PREPARED STATEMENT OF
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BEFORE THE

HOUSE COMMITTEE ON THE JUDICIARY
OVER-CRIMINALIZATION TASK FORCE

HEARING ON

DEFINING THE PROBLEM AND SCOPE OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

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Prepared Statement of
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Over-criminalization Task Force
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Defining the Problem and Scope of Over-Criminalization and Over-Federalization
Friday, June 14, 2013

Executive Summary

Mr. Chairman, Ranking Member Scott, and Members of the Task Force, thank you for the opportunity to discuss an issue that has been an important one to me. I applaud the creation of this Task Force and would look forward to further contributing to its work. A brief summary of my prepared statement follows:

- The core purpose of federal criminal law should be to protect the instrumentalities of commerce. This purpose is consistent with principles of federalism, the enumerated powers of Congress, the Founders' intent, as well as early precedents in federal criminal law.
- Over-criminalization, in my view, is defined as the process whereby criminal laws of general application are applied to what is otherwise legitimate activity, but activity that is regulated in its nature, extent and reporting to the federal government.
- Supreme Court precedents imposing criminal liability on corporations and abandoning criminal intent requirements for regulatory offenses created a framework where criminal penalties were used to regulate otherwise legitimate conduct, rather than to protect the integrity of the market.
- As a result of this framework, Congress was freed to create the broad outlines of criminal liability and delegate the creation of criminal punishments to regulatory agencies under their rule-making authority. The result is a morass of highly technical, vague regulations enforced by criminal statutes of general application.
- This framework imposes real burdens on the economy in the form of regulatory compliance costs and a chilling effect on entrepreneurial risk-taking. Additionally, by requiring companies and individuals to comply with opaque regulations under penalty of strict criminal liability, principles of fundamental fairness have been compromised and due respect for the law threatened.
- To address one aspect of this challenge, I suggest omnibus legislation to require minimum criminal intent requirements for all *malum prohibitum* offenses. Specifically, Congress could require that for any criminal violation where the required intent is not expressly stated, the government prove intentional criminal conduct, that is, that the

defendant acted with intent to disobey or disregard the law. Additional reforms to provide clarity to the law are also suggested.

Introduction

I will focus my comments today on the role of federal criminal law in protecting our markets and the impact over-criminalization has on our economy. To be certain, there is an appropriate role for federally-enforceable criminal statutes that is wholly consistent with the principles of federalism, our Constitution, and the Framers' intent. Specifically, federal criminal law, including the investigation and prosecution of fraud in commercial markets, is a traditional and powerful tool for protecting the means and instrumentalities of commerce that are necessary to sound economic health. Unfortunately, the increasing reliance on federal criminal sanctions to regulate legitimate business activity can chill the entrepreneurial risk-taking that underlies economic growth and prosperity. By re-dedicating the federal criminal law to its fundamental purpose, it is my belief that we would create an environment that nourishes the commercial heart of America, promotes job creation, and secures prosperity for future generations.

Today, I endeavor to bring to our discussion the benefit of my experience of fifteen years in the Department of Justice, including the privilege of serving as Deputy Attorney General, United States Attorney, and front-line federal prosecutor, as well as experience since in my work as co-chair of the White Collar Litigation and Government Investigations Practice at Morgan, Lewis & Bockius LLP ("Morgan Lewis"), where I advise U.S., foreign, and multinational clients on a variety of enforcement matters. My comments today are wholly my own, and I do not speak on behalf of Morgan Lewis or for any individuals or entities whom I represent.

The Problem of Over-Criminalization

Over-criminalization is the rare issue in which all sides can find common ground; indeed there is plenty to be said about the impact of a rapidly expanding federal criminal enforcement apparatus on our civil liberties, the disparate impact of federal criminal drug laws on certain minority groups, and encroachment of federal influence into areas traditionally reserved to the states. However, I address that aspect of over-criminalization whereby criminal laws of general application are applied to what is otherwise legitimate activity, but activity that is regulated in its nature, extent and reporting to the federal government.

Appropriate use of federal criminal law in the commercial context should be to protect and preserve the means and instrumentalities of commerce. A market distorted by fraud and corruption cannot be a free market. Raising concerns of over-criminalization does not mean favoring leniency for fraudsters, hucksters, liars, cheats, and others who would abuse a free market system. Fraud and dishonest practices in the commercial world subvert the market and engender a lack of respect for the rule of law. Such transgressions deserve criminal sanctions.

But regulating legitimate activity through criminal prosecution, particularly where in use of their broad discretion, prosecutors set regulatory parameters, is ill-advised. This results from Congress increasingly creating the broad outlines of criminal liability, and then regulators, using their rule-making authority to fill in the details, create a morass of dense regulations. Prosecutors then, interpreting the minutiae of highly technical, vague standards, can bring

prosecutions for crimes of general application, such as fraud and false statements, for transgressions of regulatory standards they establish. It is estimated by a number of sources that there are currently more than 4,000 criminal statutes on the books today, up from 165 in 1900, and as many as 300,000 criminally-enforceable federal regulations, though nobody knows the exact number.[1]

This proliferation of federal regulations has had an appreciable impact on the national economy. The Competitive Enterprise Institute ("CEI") recently released the 20th edition of its survey of the federal regulatory environment, entitled *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*. CEI estimates that the total cost to Americans to comply with federal regulations reached $1.806 trillion in 2012, equivalent to over half of federal spending and larger than the GDP of either Mexico or Canada.[2] This figure amounts to $14,678 per family, or 23 percent of the average household income.[3] A recent Small Business Administration survey of the overall federal regulatory environment estimated annual regulatory compliance costs of $1.752 trillion in 2008.[4]

In my experience in private practice, my practice group colleagues and I advise companies on a variety of criminal enforcement matters, such as enforcement of and compliance with the Foreign Corrupt Practices Act ("FCPA"), in the context of contemplated and ongoing business transactions and projects. This experience allows me to confidently convey to the Task Force that complicated and criminally-enforceable regulations create uncertainties that have a significant adverse effect on business. When confronted with opaque regulatory requirements that may give rise to strict criminal liability, companies too often forego opportunities, or at the very least expend valuable resources and delay ventures in order to address the legal risks that underlie entrepreneurial decision-making. It is not that the businesses and the people making decisions are overly risk-averse, it is that they cannot properly assess risk because regulatory and enforcement lines are too fuzzy.

Examples of the trend toward regulation by criminalization abound. Environmental laws for instance, incorporate steep criminal penalties for failing to meet regulatory standards in conducting otherwise legitimate commercial activity. Polluting is legal in the United States; the government issues permits to allow it. Polluting too much, however, can be a felony. Some acts of pollution may indeed be criminal because they involve volitional and intentional acts that can result in foreseeable and significant harm—dumping highly toxic materials in an open field or waterway, for example. The federal government has a legitimate regulatory interest in such activity, which is appropriately enforced using criminal penalties. But the more common subject matter of environmental "crimes" involves the line between permitted and prohibited discharges,

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[1] *See, e.g., Priority Issues: Overcriminalization*, RIGHTONCRIME.COM, http://www.rightoncrime.com/priority-issues/overcriminalization/ (last visited June 10, 2013); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507(2001).

[2] Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* 2 (2013 20th Ann. ed.)

[3] *Id.*

[4] *Id.*

which can be razor thin, often expressed in parts per million, and the stuff of great debate between experts and scientists.[5]

Similar pitfalls await those providing goods and services under government health insurance programs such as Medicare and Medicaid, and those working to extract oil and natural gas from federal lands, among other fields. The result is notorious examples in which complex regulations underlie prosecutions for crimes of far-reaching scope, frequently resulting in absurd outcomes.

While the literature on over-criminalization includes reference to a number of these cases, several of which are familiar to those of us who have studied this issue, such as *United States v. McNab*,[6] the so-called "Honduran Lobsterman" case, and the repeated raids on Gibson Guitars' Nashville factory for alleged violations of the Lacey Act, I will only focus on a couple today. One example is the 1982 case of *United States v. Hartley*, in which the Eleventh Circuit upheld the conviction of a corporation and two of its employees for selling the military breaded shrimp that failed to meet certain specifications, including the amount of breading on each piece of shrimp.[7] The defendants in that case had committed some serious criminal acts, including defrauding the government by altering inspection standards and changing the weights used to determine how much shrimp the government bought.[8] To be sure, these transgressions may well deserve criminal sanction because they involve the type of deception and dishonesty that traditionally characterizes criminal intent. But one must question whether the under-breading of shrimp—the fundamental aspect of the case—justified thirty-three counts of conspiracy, mail fraud, violations of the National Stolen Property Act, and the Racketeer-Influenced Corruption Organizations Act ("RICO").[9]

Similarly, in *United States v. Whiteside*, the Eleventh Circuit rejected the overbroad application of a general criminal statute to ordinary commercial conduct.[10] The government accused the individual defendants of making false statements under 18 U.S.C. § 1001 in Medicare/Medicaid and CHAMPUS reimbursement reports, and of conspiracy to defraud the United States, among other offenses.[11] The case turned on whether the defendants knowingly and willfully made a false statement when they filed a single report (required by regulation) classifying debt interest in terms of "how the debt was being used at the time of filing of the cost report rather than how the funds were used at the time of a loan origination."[12] However, the

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[5] *See, e.g.*, *Gen. Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1326 (D.C. Cir. 1995) (discussing the Toxic Substances Control Act, which was concerned with the level of polychlorinated biphenyls inside decommissioned electric transformers in parts per million).

[6] 331 F.3d 1228 (11th Cir. 2003).

[7] *United States v. Hartley*, 678 F.2d 961, 965-66 (11th Cir. 1982).

[8] *Id.* at 966.

[9] *Id.* *Hartley* was later abrogated regarding the applicability of the RICO statute, in that it involved the only appellate court to hold that a person and enterprise identified by the RICO statute could each be the same corporation. *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1270-71 (11th Cir. 2000).

[10] *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002).

[11] *Id.* at 1350.

[12] *Id.* at 1351.

court found no legal authority clearly supporting the government's interpretation of the regulations at issue. Instead, it noted that the experts disagreed as to the proper interpretation thereof, and accordingly found that the government failed to establish that the defendants' interpretation of the regulations was not reasonable.[13]

Whiteside has a happy ending because the court of appeals let common sense prevail. By recognizing that the government's theory of the case was significantly flawed, the *Whiteside* court's holding implicitly identified and embraced important principles of fundamental fairness and due process. As the Supreme Court has recognized, "a penal statute must define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[14]

As the *Whiteside* prosecution and other cases demonstrate, however, the current state of play has more than economic costs. Criminal sanctions for violations of opaque regulatory standards offend due process principles and can engender lack of respect for the rule of law. While many regulatory goals enjoy widespread support and are legitimate subject matter for some government regulation, that alone is not a sufficient justification for resorting to criminal sanction to achieve them. As criminal enforcement proliferates, the impact of criminal sanctions is diluted; penal statutes become predominated by *malum prohibitum* laws and the moral force—and moral legitimacy—of the criminal code is undermined. Moreover, due to the practical reality of the new framework in which Congress merely lays the borders, the drafting of criminally-enforceable rules are delegated to unelected regulators and bureaucrats, raising concerns under separation of powers principles where the legislature defines criminal acts.

How Did We Get Here?

Before offering recommendations on how, in my view, some of these issues may be addressed, let me provide some context on how I believe we reached this point. A reminder of the evolution of the use of federal criminal law, particularly as related to commercial activity, is essential to appreciate and place in context the criminal regulatory regimes that face businesses today.

The federal government, of course, does have a legitimate interest in regulating conduct which threatens to undermine the commercial health of the country. Indeed, among the driving forces behind the constitutional convention was the desire to buttress the strength of the nation through prosperity in economic union:

> There are appearances to authorize a supposition that the adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. . . . Impressions of

[13] *Id.* at 1352-53.

[14] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Raley v. Ohio*, 360 U.S. 423, 438 (1959) ("[a] state may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.").

> this kind will naturally indicate the policy of fostering divisions among us, and of depriving us, as far as possible, of an Active Commerce in our own bottoms.[15]

Encouraging economic prosperity was recognized by 20th century theorist Michael Novak to be the significant contribution of the Anglo-American system, when he stated that "[t]he invention of the market economy in Great Britain and the United States more profoundly revolutionized the world between 1800 and the present than any other single force."

It follows then that a core function of the federal government is to promote commerce, and thus a critical function of federal criminal law is to protect its means and instrumentalities. It is well accepted at this point that Congress has near-plenary authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[16] Article I, Section 8 also provides the means for Congress to promote commerce by, for example, providing the authority to make uniform bankruptcy laws, to establish post offices and post roads, and to promote science and protect inventions.[17]

Congress also has the enumerated power to define and *punish* specific crimes, including treason, counterfeiting, piracy, felonies committed on the high seas (i.e., affecting international trade and shipping), and offense against the laws of nations.[18] In other words, Congress' enumerated power to pass criminal laws serves a fundamental purpose: to protect the country, including its channels of commerce, and to preserve the integrity of the functions of government. The first Congress acted on this power and enacted laws which tracked closely its enumerated authority by punishing treason, misprision of treason, perjury in federal court, bribery of federal judges, forgery of federal certificates and securities, and murder robbery, larceny and receipt of stolen property on federal property or on the high seas.[19]

Early criminal laws up until the early part of the 20th century followed this pattern of lawmaking by which the sanction of criminal laws safeguarded commerce and cleansed it if corruption developed. Laws enacted during this period include the False Claims Act,[20] which was passed during the Civil War to prevent fraud by wartime profiteers and also to punish frauds in federal procurement; the Interstate Commerce Act;[21] and the Sherman Antitrust Act,[22] which

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[15] The Federalist No. 11 (Alexander Hamilton); *see also* The Federalist No. 12 (Alexander Hamilton) ("The prosperity of commerce is now perceived and acknowledged, by all enlightened statesmen, to be the most useful as well as the most productive source of national wealth; and has accordingly become a primary object of their political cares. By multiplying the means of gratification . . . it serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness.").

[16] U.S. Const. art. I, § 8.

[17] *Id.*

[18] *Id.*

[19] *See generally* An Act for the Punishment of Certain Crimes Against the United States, ch. 9.

[20] An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) (current version at 18 U.S.C. § 287 and 31 U.S.C. §§ 3729-3733).

[21] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

[22] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

sought to provide protection to the free market by aiming to free interstate commerce from anticompetitive forces.

Similar principles undergird federal bank fraud and robbery statutes, New Deal securities regulations, and financial reporting laws designed to preserve market integrity and promote investor confidence. Even RICO has a fundamental purpose of cleansing commercial markets of the insidious effect of organized crime. This pattern of using federal criminal statutes for specific purposes to protect the means and instrumentalities of commerce was thus consistent with the Founders' concern that the federal government be enabled to create and preserve infrastructures that would promote commerce and encourage it to flourish.

This paradigm began to shift in the first half of the 20th century with Progressive- and New Deal-era reliance on the federal criminal law to regulate otherwise lawful corporate conduct. The opening salvo came, of all places, from the Supreme Court when it decided in 1909 that corporations could be prosecuted for crimes by extending "a step further" to criminal liability principles of *respondeat superior* developed in tort.[23] In *New York Central Hudson River Railroad Co. v. United States*, the defendant corporation challenged the Elkins Act, which prohibited railroad companies from paying rebates to favored customers and expressly prohibited corporations from engaging in practices that would constitute criminal violations of the Act, if done by a natural person.[24] Recognizing that the Elkins Act was part of a growing class of *malum prohibitum* offenses, the Court concluded there was "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them . . . . If it were not so, many offenses might go unpunished."[25]

It seems not an obvious choice to extend criminal liability to corporations. Civil remedies were available to right corporate wrongs, while the keystone criminal remedy—loss of liberty—is not applicable to corporations.[26] Instead, the Court made a policy decision that regulatory violations by corporations should be criminally punished. The Court did not address, and therefore offered no persuasive rationale for, its abandonment of traditional notions of the basis for criminal responsibility in reaching the conclusion that a criminal proceeding should lie against an entity that is a legal fiction, incapable of forming intent or otherwise acting except through the conduct of real persons.

From here things progressed quickly. In *United States v. Union Supply Co.*[27] the Court upheld an indictment of a corporation for violating a statute that applied to "persons" and lacked a clause explicitly applying criminal penalties to corporations, such as was present in the Elkins Act.[28] Justice Holmes, writing for a unanimous Court, readily dismissed the defendant's

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[23] *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

[24] *See* 49 U.S.C. § 11907.

[25] *New York Central & Hudson*, 212 U.S. at 494-495.

[26] *Id.* at 495-496 (discussing the fact that corporations can only be fined).

[27] 215 U.S. 50 (1909).

[28] *Id.* at 54-55.

argument that the statute's mandatory minimum prison term meant the provision could not be applied to corporate defendants. Justice Holmes wrote, "if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean on that account to let the defendant escape."[29] Such expansive jurisprudence hastens the criminalization of otherwise legitimate corporate conduct that falls short of regulatory dictates.

With the precedent in place, the doctrine of strict criminal liability was expanded to individuals, contributing further to the widespread use of criminal law as a means of regulation. In *United States v. Balint*, the Court upheld the convictions of multiple defendants under the Narcotics Act of 1914, which made it a crime to sell certain controlled drugs without permission from the Commissioner of Revenue, regardless of whether one knew the drugs were controlled.[30] Recognizing the statute was a departure from the traditional requirement that *scienter* be proven as an element of every crime, the Court stated, "[m]any instances of this are found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."[31]

Similarly in *United States v. Dotterweich*, the Court upheld the conviction of the president and general manager of the Buffalo Pharmacal Company for criminal violations of the Food, Drug, and Cosmetic Act for misbranding and adulterating drugs shipped in interstate commerce.[32] The corporation was also charged, but had been acquitted by the jury at trial. Although the Second Circuit had reversed Dotterweich's conviction, the Court disagreed with the Second Circuit's reading of the statute's definition of "person" to include only the corporate entity.[33] The Supreme Court, on the other hand, concluded that the statute should be read more broadly and treated as a "working instrument of government and not merely as a collection of English words."[34] The Court further stated that the statute at issue was part of a "familiar type of legislation *whereby penalties serve as effective means of regulation*."[35] Acknowledging a remarkable willingness to overlook basic and fundamental notions of criminal responsibility for legislation that "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing" when the actor is "standing in responsible relation to a public danger,"[36]

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[29] *Id.* at 55.

[30] *United States v. Balint*, 258 U.S. 250, 251, 253-54 (1922).

[31] *Id.* at 252.

[32] *United States v. Dotterweich*, 320 U.S. 277, 278 (1943).

[33] *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 503 (2d Cir. 1942).

[34] *Dotterweich*, 320 U.S. at 280.

[35] *Id.* at 280-281 (emphasis added).

[36] *Id.*

the Court held it is "natural enough" to impose strict criminal liability on those who ship drugs in commerce.[37]

Now being duly unburdened by traditional common law and constitutional principles relevant to use of criminal law, Congress has followed the courts' lead and has increasingly relied on federal criminal law as a regulatory tool. In so doing, however, Congress has largely abandoned its traditional role in defining by statute what is a crime, instead enacting general enforcement provisions in regulatory schemes and allowing agencies to define the crimes by virtue of their exercise of rule making authority. Individuals and corporations must decipher these regulations to determine what constitutes a crime. Additionally, these regulations usually require regulated entities to provide information to the government, the reporting and certification of which can become fodder for prosecutors considering whether to bring charges for making false statements or concealing material information from the government.

Recommendations for Reform

Over-criminalization is a broad and diffuse issue, and accordingly there are a number of ways to attack the problem. As a general matter, in my view a concerted effort should be made to re-dedicate the federal criminal law to traditional principles underlying its purpose and fundamental fairness. To that end, requiring knowing and intentional conduct before criminal penalties can be imposed would be a major first step towards placing an emphasis back on protecting the means and instrumentalities of commerce rather than using criminal law to regulate, and punish, ordinary commercial activity governed by regulation. I propose three specific recommendations that would further this goal.

First, we could assure ourselves that no person is ever convicted of a criminal offense unless a jury has determined that he or she, or it, acted with criminal intent. I believe this could be accomplished by writing an overriding provision of law that requires, as an element of any offense where a showing of intent is not expressly required, it be proven beyond a reasonable doubt that the defendant acted with the intent to disobey or disregard the law.[38] This could eliminate any question as to strict liability criminal offenses being actionable and would reintroduce to all federal criminal law the fundamental and venerated principle that a criminal offence must include proof of *mens rea*.

Second, Congress should consider long-overdue reforms to the FCPA. Although this law is only one of several thousand imposing criminal penalties, it presents a significant impediment to businesses and uncertainty in FCPA enforcement standards represents a ready example of the adverse affect on businesses of poorly formed statutes. Specifically, because the FCPA is largely enforced exclusively by the Department of Justice and Securities Exchange Commission, beyond the scrutiny of judicial oversight, enforcement is dependent largely on prosecutorial discretion

[37] *Id.* at 281 (quoting *United States v. Johnson*, 221 U.S. 488, 497-98 (1911) (holding that Narcotics Act, while covering factual statements as to the contents of drugs, did not apply to opinion or "mistaken praise")).

[38] *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (citation omitted); *United States v. Bryant*, 420 F.2d 1327, 1333 n.9 (D.C. Cir. 1969).

and internal agency guidance.[39] In order to provide greater clarity to the FCPA, Congress should consider some of the following reforms:

- **Affirmative Defense for Adequate Procedures:** Like the UK Bribery Act, the FCPA should include a presumption against criminal prosecution upon a showing by a defendant corporation that it has in place an effective compliance program, structured around specified standards. Such a reform would permit companies to concentrate resources into structuring effective compliance programs (which in turn would help assist in furthering the deterrent effect of the law), knowing that the efforts could help insure them against unforeseeable corruption risks, thus helping to spur investment in overseas operations and ventures.
- **Repose of Post-Acquisition Due Diligence:** Congress should consider an amendment to the FCPA that would provide that if in a defined period after an acquisition closes, a company conducts a detailed compliance assessment of the acquired company's operations, promptly discloses to the government and remediates any non-compliant conduct discovered, the acquiring company would be immune from penalty for FCPA violations occurring in the acquired entity's operations during or prior to that period. Because the realities of pre-acquisition due diligence do not always allow full and complete access to the target company's operations records, this would incentivize and allow an acquiring company the opportunity to uncover issues not identified during pre-acquisition due diligence and to quickly and fully integrate the acquired entity into its compliance program.
- **Additional Reforms:** Additionally, in order to promote greater clarity, Congress should consider amendments to the FCPA that would clarify specific ambiguous terms that have been the subject of much spilled ink in the academia, the FCPA bar, and before this very Committee. Specifically, greater clarity should be provided to the meaning of "foreign official" and the degree of control required of foreign governments before a state-owned enterprise or other foreign entity is considered an "instrumentality" of a foreign government.

  Greater clarity can also be provided to the meaning of "facilitation payment." Due in part to the government's expansive definition of liability, the facilitation payment exception to the FCPA exists in theory, but not in practice. Many companies that discover what appear to be benign facilitating payments can be left paralyzed with uncertainty as to whether the practice violates the law.

Finally, the Task Force should consider drafting a set of principles to which all new or proposed criminal sanctions are required to conform before being voted out of Committee. For example, these principles could express a sense that the fundamental purpose of federal criminal is to protect the means and instrumentalities of commerce and/or to protect the integrity of government operations; if a nexus to either of these requirements cannot be clearly identified, the proposal should be tabled.

[39] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Guidance"), released jointly by the Department of Justice and Securities Exchange Commission in November 2012, consolidates the governments' interpretation of the FCPA and its enforcement expectations and is a helpful reference. However, the Guidance does not do enough to significantly reduce enforcement uncertainty.

Conclusion

In the interest of both the fair administration of justice, and in fostering an environment in which commercial prosperity—and its attendant blessings for all Americans—may flourish, Congress should consider taking affirmative steps to address the problem of over-criminalization. This Task Force is a very positive step forward in that process. The rapid expansion of the federal regulatory environment over the last half century has imposed real and significant costs on all Americans. That many of these regulations are criminally enforceable yet lack any required showing of criminal intent chills entrepreneurial risk-taking and violates traditional notions of fundamental fairness and due process. To be sure, criminal conduct should be subject to vigorous criminal enforcement, but the emphasis should be placed on protecting the means and instrumentalities of commerce rather than using criminal law to punish transgressions of regulations governing legitimate commercial activity. Entrepreneurial risk-taking—the heart of American commerce—can only thrive so long as it is nourished; regulation through criminalization undermines, rather than promotes, that commercial heart.

Again, I thank the Chairman and Members of this Task Force and I look forward to answering any questions from the dais.