrate that when we get these allegations—many of which are frivolous, many of which are actually in response to employees' belief that they're going to be fired for poor performance, so they come up with something. Nonetheless, we record them and we present the table actually to the audit committee and we have the response. We have the outcome of each of these.

So I think it's important to do on every level, but certainly if it seems to be serious, you take all those steps right away.

MR. DUNST: I was going to say, I think Sara's last point is really, really important because whenever you come across one of these problems, even if you found there really is an issue, you're not necessarily going to be picking up the phone to the DOJ on every single one of them. You may determine it's not material. You may determine that it was sort of a rogue employee, that it's not systemic. There may be a variety of issues that may result in you deciding not to self-report it. And if you make that decision then it's crucial to have that record of—okay well we as a company made the decision not to self-report. Why did we make that decision? And then also what did we do about it? What did we do when the employee—remediation is crucial. What did we do so this won't repeat itself in the future? Because in most cases, unless it's a competitor sending a letter or a whistleblower, many of the times the way these things are found are through a cold call to a help line, internal audit is doing its job and finds the problem. So it's not a situation where the subpoena gets dropped on you out of the blue. You've usually, as a company, if you have a robust program, have found it yourself. So then the issue is

now if I found it, I'm dealing with the problem. You've got to make sure that you've then got a record in place. I mean I've had situations where I've had companies that have addressed situations, done it well, and then out of the blue, two or three years later, somehow the regulator finds out about it. And then we have to go in and walk them through, "Okay, this is what internal resources of the company did three years ago to be able to demonstrate to the regulators that, hey, they did the right thing here."

Ms. Moss: Yeah just one thing about that that is certainly there needs to be consistent enforcement with regard to the employee. But remediation, I think that's part of why I like my job because you can help make things better, even in a good company. So you look at the allegation and there may not be substance to it, but the controls could be better. So you put in place something that addresses the issue with regard to the company's processes as well as dealing with the employee.

Professor Davis: So David, just before you jump in, because I want to hear from you, but I also want to hear from you on something very specific given that you're the one closest to being in government. Because I understand all the steps, but I'm curious about the answer to this question of, well, when do you self-report and who makes that call? That's the really tough question in all these cases, I presume. So I'd like to hear from everyone on that perhaps, but coming from the government's side, when would you expect companies to self-report?

Mr. Raskin: Well that is the million-dollar question, and I mean the call is the company's call. And you know, as lawyers and as former prosecutors, at least in our case, you can provide advice that can be extraordinarily helpful in making that decision. I think the most important thing that the counsel can do is lay out best we can what the steps would be for each course. If you do report, here is what is likely to happen. Here is our best estimation of how DOJ is going to react. It can be a decision tree type analysis. You can say if we do X, Y, and Z, but don't report, here is how it's going to play out. If we do X, Y, and Z and do report, here is how it can play out.

Obviously there is no way of knowing. Ultimately what it comes down to is how bad is it? How serious is the conduct? And there is the full spectrum. How high up did it go in the

company? I mean, if it's at the management level, it's probably going to be a situation where you're going to want to report it and take other remedial measures the way we've heard.

Also, you can't forget about the legal issues, some of which we've discussed here. You want to look at the basics. Is it covered by the FCPA? Is it covered by the UK Bribery Act? Are there arguments? Is it a close call? Is it not a close call? Are there maybe soft spots in the statute that would give us legal arguments or a justification for not reporting? It's a multi-factor analysis.

Ultimately it's the company's decision, and it's a cost benefit analysis, and it can—let Sara speak to this, but it can come down to dollars and cents. We're willing to take the hit no matter how bad it is, but we don't want to invest our time and energy in doing a very, very deep dive investigation. We'll take our chances.

PROFESSOR DAVIS: Just moving down the decision tree then. So you've decided whether to report or not. For whatever reason you've ended up dealing with the DOJ. They've offered some sort of agreement, some sort of settlement, some sort of resolution. You think you have some arguable issues. How do you decide whether or not to litigate or fold, as it were? Could you ever imagine going to trial on one of these cases, for instance, with a corporate client?

MS. SEYMOUR: Yes, it just takes a corporation that's willing to face the consequences, and the consequences of a conviction will depend in large part on what kind of business the entity is. If a company is charged with FCPA violations, indicted, if it's a financial institution, that's probably not going to be something that that institution can survive easily. The collateral consequences of that would be too great. Bank regulators would not want an institution to fight it out with the Department of Justice at trial is my guess. So that would be an instance where I think companies would have a harder time fighting charges, even if they believe they're unwarranted.

Contrast that with a small, closely held company that doesn't do government business, that's not otherwise regulated. They could probably fight those kind of cases. So there's a spectrum of kinds of corporations. When I talk about collateral consequences, that includes debarment. So if they're doing business with the government, let's say that you're in

contracting work in some way with the government. Consequences are, if you're going to lose that trial, you're going to lose your business with the government. So that's not a company that's likely to be able to fight.

So the question is what's the company? Can it fight? Can it deal with potentially adverse publicity that's going to come in a trial? And there have been some companies to fight FCPA charges more recently. We're starting to see more cases being brought without simultaneous settlements and that's a departure from the past. And again those are typically not the kinds of companies that I'm talking about, not financial institutions, not huge companies that are multi-national with a lot of government contracts.

Ms. Moss: Yeah I think Karen's obviously right, but I think the adverse publicity for a company that's not a financial institution but a global company would be frankly the primary consideration. These cases take a very long time, especially if you're fighting. It's a huge drain on resources, on image in every way. And luckily I haven't faced this issue or this decision in either of the companies, but I think the adverse publicity— a company that, you know, is not a financial institution and doesn't do business with the government would still, I think, pause long and hard before fighting and having that fight in public.

Ms. Seymour: Me too.

Mr. Dunst: So I think in some senses you may need a company that is willing to take a risk to make a point. The gentleman who asked the question about jurisdiction—when you're CEO of a company and you're sick and tired of this extraterritorial jurisdiction, you may make a decision to take on the Department of Justice and the SEC as much to make a point as anything else.

Ms. Moss: But what's in the interest of the shareholders?

Mr. Dunst: Absolutely right. I mean, it's a hard question, even under those circumstances, but that is likely going to be the way we will see a real knock-down, drag-out fight with the Department of Justice.

Mr. Raskin: See, I actually want to take a step back because I think this is in terms of the self-disclosure decision. Because this is in many ways part of the issue in that if you as a company know and consulting with your counsel, or if I go in

and I self-disclose this, I'm going to get a definable benefit out of this. You know, they're not going to charge me, or they're going to give me a reduced fine. And in many ways, the challenge of recent years is you try to—again, there are very few reported cases, so you just have to sift through the reported settlements to try to divine what the principles are, and candidly it's hard to divine them in terms of if a company self-reported and what is the exact benefit that they've gotten. And sometimes you look at some of these major settlements, and you're struggling to find out what the actual benefit was. And, in many ways, if things go bad and then you end up in a situation with a trial, then things have gone from bad to worse.

So that's certainly, I think, in many ways, is sort of the key moment in many of these cases. Am I going to make that self-disclosure decision? I think all the points have been said in terms of the factors are all crucial ones, especially I think how high up in the company it goes.

MR. DUNST: Just a small point—Siemens pled guilty in a very publicized settlement in 2008. They are still cooperating in an extraordinary way, and the government could not have brought the case that it did last fall against the executives without the corporation's whole-hearted full support. So cooperation can go on a very, very long time. Even when you feel the case is done, it's not done.

PROFESSOR DAVIS: Can I ask a practical question? Assuming you're not going to trial and you want to negotiate, in a world where you've got to worry about the UK, Germany, France, as well as the U.S. with both the DOJ and the SEC, and possibly the host country government and its regulators as well, how do you go about working out a deal with all those regulators? First of all, who do you disclose to? Who do you disclose to first, and then secondly, do you sign an agreement with one and then hope they can do it sequentially, or do you try for some sort of global agreement? Just in terms of the nuts and bolts of this, how do you do it?

MS. SEYMOUR: I'll jump in. First of all, you're thinking, "Who do you self-report to?" You know, the U.S. so far has wielded the biggest stick and has pounded more heavily than the other regulators. So if you're going to make a decision to self-report and there's even colorable, broadly defined jurisdiction extraterritorially, you're going to want to report to the

U.S. If you have a significant presence in the UK, and I think the SFO and the UK have given some guidance, in spite of the breadth of the statute, I don't really think we're seeing an intent to become the world's policeman in the UK, in spite of the sort of very scary legislation there. But you're going to want to get advice from UK lawyers about that. And if the bribery is in a particular jurisdiction that is taking bribery very seriously now, you're going to think about the regime there, you're going to get local advice about the benefits and perils of self-reporting.

So you're going to do a real analysis. But know that once you self-report to the U.S., the U.S. prosecutors and the SEC get together very frequently now with the OECD members and talk about bribery cases, and they go around the room. They have a roundtable when they actually talk about what cases they're doing. So your decision shouldn't be, "Well I'll report to them and the others probably won't hear about it." They will hear about it, so you might as well own up to that and deal with them in a forthright way from the beginning.

Let's assume you have several jurisdictions involved and you want to try to wrap this up. You're probably going to want to be dealing with those jurisdictions along the way so that as you start getting closer to a settlement with say the U.S., you're going to know whether the UK, Italy, France, wherever it is, is also going to be taking action. You're going to know if you're cooperating with all jurisdictions. I certainly have had cases where cooperating with some but not all jurisdictions, because sometimes in certain countries where corruption is rampant, you don't actually want to deal with the people in that country for fear that the information that you would reveal might be misused.

There certainly are security risks. There are danger risks to revealing very sensitive information about bribery in certain countries. So by no means do I suggest that there's going to be a one-size-fits-all approach; cooperate with everybody. But you're going to proceed quickly. Most of our clients like to have one bad press day, so you try really hard to have one bad press day with simultaneous agreements. But when you're dealing with a lot of different entities, getting pulled in different directions, that can be very difficult to achieve.

MR. RASKIN: Yeah I was going to say, that final point's the key one because as soon as you self-disclose, either to the U.S. or to regulators outside the U.S., you obviously lose control of the situation. The hope is always, "I'm going to have one global settlement, I'll have one bad press day, and that'll be the end of it." And in many of the cases that's the way it works out. There are a lot of the cases out of the UN Oil for Food cases, and it was, you know, a settlement with the U.S. and a European regulator, and then you were done.

But there have been others where you're going to settle in the U.S. and then it rumbles on for years outside the U.S. And the flip side: just recently, Aon, the big insurance broker, had a settlement several years ago with the FSA in the UK. They only just recently settled in the U.S., which is the complete reverse of how this usually happens. So they've had two bad press days, and also the distraction of this just continuing on and on for years.

So again if you think you've got multiple jurisdictions, and the regulators really are going to look at this, it is to your benefit to go into both of them simultaneously, or one soon after the other, to make sure they're both on board. And then your hope is, as counsel to a company, to really try to help manage the process, so that you can get this all wrapped up at the same time. But there's no guarantee.

MS. MOSS: No, there's not, and different countries don't have the same legal regimes, to state the obvious. Not every country allows plea bargaining or settlements, pre-court settlements. So, you know, it's a very interesting area of the law, I find, in part because you learn so much about how different legal systems work, and they're often quite different from what we're used to. So you know, our approach to remedies and resolving things is just so foreign it's not going to work, so you're going to have to try to work within the laws and the culture as you find it.

MR. RASKIN: Maybe one other thing, because I think we always— at least I always assume, I think, of DOJ and SEC together, that they're just hand-in-glove and that they'll handle everything together. That's not always the way it is. I mean, forget your regulators overseas; you've got issues here in the U.S. Are you dealing with SEC in Washington or a local office, or are you dealing with main Justice, or are you dealing with

the local U.S. Attorney's Office? There are a lot of dynamics here.

Traditionally those cases would all get resolved the same day. Even that is starting to break down a bit. Now sometimes you'll have the SEC act first, then the DOJ later, or vice versa. So there are a lot of complicated issues with the regulators that you've got to deal with in one of these processes.

MR. DUNST: Are you saying that the U.S. Attorney's Office might not get along with the Department of Justice?

MR. RASKIN: I never - - I would never say that.

MR. DUNST: I can't imagine that.

PROFESSOR DAVIS: I notice that you all have a criminal law background. Do you ever worry about any civil liability coming out of these? We haven't said much about that. Where do you see the greatest risk on the civil side? Competitors? Shareholder suits?

MS. MOSS: You know, all of the above. I think there certainly is civil exposure and it comes along with the territory, but the magnitude of the risk and the magnitude of the potential harm to the company I think is dramatically different. So FCPA is far more of a concern.

PROFESSOR DAVIS: I wanted to leave a bit of time for us to talk about the policy implications of all this. Because now we have a sense of what sort of impact it's having on firms' decision making. But before jumping right into the question of whether we should amend the FCPA, I want to first of all start with the question that I think the government should be asking and Congress should be asking which is, "Is it serving its purposes?" Given the fact that it's causing firms to undertake these relatively expensive risk assessment exercises and to adopt all these compliance programs and so forth, are the costs worth it?

So I guess I'm hoping you can be candid about this, but I'm wondering whether you think that the legislation and the recent spate of enforcement activity has actually changed the way your clients are behaving. Is this legislation deterring bribery, is it having more of an effect on U.S. firms than foreign firms, or do you see any evidence that around the world all this police effort is making a difference? Is it making the world a more honest and less corrupt place?

MS. SEYMOUR: The FCPA has been around for a long time. I think the increased enforcement in the U.S. and around the world, with other countries are enforcing similar kinds of acts, and certainly antitrust enforcement, there's more regulatory enforcement around the world than there has been. I do think that it gives the compliance function and compliance a higher priority, and to that extent, again, in my company I see having a higher priority in terms of education and training. Everyone above a director level must, must complete these two modules every year, in addition to signing the code of conduct.

And frankly I think that's helpful. So I know this is heresy, but Sarbanes-Oxley I think to some extent was positive. I think it far overreaches, and these things should be looked at and amended, and I think that Dodd-Frank should be repealed completely. I mean, that to me is outrageous. But I do think that the enforcement does bring the compliance issue to the fore, and that's generally a good thing.

MR. RASKIN: Obviously there are a number of policy goals that the U.S. has in mind when it steps up enforcement, and one of them is to encourage our neighbors and far-flung neighbors to start enforcing anticorruption better than they have. And I think that's an open question as to whether that's happening, but what we do know is there is new legislation. Certainly obviously we've talked about it in the UK with a relatively new statute.

But in Asia, in Russia, and I believe in India, there's an anti-bribery statute in the works. Whether those statutes will be enforced at the level that we're seeing domestically, you know, we'll have to wait and see. But they certainly are signs that our partners around the world are paying far more attention to corruption than they had been in the past.

MR. DUNST: I think that's an excellent point. I think one of the fair criticisms of the FCPA in the past was that it was penalizing U.S. companies, that we were imposing this standard on U.S. companies, and that non-U.S. business competitors simply didn't have to follow these rules. So, you know, whether or not the local regulators start to enforce their local laws, the jury's still out on that, but certainly the U.S. regulators have stepped into that void quite aggressively, seeing as where they're enforcing the FCPA quite aggressively against

non-U.S. companies and leveling the playing field for U.S. companies and encouraging everyone to act in sort of an ethical manner.

So I think in that respect, certainly from a U.S. business competitor perspective, it certainly is more advantageous to the U.S. that enforcement is now happening against non-U.S. companies. I'll certainly say in terms of clients that I deal with, both U.S. and non-U.S. ones, I think they have viewed this—I think ultimately whether it's FCPA or just increased enforcement generally, as ultimately being beneficial in terms of creating an ethical environment within the company and viewing that as a matter of—I mean many of my clients have used the expression, doing business the right way. There is obviously the goal to generate value for the shareholders, but also to ensure that it's being done in a proper manner. And it's not just FCPA, its social responsibility issues, environmental issues, which exposes companies to liability both in U.S. and elsewhere, and then obviously the potential PR damage.

So it's really, I think, setting a tone within companies to do things the right way, and often times using an FCPA settlement, either usually from a competitor, as an example of, well we don't want to be in that situation, so we really want to avoid that and do things the right way.

PROFESSOR DAVIS: So that all sounds good. So if it's doing all these good things, what's all the fuss about? Why is the Chamber of Commerce lobbying so vigorously to reform this statute? For those of you who are not familiar with the issue, they've got five specific proposals for reform.

They want a compliance defense so that corporations that have made reasonable efforts to comply with the legislation are completely exempt from liability, as opposed to having that kind of compliance simply serve as a mitigating factor on sentencing. So they want the compliance defense.

They want to eliminate the kind of successor liability for acquiring companies that Karen was talking about, so to make sure you can't buy the FCPA liabilities of the acquired firm. I mean, it would retain its liability, but the acquirer shouldn't take those on just because it's become the parent. So that's something else they want to eliminate.

Third, they'd like to add a willfulness requirement for corporate criminal liability, so in some sense the corporation has

to know that they've committed the crime. I'm not quite sure what that means but that's the proposal.

Elimination of parent company liability for a subsidiary's actions, that something that the SEC has done to some extent.

And then finally, to clarify the definition of a public official so that firms find it easier to ascertain whether that counterparty, you know, who works for a Chinese hospital, someone working in a lab in a Chinese hospital, turns out they're being considered to be a foreign official, at least by the DOJ. Just to clarify things, to give firms a better sense of where the boundaries are when it comes to foreign public officials. So that's the fifth proposal, just for clarification of that term.

There's also the sense that I think they would like the overall level of enforcement activity be scaled back, but that's not something people are necessarily putting in writing. But you know, there's a lot of effort behind this to sort of restrict the scope of the FCPA.

On the government side, I haven't heard very much aside from the promise of guidance on matters of enforcement. So who knows what the government will do, what Congress will do. But there's a lot of talk, at least, about reforming the FCPA. So I guess, in the interest of time, I'll ask each of the panelists just to pick their one favorite suggestion for reform. Like if there's one thing that ought to be done to make the FCPA work better, whatever that means.

MR. RASKIN: Well I'll start with public official, because that's the one— and I have specific work with clients on that. I mean, the situations today— I mean, many major Chinese companies are now listed on the New York Stock Exchange, and I've had clients that have interacted with them and done things that they may or may not do in the U.S. But they've engaged with them, and then they haven't realized until after the fact that oh, they're 80% owned by the Chinese government so now I've got a potential FCPA issue.

You know, I think when the FCPA was first drafted, you were thinking more of the classic example of a government official, a member of a ministry, someone in a political party, someone in the government, a political candidate, someone who's been a senior executive in a ministry. But it's evolved so much as you're now operating in—companies are now operating in lots of countries where there's no fine line between pri-

vate and public enterprise. And I think much more certainty on that would be extremely helpful to enforcement activities, but then I think also within companies in terms of their compliance efforts to make sure that they're educating their employees properly to know, "Okay, do I have an FCPA issue or not?"

Ms. Moss: I would pick public official as well, but I think also willfulness. I mean there really does need to be an attempt to obtain some benefit from the bribe, and that's a willful act. So again I sort of wonder how it's been enforced. I mean, but I know that there's strict liability, so think willfulness is something that's worthwhile.

Mr. Dunst: Since I'm so recently departed from the government, I'm not going to criticize the statute at all. I think it's fine. I think—look, what I think bothers people is, there's a definition of foreign officials in the statute, but the most important definition is the one in DOJ's head. There's a tremendous—there's a lot of room for discretion on the prosecutorial side in deciding what to pursue and when to pursue it. And one of the reasons why the prosecutors in the FCPA context have so much discretion is there really hasn't been a whole lot of guidance from the courts.

That's what normally happens with all the other criminal statutes is, people get charged, they go to court, sometimes they win arguments, sometimes they lose them, but there are judicial decisions that begin to answer questions like what is a facilitation payment, what is a foreign official? There hasn't been a lot of that and so corporations are very often left to guess what the DOJ is going to think those terms mean, and panels like this become very well attended because everybody has a view and it becomes informative of the meaning of these terms.

I think DOJ is heading in the right direction by focusing more on individual prosecutions because that's a completely different calculus from the one we talked about corporations going through. Right? It's not so much a cost-benefit analysis, because you're looking at possibly going to jail. So you are much more likely to want to take DOJ on. Very often, if you've been charged with a criminal offense, you've been fired from the company so it's not even about trying to keep your job. The case law is very likely going to develop in significant ways

from these individual cases, and we've seen some of it—some of those, saw a number of trials this year which will be going up to appellate courts.

So I think to the extent DOJ and the regulators can continue to bring more cases against individuals, number one, as a tremendous deterrent effect when you talk about executives possibly going to jail, which is arguably an even bigger deterrent effect than large companies paying large fines. But, in addition, it will allow the case law to grow and definitions to become more clear to allow companies and everybody else to conform their conduct more easily.

MS. SEYMOUR: Since I'm left with the leftovers I guess they'll be my favorites for the moment, but let me talk just briefly about this so-called defense that's being proposed for an adequate corporate compliance program. That would put the U.S. on par with several other jurisdictions – the UK and Italy, for example – who have defenses like that. And there could be good reason to help encourage U.S. corporations to have good, adequate, robust compliance programs. So I can see the benefits in terms of messaging to our corporations and making them feel better about the good acts that they're probably already doing. But from a practitioner's standpoint as I step back from it, let's assume that tomorrow the law was changed. Well, I would still be faced with the same issues, because in representing corporations as Sara described, very few even that could technically survive, can't really go to trial against the government and take on a corruption case.

So if they're not going to go to trial, when do you think that defense is ever going to be decided? It's going to be decided by those same very people that you're talking to in the Department of Justice and the SEC that we're talking to right now. And guess what? They're supposed to consider whether you have a robust and adequate compliance program already. And when I give presentations about our companies' and our clients' robust and adequate compliance programs, it's sometimes with, "Well then how did all this corruption happen if it was so good?"

So, I hear what you're saying, but it wasn't that good. So I'm not really sure that we're going to make any great headway, even if we adopt the defense. That said, there is something that is troubling when you see the great disparity in the

way that different countries have organized their programs for eliminating corruption so that some countries have this defense, and we don't. Something about that just doesn't really feel fair, but I'm not sure that, practically speaking, that would change.

The other thing I would mention is on the other change, the proposal is not, I don't think, a legislative one in terms of the subsidiaries, and the issue is if you are a parent that's listed on a U.S. exchange, can the SEC, where there's no control over the acts, charge that subsidiary with acts that it does independently for corruption? I would say the legislative history is crystal clear on this issue. It cannot, unless the SEC meets its burden of proof of showing that it did act—the parent or individuals in the U.S. acted to control it. The SEC disregards that part of its proof in settlements, so I think the Chamber of Commerce is quite right to say, "SEC, you're reading that element out of the statute; you ought to read the law." So I'm in favor of that.

PROFESSOR DAVIS: Thank you very much. So we have some time for questions now, actually, from the audience. So we've been talking for a while. I believe Audrey's got a mic and can come around to anyone who wants to put up their hand. So we're open for questions.

AUDIENCE MEMBER: I think one of the big questions is going to be with the—and perhaps this is more of a comment than a question—with the passage now of the UK Bribery Act and with the serious fraud office in the UK, now importing deferred prosecution agreements or corporate compliance-type agreements. Whether or not the present compliance programs that corporations now have will satisfy both their requirements in the U.S. and the requirements elsewhere.

It's very interesting, I think, to me, to see that the United States government and, in addition, the UK government and other jurisdictions around the world are not providing guidance *ex ante* on what would be an effective corporate compliance program. And so I think going forward we're going—it'll be important to see how companies can handle this. Further, I think it's going to be quite difficult for companies to evaluate their compliance program on a multi-jurisdictional basis because we have very little guidance as to your point, because most of this gets settled through deferred prosecution agree-

ments or through settlements with the government. And that's becoming a—it has been and will continue to be the sanction of choice both in United States and now in the UK with their importation of these kinds of agreements.

MR. RASKIN: I think that's a good point. It sort of goes back to what I mentioned earlier at the outset: how we've got a difference between the laws. I mean facilitation payments as the example where you can do it under the FCPA, but you're barred by the Bribery Act. And I think in many ways what I've at least been advising companies is if you're more U.S. based, U.S. centric, the FCPA is the starting point and then sort of tweak it, if you have to, to address the UK Bribery Act. But I think in many ways the real issue is going to be— and we're going to have to wait and see how the UK Bribery Act is actually enforced, and is it going to be enforced just against UK companies, or are they going to start utilizing it the way the U.S. regulators have used the FCPA to really go after companies outside of the UK with limited contact? We'll wait and see. I mean, certainly, there are different resources that the SFO has versus the U.S. regulators, and then also it's an evolving regulatory regime in terms of self-disclosure in the UK, which is certainly part of the system here in the U.S., and similarly the extent to which, if you have some kind of a plea agreement, whether or not that'll even be accepted in the UK.

So there are a lot of factors that go into this, and I think right now, I think, most companies are using or continuing to use the FCPA as the starting point and then just waiting to see a little bit how enforcement evolves, especially in the UK.

MS. MOSS: I think that's right, we're waiting to see how enforcement evolves, but we're certainly educating our UK employees on the UK Bribery Act and the provisions of the Act. We've put it in our code of conduct for all of our employees around the world. We're not doing as much in other countries because I think although it has jurisdiction – or it purports to have jurisdiction – I think that's still up in the air.

When I say we're training, we're going through the provisions of the Act, but what does it mean? Still that's unclear. But I think you have to raise it as a flag for sure.

MS. SEYMOUR: I think it's interesting the SFO in the last year or so has actually invited a lot of companies in, and they claim that many companies are taking them up on their kind

offer to come and talk about their compliance programs in the absence of difficulty. So this isn't self-reporting; this is just come in and chat. And I know some of our clients have done that, and they've gotten good feedback about their compliance programs. Whether that will serve them well in any defensive capacity in the future is completely uncertain, but, you know, it has to probably be helpful to have that kind of dialogue.

I would also say, though, with the Department of Justice I've had on a recent matter, they're inviting in a compliance officer in a matter that they are declining. But they said, "Bring in your compliance officer. We're declining, but I'd love to tell him what we're seeing in this area, so you can have best practices." Which I really appreciated, and I know that the company really appreciated, because it wasn't a case where they were evaluating it to see if they were going to charge. It was a really open, nice dialogue, and to me that's kind of the best practice in terms of what I would like to see going forward.

AUDIENCE MEMBER: Yeah I think it's especially interesting just to your point, the UK government. I mean, I recently published an article on this. The UK government is importing deferred prosecution agreements and really looking to U.S. style prosecution, and they're aggressively pursuing this, so we'll have to see over the next decade or so, five years, where that's going to go with regard not only to the UK Bribery Act, but to other kinds of corporate wrongdoing.

MR. RASKIN: It's also, just to follow up, as you probably know having written on this subject, just because the SFO wants to use these resolution vehicles, doesn't necessarily mean they're going to be able to, and they've had at least one judge tell them they can't. And it's really having those mechanisms are tremendously important to the process that starts with a voluntary disclosure and ends with a resolution that is equitable for the government and for the corporation.

There's really no middle ground, at least not in the criminal law. In the UK it's either go to trial or, you know, plead guilty to the whole enchilada. So they're in need of mechanisms like deferred prosecution agreements and non-prosecution agreements that allow for a settlement of a criminal charge against a company, so it's a very important question.

Ms. SEYMOUR: I might just add on that we may be missing a piece here in terms of the final chapter on when you reach these agreements, and whether they actually will just go forward as the parties expect, and that's the sort of issue of judicial review that I think is an interesting issue that hasn't quite hit the FCPA context, but I think it likely could because you see with Judge Rakoff with the Citigroup settlement where he refused to approve the SEC settlement as is. That would apply equally in the FCPA context where he would want more support and findings and admissions, for example, before he approves it.

You saw Judge Sullivan in connection with one of these federal trade sanctions cases in Washington with Barclay's. He questioned the prosecution pretty mightily about why individuals weren't charged and why he should approve this settlement and why the amount of money wasn't enough. So what used to be, for practitioners, one of those things that "Oh, we're done; we finally reached the agreement. Let's just file those papers, send the checks, and we're going to be done with this matter"— no longer. You have to worry about what's going to happen in that courtroom. So that could be an interesting area for us in the future.

Ms. MOSS: I agree.

AUDIENCE MEMBER: Thank you. Does the recent whistleblower provision change decision-making of self-reporting? If it does, then how?

MR. DUNST: Well, I'd say, you know, I think it depends upon what your current compliance program was, and how robust it was. I mean, I think that what it reinforces is that you've gotta have a system in place when as a company you receive a complaint, if you receive it from a helpline, if you receive it from an anonymous letter, or if you receive it from someone going into a supervisor, you have to have a system in place that addresses it, and that you conduct either an internal review or an external review. And then the key part of it is, if you make a determination that there's nothing there, that you've really documented it well, and that you've got a file that, you know, in your— at the company or if you engage external counsel, can really address the situation.

I mean, if you find a problem, then we're in a whole different ball of wax, and then you've got to go into the whole

self-disclosure discussion. But it's really more the situation if you go through it and you say, "Hey, you know, there's no there there," but you've got to make sure you've really dealt with it because, you know, if the SEC comes a-calling, that's really what they're going to ask for. They're going to say, "Hey, did you ever know about this, and if you did, what did you do about it?" I mean, I've been in several occasions on whistleblower cases where— I mean, I've gone in with the SEC and just walked through, "Okay, here are the 10 incidents that this person is talking about. Let me show you what the company did four years ago and walk you through it, and walk you through how they dealt with it and who they interviewed." And really what they expect is a lot of detail. It's, "Okay, this complaint came in and, you know, people in compliance or internal audit or external counsel interviewed the following witnesses. They pulled emails; they looked at this." And you've got an investigative report or a file internally that you can rely upon.

So I think that's been—most companies hopefully should have that already. Not all do. Again it depends upon the nature of the company, but I think that certainly is an evolution now, reinforced by the Dodd-Frank whistleblower provision to ensure that a company has got sort of a system in place for when these come in to deal with them and then document them.

Ms. Moss: Right, I think Dodd-Frank has also really highlighted that you need to have a good clear HR process for performance evaluation, because in the times that these threats have come up, it's really been a poor performer who is casting about and knows that you can't retaliate, and so he's trying to keep their job. And you look back at the record and this person's been a poor performer for a long time, and the record is not as clear as it should be. So obviously you need to take all of those steps if there is an allegation, but I think it has caused us to tighten up our HR processes as well so that when there is poor performance that is documented and the steps you're taking are clearly not a retaliation, but they're— because you know, they're the right thing to do.

Ms. Seymour: But if I may, and to take these sort of hypotheticals, if you have a company that then finds a big problem, can you say, "I'm not going to self-report?" Of course you can. The company can do that, but the risks have increased

dramatically with these new whistleblower provisions because the whistleblowers are getting paid off by the SEC and Dodd-Frank. So there's powerful incentives where there used to not be really any incentive, a lot of people— they're disgruntled but they move on with their lives. They're not going to go to the SEC; they don't want to be bothered. Now they want to be bothered; they want to make money. So I think it, at least in thinking about whether to self-report, if a company does have a problem, they really have to assume the SEC will find out about this.

So I agree completely with the prior comments and questions. What did you do? Is it defensible? Will it hold up? But I don't think you can sort of clean up a problem, hope nobody discovers it, and assume that they won't discover it. I think you have to assume the risk that the authorities will discover it.

MR. RASKIN: And you really want to battle the incentive to go to the government, and it's a strong incentive because there's money at the end of the rainbow. Not automatically but potentially. But there are things that the corporation can do internally to incentivize disgruntled employees to report to the company first. Doesn't work for everybody, you know. As Sara pointed out, the disgruntled employee who is looking to blow the whistle merely to keep his or her job— that's probably not somebody you're going to reach.

But with a strong program separate and apart from Dodd-Frank, a strong program that encourages people to come forward, that provides feedback so employees actually believe it's meaningful. I know of a company that actually publishes a list of the complaints and how they were resolved. Most of them turn out to be nothing, but that sends a message to employees that this isn't a waste of time. It's not going to be futile, and you're certainly not going to get retaliated against, whatever the bylaws say or the policy says, but the company is encouraging you to come forward. People still want to hit the jackpot, but a culture like the one I just described is much more likely to encourage employees to report internally, even before they go to the SEC.

AUDIENCE MEMBER: I just had a couple questions about— if you could provide some insight as to how companies are responding to this. It sounds like a lot of the responses are in the compliance mechanisms and internal controls. But do you

see it impacting operating decisions? Choices on where a company is going to conduct business, who they're going to conduct it with, or, perhaps in an acquisition context, examples of times they've walked away or decided to structure it in a different way?

MR. DUNST: I was going to— absolutely. I mean, there's no doubt about it. I've worked with clients that have, you know, clients in oil and gas business in particular where they've got to go into very, very difficult and challenging environments, and I've had clients that just have made the decision on their own and have sort of gone through to go back to first principles and sort of made that risk assessment decision. Not just looking at FCPA, but looking at all the issues that they're going to face in a particular country, and just made a decision. You know what, this is just too difficult right now. This is just not going to be— because the goal, listen, the company's goal is to go in, get a value for the shareholders, and have a successful operation. And they just looked at it and said the risks are too high. So I think companies very much are, in this environment today, are really willing to walk away, which I think in the grand scheme of things, I think, is hopefully helping to incentivize countries around the world to avoid, you know, corruption situations. To try to clean up some of the issues you may have in your country is ultimately beneficial to sort of your own local economy and helping it sort of move forward. Because many, I think, multi-nationals really do look at certain countries in terms of just the nature of their business and say, "You know what? The risk is just too high."

MS. MOSS: It's definitely an issue in an acquisition context, and, you know, there's some countries in the world where evading taxes is a sport, and, you know, it's just part of how people do business. But those implications and the FCPA implications of a company that has those kind of tax problems or potentially those tax problems, and how they would deal with those tax problems, has been a huge deterrence for us because there is strict liability. So, certainly in an M&A context. Absolutely.

PROFESSOR DAVIS: We have time for one final question.

AUDIENCE MEMBER: So I gather there's both corporate liability here and potential individual personal liability, and there could be a conflict between the corporation and the individ-

ual. Could you just speak to how that works out? Are both parties represented by separate counsel who pays the legal fees and so on?

Ms. Moss: Well, yes, where there is a potential conflict, certainly someone in management is a target. There needs to be separate counsel for the board for the audit committee, a different law firm representing the board, and then the law firm representing the management or the company. And the company pays those fees.

Ms. Seymour: And individuals, if they're implicated—they'll have their own counsel. And companies will differ on their appetite for funding that counsel when faced with, you know, when they understand that bribes were paid, and, depending on, you know, their DNO policies, their articles of corporation, their bylaws, they're going to pay or not, legally. And they're going to have an option where they could pay if they want to, and they're going to make different choices there. So some companies are very good about paying lower-level employees' fees. Other companies are not; they see it as a waste of shareholders' money.

Ms. Moss: It depends on the evidence as well.

Mr. Dunst: Yeah, I was going to say, sometimes, as well, you also have another stakeholder opining on that, which is the government. Sometimes you as the company will be, you know, "Well I can have one counsel represent all these individuals; I don't see a conflict here." And the DOJ and the SEC—they have a different view, which ultimately sometimes becomes a whole separate discussion with them about how there isn't a conflict as a goal of trying to save money for the company.

Ms. Moss: And that actually too becomes an interesting issue in self-reporting. Who makes that decision? You would say the company, but, you know, is it the board of directors, which I think it would have to be, really. But separate counsel for the board as opposed to an individual or the management.

Mr. Raskin: Just to be clear, the government does not weigh in on the decision on whether or not the company is paying the fees or not.

Ms. Seymour: Not anymore.

Mr. Raskin: Not anymore. The government learned that lesson.

PROFESSOR DAVIS: So I think that concludes our session. I'd like to thank all of our panelists, first of all. And also of course the Journal of Law & Business and especially the editors who helped put together this particular panel, Audrey and Kaitlyn. Thank you very much and enjoy your weekend.