Department of Justice

STATEMENT

OF

GREG ANDRES
ACTING DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"FOREIGN CORRUPT PRACTICES ACT"

PRESENTED ON

JUNE 14, 2011

Statement of
Greg Andres
Acting Deputy Assistant Attorney General
Criminal Division
Department Of Justice

Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives

"Foreign Corrupt Practices Act"

June 14, 2011

I. INTRODUCTION

Chairman Sensenbrenner, Ranking Member Scott, and distinguished Members of the Subcommittee: Thank you for providing me with the opportunity to speak to you today about the Department of Justice's enforcement of the Foreign Corrupt Practices Act ("FCPA"). I am privileged to appear before you on behalf of the Justice Department.

Corruption undermines the democratic process, distorts markets, and frustrates competition. When government officials, whether at home or abroad, trade contracts for bribes, communities, businesses and governments lose; and when corporations and their executives bribe foreign officials in order to obtain or retain business, they perpetuate a culture of corruption that we are working hard to change. As the FCPA's legislative history makes clear, "Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service." The Department of Justice is committed to fighting foreign bribery through continued enforcement of the FCPA, and to providing guidance to corporations and others on our enforcement efforts.

II. FOREIGN CORRUPTION

Foreign corruption remains a problem of significant magnitude. Its effects are felt far and wide, including in U.S. markets, boardrooms, factories, mines, and farms. The World Bank estimates that more than $1 trillion dollars in bribes are paid each year – roughly three percent of the world economy. Some experts have concluded that bribes amount to a 20 percent tax on foreign investment.

Foreign bribery offends core American principles of fair play and it is plainly bad for business. In short, it stifles competition. Responsible companies, which prosper through innovation and efficiency, quality and customer service, unfairly lose business opportunities when their competitors cheat. Congress recognized as much more than 30 years ago, when it enacted the FCPA in the wake of the Watergate scandal, noting:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.

These principles have equal force today.

Moreover, corruption undermines efficiency and good business practices. Bribes are rarely paid only once. Companies and executives that pay bribes often rely on loose controls and poor accounting, which promote corporate instability and permit other crimes, such as embezzlement and antitrust violations, to flourish – all to the detriment of shareholders and the marketplace. Recently, a federal jury in the Central District of California heard evidence of

bribes paid by an American company to Mexican officials, including bribes consisting of a $297,500 Ferrari Spyder, a $1.8 million yacht, and payments of more than $170,000 towards one official's credit card bills. It is difficult to dispute that this conduct does not amount to good business practices.

III. ENFORCEMENT

In recent years, the Department has made great strides prosecuting foreign corruption in all corners of the globe – against both foreign and domestic companies. These cases have often involved systematic, longstanding bribery schemes in which significant sums of money were paid. Department prosecutions have not involved single bribe payments of nominal sums. For example, the Department's prosecution of Daimler AG involved hundreds of improper payments worth tens of millions of dollars to foreign officials in almost two dozen countries. Similarly, the Department's prosecution of Siemens AG, a German corporation, and three of its subsidiaries, involved the payment of over $50 million in bribes in a variety of countries.

A. Prosecution Guidelines

When the Department seeks to enforce the FCPA against corporate entities, it does so pursuant to internal procedures set forth in the Department's United States Attorney's Manual. These rules, also known as the *Principles of Federal Prosecution Of Business Organizations,* represent official Department policy that all federal prosecutors must follow.

The Principles require federal prosecutors to consider the following nine factors when assessing whether to pursue charges against a business entity:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;

3. The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

5. The existence and effectiveness of the corporation's pre-existing compliance program;

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. The collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. The adequacy of remedies such as civil or regulatory enforcement actions.

Pursuant to these Principles, generally the Department does not hold a corporate entity accountable for the acts of a single employee. And while no single factor is necessarily more important than another, the existence and implementation of a company's compliance program remains an important factor, and one which the Department has routinely recognized as significant. For example, on April 8, 2011, the Department announced that it had entered into a deferred prosecution agreement with Johnson & Johnson, its subsidiaries, and its operating companies (collectively, "J&J"). As set forth in that agreement, the Department and J&J resolved the investigation in this manner, in part, because "J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally

resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies."

Cooperation is another important factor. The Panalpina matter helps illustrate this point. On November 4, 2010, the Department announced that it had resolved its investigation of Panalpina World Transport (Holding) Ltd. ("Panalpina"), a global freight forwarding and logistics services firm based in Basel, Switzerland, its U.S. subsidiary, and five oil and gas service companies and subsidiaries. According to publicly-filed documents, Panalpina and its U.S.-based subsidiary admitted that between 2002 and 2007, it paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan. Because of their criminal conduct, the companies involved in the schemes agreed to pay a total of over $150 million in criminal penalties. As part of its efforts to cooperate with the Justice Department's investigation, Panalpina engaged counsel to lead investigations encompassing 46 jurisdictions, hired an outside audit firm to perform forensic analysis, and promptly reported the results of its internal investigation in over 60 meetings and calls with the Department and the SEC.

The Panalpina resolution was consistent with the Principles, which require federal prosecutors to consider resolving, where appropriate, FCPA investigations through deferred or non-prosecution agreements. As the Principles recognize, these agreements "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation," especially where the collateral consequences of an indictment to the corporation could be significant.

B. Enforcement Actions

As the Daimler, Panalpina, and Siemens matters discussed above illustrate, the Department focuses its FCPA and related enforcement on matters where the allegations of criminal conduct are clear, egregious, and fall squarely within the FCPA. There are other examples of egregious conduct, including the following:

- **The Bonny Island matter: payments of over $180 million intended, in part, as foreign bribes.** On February 11, 2009, Kellogg Brown & Root LLC (KBR), a global engineering, construction and services company based in Houston, pleaded guilty to FCPA violations. KBR admitted that it paid two agents approximately $182 million, and that KBR had intended for these payments to be used, in part, for bribes to Nigerian government officials in exchange for engineering, procurement and construction contracts. KBR's former CEO, Albert "Jack" Stanley, also pleaded guilty for his role in the scheme. In addition, three foreign corporate business partners of KBR have all reached criminal resolutions with the Department in the Bonny Island matter: Snamprogetti Netherlands B.V. / ENI S.p.A (from Holland/Italy), Technip S.A (from France), and, most recently, JGC (from Japan).

- **The Maxwell Technologies matter: payments of over $2.5 million intended, in part, for foreign bribe payments.** On January 31, 2011, Maxwell Technologies Inc., a publicly-traded manufacturer of energy-storage and power-delivery products based in San Diego, pleaded guilty to charges related to the FCPA. Maxwell admitted that its wholly-owned Swiss subsidiary paid its agent in China more than $2.5 million, and that it intended for these payments to be used, in part, for bribes to officials at state-owned entities in exchange for business contracts.

- **The Alcatel-Lucent matter: payments of millions in foreign bribes.** On December 27, 2010, the Department announced that Alcatel-Lucent S.A. and three of its subsidiaries had resolved an FCPA investigation with the Department. Alcatel-Lucent's three subsidiaries paid millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia and Taiwan. For example, one of the subsidiaries paid more than $9 million in bribes to foreign officials in Costa Rica in exchange for business contracts.

C. Corporate Governance Legislation & United States Treaty Obligations

Many have commented about the recent increase in FCPA enforcement actions. At least one likely cause for those cases is increased disclosures by companies consistent with their obligations under the Sarbanes-Oxley Act ("SOX"), which requires senior corporate officials to certify the accuracy of their financial statements, including that those statements accurately reflect companies' payments to third parties. The SOX certification process has led to more companies discovering FCPA violations and making the decision to disclose them to the SEC and DOJ.

Of note, United States' treaty obligations also impact the Department's enforcement of the FCPA. For example, the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Antibribery Convention"), to which the United States and 37 other countries are signatories, as well as the United Nations Convention Against Corruption, are important.

The United States was a driving force behind the negotiation and conclusion of the OECD Antibribery Convention, which was approved by the United States Senate on July 31, 1998, and entered into force on February 15, 1999. In particular, the OECD Antibribery Convention requires the United States and all signatory countries to criminalize bribery of a "foreign public official," which the OECD Antibribery Convention broadly defines to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise."

The Department is proud of our FCPA enforcement record, and of our continued partnership with the Securities and Exchange Commission and the Department of Commerce. Others have taken notice as well. On October 20, 2010, following a lengthy official review, the Organisation for Economic Co-operation and Development (OECD) noted that:

> The creation of a dedicated FCPA unit in the SEC, continued enforcement of books and records and internal controls provisions by the DOJ and SEC, increased focus on the prosecution of individuals and the size of sanctions have had a deterrent effect and, combined with guidance on the implementation of these standards, has raised awareness of U.S. accounting and auditing requirements among all issuers.

IV. GUIDANCE

The Department also takes seriously our obligation to provide guidance in this area: our goal is not simply to prosecute FCPA violations, but also to prevent corruption at home and abroad and promote a level playing field in business transactions.

In the past year we have made great efforts to provide more information and transparency. Senior officials from the Department, as well as others from the Securities and Exchange Commission and the Department of Commerce, often speak publicly about the Department's enforcement efforts, highlighting relevant considerations and practices. Department officials have addressed compliance officials, general counsels and other business executives both in the United States and abroad. In addition, the Department worked closely with the OECD to develop the Good Practice Guidance on Internal Controls, Ethics, and Compliance, which was issued in February 2010, and establishes a framework of what an effective compliance program should contain.

Moreover, through our Opinion Release Procedure, the Department advises companies on how to comply with the FCPA. This procedure, provided for in Title 15, United States Code,

Sections 78dd-l(e) and 78dd-2(f), is unique in U.S. criminal law and allows companies and individuals to request a determination in advance as to whether proposed conduct would constitute a violation of the FCPA. Requests for opinions under this provision require the Department to issue a response within 30 days of a completed request.

The resulting opinions, which are available on the Department's FCPA-dedicated website (http://www.justice.gov/criminal/fraud/fcpa/), provide additional guidance on the Department's interpretation and enforcement of the FCPA. For example, the Department has issued at least five advisory opinions concerning whether a party fit within the definition of "foreign official." In one such opinion, issued on September 1, 2010, the Department explained that a consultant who was otherwise a "foreign official" would not be acting as a "foreign official" under a particular business arrangement given the facts and circumstances posed. Similarly, opinions have been issued regarding what constitute "bona fide" expenditures in promoting a product and what are considered excessive travel and entertainment costs for foreign government officials.

Our website also contains a copy of the FCPA statute in 15 different languages, the relevant legislative history, and a "Lay Person's Guide" to the FCPA, a plain language explanation of the Act. Further, we include on our website the relevant documents from our FCPA prosecutions and resolutions dating back to 1998 (and thus include more than 140 FCPA prosecutions, including charging documents, plea agreements, deferred prosecution agreements, press releases, and other relevant pleadings).

V. CONCLUSION

As discussed above, international bribery is bad for United States' businesses, weakens economic development, undermines confidence in the marketplace, and distorts competition. FCPA enforcement is vital to United States' business interests, to ensuring the integrity of the

world's markets and sustainable development globally, and to making the international business climate more transparent and fair for everyone.

We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption.