Introduction and overview

This book is about the Foreign Corrupt Practices Act ('FCPA'), and the FCPA is about bribery, at least a certain type of bribery – bribery of 'foreign officials.' Bribery of course is bad, and all would agree that providing a suitcase full of cash to a foreign government official to secure a foreign government contract is bribery.

You may be asking, 'how can an entire book be devoted to this topic and how can enforcement of the FCPA be controversial?' It is a good question to ask early in this book, but perhaps at the risk of oversimplification, the above scenario is where the consensus often stops.

Payments to incentivize a low-ranking foreign official with ministerial or clerical duties to do something that the official ought to do anyway – is this bribery? In passing the FCPA Congress said no, but FCPA enforcement actions in this new era seem to suggest otherwise.

Is it bribery when a corrupt foreign tax official threatens to assess penalties and shut down a company’s offices unless a cash payment is made and the company acquiesces so that it can continue to do business in the country? In the eyes of the FCPA’s dual enforcers (the Department of Justice and the Securities and Exchange Commission), the answer seems to be yes.

If person ‘x’ is the recipient of a corporate gift or entertainment or other things of value why might we call it effective sales and marketing and maintaining good will with a customer, yet if person ‘y’ is the recipient why might we call it bribery?

You will learn in this book that in 1977 Congress passed the FCPA. The FCPA was a pioneering statute – the first-ever law governing the conduct of domestic companies in their interactions with foreign government officials in foreign markets. Yet in passing the FCPA, Congress was confronted with many difficult and complex questions. In short, Congress quickly learned, as the above questions highlight, that corporate bribery was not the ‘simple, safe issue it seemed at first blush.’ The FCPA’s legislative history detailed in this book teaches that:

Trying to define exactly what bribery is is a real problem. You and I would have no trouble saying what a bribe is and what isn’t. However, having said that, it’s very difficult to put it down on paper in statutory language that
would not be damaging to some legitimate things that happen on the periphery … In certain instances, we have a gray area when it comes to this bribery question.

The FCPA’s legislative history further instructs that there will be ‘countless situations’ in which fair-minded individuals ‘will be hard-put to determine whether a particular payment or practice is a legitimate and permissible business activity or a means of improper influence.’ It was noted that reasonable persons ‘and even angels will differ on the answers … [and] such distinctions should make us less sweeping in our judgments and less confident in our solutions.’

This is particularly true, as Congress acknowledged, given the foreign business conditions and barriers that often funnel well-intentioned businesses into an arbitrary world where harassment bribery flourishes and is condoned. Indeed, a former Chief of the DOJ’s FCPA unit observed:

In my almost 40 years of experience, I have rarely seen American companies affirmatively offering bribes in the first instance; rather they are typically reacting to a world not of their making. It is a fact that corruption in government remains endemic worldwide and that is not likely to change. As the world shrinks companies who seek to do the right thing can’t help but confront corrupt officials – as customers, regulators, and adjudicators – and confront them often.

There are many other difficult and complex questions relevant to this new era of FCPA enforcement.

Who decides what bribery is? Under our legal system, Congress passes laws, enforcement agencies enforce the laws, and courts oversee an adversarial system in which mitigating facts and potential defenses are weighed to determine if the enforcement agency has met its high burden of proof as to each element of the law that Congress passed. Yet, as detailed in this book, FCPA enforcement in this new era has largely bypassed this system that has served our country well since its founding.

Are business organizations that resolve FCPA enforcement actions or subject to FCPA scrutiny ‘bad’ or ‘unethical’? The enforcement agencies often link FCPA enforcement to classical notions of bribery such as roads not being built, schools lying in ruins, and basic public services going unprovided. However, many companies that resolve FCPA enforcement actions are otherwise viewed as industry leaders that sell the best products for the best prices. Some of these companies have been recognized as being among the ‘world’s most ethical companies’ during the same general time period relevant to an FCPA enforcement action or instance of FCPA scrutiny. How is it that a ‘world’s most ethical
company’ can also be the subject of FCPA enforcement? Moreover, can it truly be said that the sole reason such companies obtained or retained the business was because of the alleged improper payments?

Is it bribery if the conduct was engaged in with the knowledge and support of the highest levels of the U.S. government? Are there two tiers of justice when it comes to FCPA enforcement in which certain companies that sell certain products to certain customers are treated differently than other companies?

If bribery – however defined – is bad, does that mean that all attempts to punish bribery and deter future misconduct are good? Why has FCPA enforcement increased such that it is now a top legal and compliance concern for companies doing business in the global marketplace? Is more FCPA enforcement an inherent good, regardless of resolution vehicles used, regardless of enforcement theories, and regardless of actual outcomes? Has the quantity of FCPA enforcement actions become a higher priority for the enforcement agencies than the quality of the enforcement actions?

A former DOJ Assistant Chief for FCPA enforcement candidly stated, ‘the government sees a profitable program, and it’s going to ride that horse until it can’t ride it anymore.’ However, should return on investment be a consideration in law enforcement or should enforcement agencies only enforce a law consistent with Congressional intent in the context of an adversarial system with appropriate checks and balances and judicial scrutiny? Indeed, one of the greatest challenges in this new era is how to enforce the FCPA consistent with the rule of law, and its demand for transparency and consistency, and in a way that inspires public confidence that enforcement is fair and actually effective in achieving the laudable objectives of the FCPA.

What have been the effects of this new era of FCPA enforcement? In response to this new era, more business organizations have implemented in good faith, pro-active compliance policies and procedures designed to minimize FCPA risk. Yet, why does FCPA compliance remain difficult for even the most well-managed and well-intentioned companies and why are so many companies the subject of FCPA scrutiny?

Has this new era of FCPA enforcement resulted in wasteful over-compliance, with companies viewing every foreign business partner with irrational suspicion and companies deploying teams of lawyers and specialists around the world spending millions of dollars to uncover every potential questionable or unethical corporate payment? Indeed, one of the effects of this new era of FCPA enforcement has been the emergence of a ‘thriving and lucrative anti-bribery complex’ that, in the words of a former Chief of the DOJ’s FCPA unit, has been ‘good
business for law firms, [...] good business for accounting firms, [...] good business for consulting firms, the media – and Justice Department lawyers who create the marketplace and then get [themselves] a job.’ For many FCPA Inc. participants, the new era of FCPA enforcement has been a desirable boom.

Yet is the status quo in fact desirable from a legal or policy perspective? Has this new era of FCPA enforcement been successful in actually reducing bribery? If not, can the FCPA be improved through amendment and can certain enforcement agency policies and procedures be revised to better achieve the original aims of the FCPA? As the FCPA’s legislative history instructs, ‘just because the FCPA spotlights a sensitive subject [...] some people turn a blind eye to its shortcomings rather than risk being accused of being soft on bribery.’

It is these questions, and many more, which make the FCPA a worthwhile and controversial topic capable of filling the pages of an entire book.

This book begins the same way I began my testimony before a Senate committee that was examining FCPA enforcement.

The FCPA is a fundamentally sound statute that was passed by Congress in 1977 for a specific reason. [...] In enacting the FCPA in 1977, Congress specifically intended for its anti-bribery provisions to be narrow in scope and Congress further recognized and accepted that the FCPA would not cover every type of questionable payment uncovered or disclosed during the mid-1970’s. [...] That the FCPA is a fundamentally sound statute does not mean that FCPA enforcement is always fundamentally sound.

That is what this book is about – the FCPA and its enforcement in a new era.

In 2010, the DOJ Assistant Attorney General proclaimed, ‘we are in a new era of [FCPA] enforcement; and we are here to stay.’ While much of what defines this new era began sprouting years prior, the formal declaration of the new era was a significant milestone. Indeed, of the nearly 900 federal statutes the DOJ criminal division enforces, the FCPA is one of the DOJ’s ‘top priorities’ and the DOJ has stated that its ‘focus and resolve in the FCPA area will not abate.’ Likewise, in 2010 the SEC created a specialized FCPA Unit and declared that the FCPA would be a ‘vital part’ of its overall enforcement program. The SEC stated that the FCPA Unit would be ‘more proactive’ in its enforcement of the FCPA including through ‘targeted sweeps and sector-wide investigations.’

For these reasons, the FCPA has emerged as a top legal and compliance concern for companies – both public and private and across a variety of industry sectors – doing business in the global marketplace.
Understanding the FCPA’s new era is thus a fundamental skill-set for a diverse group of professionals navigating this marketplace. Simply put, if you are a professional doing business in the global marketplace, the FCPA needs to be part of your vocabulary.

Yet the declaration of the FCPA’s new era in 2010 was also a curious milestone. Not one word of the FCPA has changed since 1998, and it was not obvious why a new era of FCPA should be declared or why FCPA enforcement has materially and dramatically changed over the past decade.

This book dissects the FCPA’s new era, and readers from the classroom, to the courtroom, to the boardroom will benefit from the chapters that follow which place the FCPA’s new era in context and provide a practical and provocative analysis of the FCPA, its enforcement, and related topics.

In dissecting the FCPA’s new era, you will confront the FCPA statutory text, legislative history, and judicial decisions. Much of this legal authority is presented in depth in its original source format because what a law says, what Congress intended the law to mean, and how courts have interpreted the law is what matters most in this new era of FCPA enforcement. However, you will learn that what seems to matter most in this new era is not such legal authority, but non-legal sources of information such as enforcement agency guidance and resolved FCPA enforcement actions known as prosecutorial common law.

From these various sources of authority and information, you will understand how many instances of corporate FCPA scrutiny in this new era raise two distinct questions. The first is whether Congress, in passing the FCPA, intended to capture the conduct at issue. The second is whether the conduct at issue can expose a company to an FCPA enforcement action given the current enforcement theories of the DOJ and SEC.

This book injects innovative and provocative concepts to the study of the FCPA and its enforcement such as the ‘world’s most ethical FCPA violators,’ ‘the façade of enforcement,’ the ‘three buckets’ of FCPA financial exposure, ‘FCPA Inc. and the business of bribery’ and the ‘offensive use’ of the FCPA. Useful tables and charts will better instruct you on various aspects of the FCPA’s new era and its legal and policy implications. In addition, throughout this book you will assemble a pair of ‘FCPA goggles’ and learn compliance pointers and risk-assessment strategies that can lessen the likelihood of FCPA violations from occurring when doing business in the global marketplace. In this way, the book provides a toolkit that you can use in your profession to better understand
the FCPA, its enforcement, and the many legal and policy issues present in this new era.

This book places an emphasis on learning FCPA issues incrementally in the belief that foundational knowledge introduced early will best enhance understanding and comprehension of specific FCPA topics that follow. Consistent with this objective, the nine chapters of this book are organized as follows.

CHAPTER 1

In this new era of FCPA enforcement, it may seem odd to begin by rewinding the clock back to a different era. However, to best understand and appreciate the FCPA’s new era, it is first necessary to understand and appreciate why the FCPA became a law. As with most new laws, the FCPA did not appear out of thin air. Rather you will learn of the real events and real policy reasons that motivated Congress to act and pass the FCPA.

Chapter 1 tells the FCPA’s story through original voices of actual participants who shaped the pioneering law signed by President Jimmy Carter in 1977. This chapter will also highlight early FCPA enforcement and how the FCPA matured through its 1988 and 1998 amendments into its modern form. By the end of Chapter 1, you will possess a firm understanding for why Congress enacted the FCPA, what conduct Congress sought to capture in enacting the law, and how the FCPA was enforced prior to this new era. Knowledge of this FCPA history is critical to understanding the FCPA’s new era and addressing the FCPA’s future.

CHAPTER 2

This book, of course, focuses on a particular statute, but it is important to understand from the beginning that other general legal principles, as well as general DOJ and SEC enforcement policies and resolution vehicles, impact FCPA enforcement. Chapter 2 highlights such general foundational knowledge to best enhance your understanding and comprehension of the specific FCPA topics that follow.

The first general legal principle is *respondeat superior*. Business organizations operating in the global marketplace act through employees and agents, and pursuant to *respondeat superior*, employee and agent conduct can expose a business organization to legal liability, both criminal and civil, even if the employee or agent acts contrary to the
organization’s pre-existing compliance policies. Understanding this key legal principle, as well as the realities of the global marketplace that are also highlighted, instruct how companies often become the subject of FCPA scrutiny. Because of respondeat superior, and the realities of the global marketplace, not all companies that resolve FCPA enforcement action are ‘bad’ or ‘unethical,’ and this chapter introduces you to the term ‘world’s most ethical FCPA violators.’

Next, general DOJ and SEC enforcement policies are introduced and the ‘carrots’ and ‘sticks’ relevant to resolving a corporate FCPA enforcement action are highlighted. Mindful of these ‘carrots’ and ‘sticks,’ business organizations are often motivated to resolve FCPA enforcement actions for reasons of risk aversion, and not necessarily because the enforcement agency has a superior legal position. Discussion will next turn to the typical resolution vehicles used to enforce the FCPA in this new era – DOJ non-prosecution agreements (‘NPAs’) and deferred prosecution agreements (‘DPAs’) and SEC ‘neither admit nor deny’ settlements. You will confront the controversial aspects of these resolution vehicles and can decide whether they are in the public interest or facilitate a ‘façade’ of FCPA enforcement. Against the backdrop of several general enforcement agency policies that impact FCPA enforcement is also a specific DOJ policy that has resulted in the FCPA being enforced differently than most other federal criminal statutes.

Prior to diving into the specific elements of the FCPA’s anti-bribery and books and records and internal controls provisions in Chapters 3 and 4, it is useful to first address the question of what the FCPA actually means. Chapter 2 thus concludes by setting forth a hierarchy of FCPA legal authority and other information and you will discover that much of what defines this new era of FCPA enforcement is non-binding, non-legal sources of FCPA information including so-called prosecutorial common law.

With the foundational knowledge acquired in Chapter 2, a comprehensive analysis of the FCPA’s provisions can proceed in a more informed and sophisticated manner.

CHAPTER 3

Chapter 3 provides a comprehensive analysis of the FCPA’s anti-bribery provisions and its general elements: offering or paying money or anything of value, to a foreign official, to obtain or retain business, with a corrupt intent. For each element, legal sources of authority as well as non-legal sources of information will be discussed.
To state the obvious, providing a suitcase full of cash to a foreign
government official to obtain a foreign government contract satisfies the
elements of the anti-bribery provisions. However, you will learn that
FCPA enforcement actions seldom involve such scenarios and the proper
scope of the anti-bribery provisions is subject to much dispute in this new
era as legal development of these elements is still in its infancy.

You will also learn that the FCPA’s anti-bribery provisions prohibit not
only direct payments to ‘foreign officials’ to ‘obtain or retain business,’
but also payments to ‘any person’ ‘while knowing’ that the payments will
be provided to a ‘foreign official.’ Given the prevalence of foreign third
countries, the FCPA’s third-party payment provisions often present the
greatest source of FCPA risk for companies competing in the global
marketplace. In addition to the substantive elements of the anti-bribery
provisions, jurisdictional issues will also be discussed including extra-
territorial jurisdiction as to U.S. actors as well as the expansive jurisdic-
tional theories advanced by the enforcement agencies in bringing FCPA
enforcement actions against foreign actors.

Even if all of the substantive elements of the anti-bribery provisions
have been met and there is jurisdiction over the actor, the final step in
analyzing the anti-bribery provisions is determining whether the FCPA’s
facilitating payment exception or the FCPA’s affirmative defenses apply.
After highlighting legal authority and non-legal sources of information
relevant to the exception and affirmative defenses, the question is posed
whether the FCPA’s facilitating payment exception has any real meaning
in the new era or whether the enforcement agencies have essentially
repealed this exception through its enforcement theories.

Chapter 3 will conclude by highlighting other legal issues also relevant
to FCPA enforcement in this new era, including statute of limitations
issues and how the FCPA is a supply-side statute targeting only one actor
in a bribery scheme.

CHAPTER 4

The FCPA is a law much broader than its name suggests. Indeed, most
FCPA enforcement actions are not foreign in nature and do not involve
allegations of bribery. This odd dynamic is the result of the FCPA’s books
and records and internal controls provisions which are among the most
generic substantive legal provisions one can find.

In Chapter 4, you will learn that Congress intended for the FCPA’s
more glamorous anti-bribery provisions to operate in tandem with these
generic provisions to reduce instances of corporate bribery and other
misconduct. Although allegations of foreign bribery are not necessary for the FCPA’s books and records and internal controls provisions to be implicated, these provisions, which apply only to so-called issuers under the FCPA, are nearly always charged in issuer FCPA anti-bribery violations. The enforcement theory giving rise to books and records and internal controls violations in nearly every instance is that the alleged improper payments were misrecorded on the issuer’s books and records and insufficient internal controls allowed the improper payments to occur.

While a dull read, the FCPA’s books and records and internal controls provisions are nevertheless potent provisions particularly because they operate independently of the FCPA’s anti-bribery provisions and can be charged even if all the elements of an FCPA anti-bribery violation are not met. Even though potent, you will nevertheless learn from the FCPA’s legislative history that Congress specifically qualified these provisions through concepts of reasonableness and good faith.

Against the backdrop of generic statutory language, Chapter 4 will also highlight legal authority and enforcement agency guidance concerning the books and records and internal controls provisions. From there, enforcement agency theories are introduced through actual FCPA enforcement actions, and the question is posed whether certain theories are in fact consistent with relevant legal authority or even enforcement agency guidance.

CHAPTER 5

Chapters 3 and 4 will provide a comprehensive analysis of the FCPA’s anti-bribery and books and records and internal controls provisions. Yet just because these provisions may be violated does not mean that an FCPA enforcement action will result. To state the obvious, the enforcement agencies must first learn of the improper conduct. Chapter 5 begins by highlighting the typical origins of FCPA enforcement actions including the prominent, yet controversial, role voluntary disclosures play in serving as the basis for most FCPA enforcement actions.

Next, Chapter 5 introduces you to the ‘three buckets’ of FCPA financial exposure. The first bucket is pre-enforcement action professional fees and expenses, and you will learn how long FCPA scrutiny typically lasts and why. The second bucket is fine, penalty and disgorgement amounts in an actual FCPA enforcement action, and you will learn how such amounts are calculated by the enforcement agencies as well as certain controversial aspects regarding these amounts. The third bucket is post-enforcement action professional fees and expenses, and you will
learn that a company’s financial exposure rarely ends with an FCPA enforcement action. Of these ‘three buckets,’ while settlement amounts in an actual FCPA enforcement action tend to get the most attention, pre-enforcement action professional fees and expenses are often the most expensive aspect of FCPA scrutiny and enforcement.

Chapter 5 will then analyze and compare the FCPA’s two enforcement regimes: corporate enforcement actions and individual enforcement actions.

After highlighting various facts and figures from corporate FCPA enforcement actions, certain uncomfortable truths regarding corporate FCPA enforcement will be discussed including how certain companies in certain industries appear to be immune from FCPA anti-bribery charges and how the general fight against bribery and corruption suffers from several double standards.

After highlighting various facts and figures from individual FCPA enforcement actions, discussion will focus on how, despite enforcement agency rhetoric to the contrary, FCPA enforcement in this new era is largely corporate enforcement only. However, on occasion individuals are also charged with FCPA offenses and this chapter will also discuss dynamics relevant to resolving FCPA individual enforcement actions. Unlike business organizations subject to FCPA scrutiny, individuals are often more motivated to put the enforcement agencies to its burden of proof at trial and this chapter will also highlight how the enforcement agencies have generally struggled when put to its burden of proof in individual FCPA enforcement actions.

Chapter 5 concludes with a discussion of sentencing issues in individual enforcement actions and how sentencing judges often see shades of gray in FCPA enforcement actions that the DOJ portrays to be black and white.

CHAPTER 6

That FCPA enforcement has increased in this new era begs the question why? Chapter 6 offers several practical and provocative reasons for the increase in FCPA enforcement.

Practical reasons include that there is more international business, the introduction of NPAs and DPAs to the FCPA context, and the impact another law – Sarbanes Oxley – has had on FCPA enforcement.

Provocative reasons highlighted include the belief by many that FCPA enforcement has increased because it is lucrative for the government. In addition, one of the effects of this new era of FCPA enforcement has
been the emergence of a thriving and vibrant anti-bribery complex called FCPA Inc. and the issue will be explored whether FCPA Inc. itself is one of the reasons for the increase in FCPA enforcement and scrutiny.

Even though FCPA enforcement has trended upward during this new era, enforcement statistics need to be viewed in the proper context. Chapter 6 concludes by placing FCPA enforcement statistics in the proper perspective and demonstrating that the FCPA is not nearly the boogeyman it is often portrayed to be.

CHAPTER 7

Chapter 7 explores the FCPA’s long tentacles and demonstrates how actual FCPA enforcement actions brought by the DOJ and/or SEC are often just one consequence of FCPA scrutiny in this new era.

Indeed, when the dust settles on a corporate FCPA enforcement action a company may become the subject of a foreign law enforcement investigation or enforcement action based on the same core conduct alleged in the FCPA enforcement action. After all, the U.S. action was based on allegations that the company, or someone on its behalf, made payments to a foreign official to obtain or retain business. It is thus understandable why foreign law enforcement agencies may also investigate the conduct and seek monetary fines and penalties.

Next, Chapter 7 focuses on the business effects of FCPA scrutiny and enforcement. You will learn from various case studies how FCPA scrutiny can impact a company’s business operations and strategy in a variety of ways from market capitalization, to cost of capital, to merger and acquisition activity, to impeding or distracting a company from achieving other business objectives. For these reasons, FCPA scrutiny and exposure is not just a legal issue, but a business issue as well that needs to be on the radar screen of business leaders operating in the global marketplace.

FCPA scrutiny and enforcement can also expose corporate directors and executives to private FCPA-related civil suits. Although courts have held that the FCPA does not provide a private right of action, in this new era, plaintiff’s lawyers representing shareholders often target corporate leaders with civil suits alleging, among other things, breach of fiduciary duty or that the company engaged in securities fraud, in connection with the company’s FCPA scrutiny. Chapter 7 highlights FCPA-related shareholder litigation and explores whether such suits serve a purpose or are merely parasitic actions which feed off FCPA scrutiny and enforcement in this new era.
Chapter 7 next discusses an emerging trend. Ordinarily, companies are in a defensive posture when it comes to the FCPA. However, in this new era the FCPA is increasingly being used ‘offensively’ to achieve a business objective or to further advance litigating positions.

In short, the FCPA has long tentacles and there are many reasons to comply with the FCPA in addition to the obvious reason that non-compliance can expose a company and culpable individuals to an FCPA enforcement action. At the same time, because of the FCPA’s long tentacles and the feeding frenzy that often follows FCPA scrutiny or enforcement actions, it is important that FCPA enforcement be subjected to meaningful judicial scrutiny and that enforcement actions represent legitimate instances of provable FCPA violations, not merely settlements entered into for reasons of risk aversion.

CHAPTER 8

Chapter 8 is devoted to FCPA compliance. However, before diving into the specifics of this topic, it is important to recognize that FCPA compliance is difficult for even the most well-managed and well-intentioned business organization. This is due to respondeat superior, the realities of doing business in the global marketplace, and the shifting and often conflicting messages by the enforcement agencies. Because of these difficulties, and the fact that rogue employees exist and no compliance program can ever prevent all misconduct, FCPA risk can’t be eliminated.

However, FCPA risk can be effectively managed and minimized, and one positive result of the increase in FCPA enforcement in this new era has been the related increase in ‘soft’ enforcement of the FCPA through compliance policies and procedures. Certain FCPA enforcement actions provide an opportunity to learn and Chapter 8 will showcase various teachable moments from compliance failures in actual enforcement actions.

FCPA compliance however is not a one-size-fits-all proposition. Rather effective and cost-efficient FCPA compliance is best achieved through conducting a risk assessment, and you will learn the basic fundamentals of conducting a risk assessment so that compliance can be uniquely tailored to a company’s FCPA risk profile.

Chapter 8 also highlights various FCPA compliance best practices – from high-level commitment to third-party due diligence and oversight, to review and monitoring of compliance programs – designed to manage and minimize FCPA risk. A component of FCPA best practices is
ensuring that compliance is not viewed strictly as a legal function but rather holistically throughout a business organization. This requires not only active engagement and participation by legal personnel, but also training of other personnel such as finance and audit professionals so that they can approach their job functions with FCPA goggles on and recognize FCPA risk and report it to appropriate experts within the organization.

Even though more FCPA compliance is one positive result of this new era, Chapter 8 concludes by examining whether certain aspects of FCPA enforcement have resulted in wasteful overcompliance and whether too much FCPA compliance and training have resulted in compliance fatigue and its unintended consequence of numbing individuals to the FCPA.

CHAPTER 9

This book concludes by returning to an opening thesis – while the FCPA is a fundamentally sound statute, this does not mean that the FCPA could not be improved or that FCPA enforcement is always fundamentally sound. Indeed, one of the greatest challenges in this new era is how to enforce the FCPA consistent with the rule of law, and its demand for transparency and consistency, and in a way that inspires public confidence that enforcement is fair and actually effective in achieving the FCPA’s objectives.

Reforming a law called the ‘Foreign Corrupt Practices Act’ has always been a political hot potato and a substantive, issue-based discussion has always been difficult. However, declaration of the FCPA’s new era and wider recognition of the enforcement theories and policies which have come to define this era have resulted in the positive development of greater attention to the FCPA and its enforcement on Capitol Hill and among other policy makers and interested observers.

Chapter 9 focuses on FCPA reform and, among others things, highlights recent reform proposals and related Congressional hearings. As history instructs, the mere discussion of FCPA reform has once again been opposed by some who have advanced the simplistic – either you are against bribery or for bribery – position. The implicit position of those opposing FCPA reform would seem to be that the FCPA is a perfect statute and that the current FCPA enforcement policies are best achieving the laudable objectives of the FCPA.

This is not the position advanced in Chapter 9. Rather, FCPA reforms are suggested that are designed to ensure that the FCPA is best achieving the original goals of the law and that FCPA enforcement is transparent.
and otherwise consistent with the rule of law. Using the knowledge base acquired throughout this book, you can analyze this new era of FCPA enforcement and determine for yourself whether FCPA reform is warranted.