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Fireside Chat on the Foreign Corrupt Practices Act

JEFFREY MANNIS: Good afternoon and welcome to the Fireside Chat on the Foreign Corrupt Practices Act, broadcast by the Securities and Exchange Commission Historical Society on www.sechistorical.org. My name is Jeffrey Manns. I am Associate Professor of Law at the George Washington University Law School and I am the moderator for today's program.

In 1977, Congress enacted the Foreign Corrupt Practices Act which launched an extraordinary experiment in giving the Department of Justice and SEC the power to police corruption by U.S. companies abroad. Federal prosecutors are now using the FCPA to investigate a wider range of industries paying foreign bribes, expanding charges against individual U.S. business executives with crimes related to the FCPA and even exploring the possibility of bringing criminal charges against foreign officials who accept bribes.

Joining me today to discuss the impact of the FCPA now and in the years to come are two distinguished panelists. Paul Berger is a partner at Debevoise & Plimpton LLP, specializing in securities litigation, enforcement and white collar crime; he has an expertise in FCPA regulation and experience with anti-bribery laws from his time at the SEC. Judge Stanley Sporkin is the former Director of the SEC Division of Enforcement and a former Judge for the U.S. District Court for the District of Columbia. Under his leadership, the SEC's investigation of corporate payment malfeasance in the aftermath of the Watergate scandal provided most of the evidence for Congress to pass the FCPA in 1977.

Welcome to everyone who has joined us online. Today's program will add material on the Foreign Corrupt Practices Act already in the virtual museum and archive at www.sechistorical.org, including the September 2007 Fireside Chat on the Accounting Aspects of the FCPA, Judge Sporkin's oral histories interview in 2003, and the June 27, 1975 address by former SEC Chairman Ray Garrett on the lead up to the FCPA, aptly titled, 'Homily On the Glories Of Right Conduct And The Wages Of Sin.'

The SEC Historical Society, through its virtual museum and archive, shares, preserves and advances knowledge of the history of financial regulation. The museum and archive are free and accessible worldwide at all times. The Society is independent of and separate from the SEC and receives no government funding. Both the Society and I want to thank Debevoise & Plimpton LLP for its generous sponsorship of today's program. I would like to note that it was the society who selected me to moderate the Fireside Chat and I am solely responsible for the topics and questions that will be discussed. I am grateful to the museum visitors who submitted questions prior to today and I will be using those questions throughout the program.

Let's get started. Our discussion will focus on three segments. The first will be on the genesis and evolution of the FCPA over its first two decades from 1977 to 1997. The

second part will focus on the surge of enforcement and settlements since 1997. And the last part will consider future developments and challenges facing the SEC's enforcement of the FCPA.

So our first question for the day will be this. What was the logic behind vesting the SEC and the DoJ with complimentary mandates under the FCPA and how has cooperation between those agencies developed overtime?

STANLEY SPORKIN: Well, I wish I could tell you that this was something that came about by an architect coming in and designing this program. It didn't come about that way. I often get foreign governments coming to me and they say, "You had a lot to do with this. Well, tell us how did you do it? What was the mechanism, what was..?" It was very simple, that I was watching a television... I was watching the Watergate hearings and at night they would be replayed and listening to these people coming forth and there is a segment that very few people know about and that was that corporations were making payments to re-elect President Nixon. And that's against the law and I have an accounting background, because of the accounting background, it occurred to me to ask the question. How does a corporation bill an illegal payment? And I called one of my people in and I say, go to see Gulf Oil, since they were the ones who were under the gun at that hearing that day. This isn't a great investigation, he came back the next day and he says, it's very simple. They set up two bogus accounts in the Bahamas, they name it x1, they name it y1, put \$5 million in each account. Put the money back to a fellow named Dorsey who was the chairman of Gulf Oil at the time. He put it in his safe and that's where the money was used. And then when we dug into it we found out what the money was being used for. In addition to making campaign contributions, it was being used for business purposes and a lot of nefarious kinds of activities which I really can't discuss today, but they were very, very bad kinds of things. And then I was left with the question of what do we do about it. And my thinking was how does this fit in with the SEC's disclosure program? And I came to the conclusion, I was director of the division and so I said, "Well, why shouldn't they have to disclose this? This is something material to a shareholder to know that their company is getting business by paying bribes. So, at least they should know how much of that business and what would happen if they didn't get that business." And we went with that theory to the Commission and the Commission after thinking and thinking about it, bought it and we went from there and this thing just mushroomed because we found a lot of those people doing it. That caught Senator Proxmire's attention and he called me up and said, "Well, Stan, don't you need a law? You are enforcing a law that's not on the books." And so we said yeah and came up...

JEFFREY MANNS: That never stopped you in the past.

STANLEY SPORKIN: And that came up with the idea that I couldn't see how they could... I wanted to enlist the aid of the accounting firms. Because if they would see a payment like this, they would immediately stop it. And so the concept was to get a Books and Records provision, you got to keep... it's our provision, it says, "A public corporation took public money, had to keep an accurate books of records. They couldn't do anything they want with it." And so that became the cornerstone. We had a great chief accountant there, Sandy Burton, who said, "Wait a second. We need a requirement that they must keep good internal controls." And that became a second part. It is interesting that at this late date because Sarbanes-Oxley has a provision about internal controls, everybody is complaining. But they were violating the laws, they weren't complying with it up to this point because it's still on the books and is required. And then Proxmire himself said he

wanted to have the anti-bribery provisions and because the anti-bribery provisions came in, that obviously is where the Justice Department, because they had to enforce that. And the second part of the Justice Department was that it was... people said, "Well, look, it's unfair to load this case against public companies and that private companies would get a free bite." And so a second component was... rather than give that jurisdiction to the SEC, they said we have to give that jurisdiction to the Justice Department. So, the Justice Department has not only criminal jurisdiction but they have civil jurisdiction. So, that was the whole scheme. It was nothing really more than that. And it wasn't ever contemplated at that time, that in the ordinary kind of courts of Foreign Corrupt Practices, that there will be overlapping reviews by both the SEC and the Justice Department.

JEFFREY MANN: But obviously over time there have been many overlapping reviews and how they have begun to evolve.

STANLEY SPORKIN: It's a violation of the criminal code and of course they did it. Now, again the good points that came out of it. The guy that the Justice Department turned to run that program, Peter Clark, came out of my division. So, he understood the law and understood their role and understood our role. And so I think that's the way it worked fairly smoothly over the many years.

PAUL BERGER: And I think there have been tensions over the years between the two in terms of who's going to take penalty, who's going to take... when the SEC started the program of taking the disgorgement of the ABB case the first time, how would that work. So, there have been some tensions which frankly, I think, have been healthy tensions, helping both agencies get to the right answers.

JEFFREY MANN: Paul, one question I had was this. How does it matter whether the DoJ or the SEC gets credit and what percentage of the pie that they divide up?

PAUL BERGER: I am not sure people were thinking about it in terms of getting credit but agencies have their own kind of proprietary interests. I think it's only human nature that they want to guard their own territory. And there is a very small contingent in the Department of Justice that was looking at FCPA. And early on back in, at least when I was there in the mid to late '90s, a very small number of people were also looking at it. And as the interest in enforcing the law increased and as a policy matter both agencies decided that this was something worth pursuing and devoting more resources to, both agencies started gearing up, pouring more interest, resources into it, paying more attention to the issue. When the SEC brought the Triton case in '97, that was the first time that the SEC had brought in an FCPA case in 11 years, prior to the '86 Ashland Oil case. So, there really hadn't been a lot of attention paid to it. And then in the late '90s, I think both DoJ and SEC and to some extent the Department of State started working with the OECD countries to get legislation that would be implemented abroad so that really when the SEC was prosecuting cases and DoJ, they wouldn't be the only agencies and create something of an uneven playing field and unintended consequence, where you would have the U.S. prosecuting and putting a U.S. company at a disadvantage to say a French company and so this has evolved over time. It wasn't until, roughly 2001 when you had conventioning ends comparing bribery, go into effect and countries start to implement legislation abroad that you had some more lawyers in place. Up until 2001, there were a couple of countries in Europe that allowed bribery. You could deduct your expenses on your taxes for paying a bribe.

JEFFREY MANNS: That is quite extraordinary in itself from an American perspective. Let's unpack a little bit in terms of thinking of the history of the FCPA. Judge Sporkin, was the extra territorial reach of the FCPA, controversial at the time for the events surrounding Watergate, so unsettling that this really passed law so easily.

STANLEY SPORKIN: Well, yeah, but it was much more than that. What developed over the years, this thing just had a life of its own. We found bribery... Prince Bernhard was taking bribes. Tanako, who was the head of the Japanese government, indeed every five years or so I get a visit and a little present from a Japanese reporter that wants to go back and talk about their prime minister...

PAUL BERGER: Sir, did you take that gift?

STANLEY SPORKIN: Yeah, but the point is that these were study cases where... the whole point is that once... the fellow that used to head the Federal Trade Commission and he said to me, called me over and... Charles Wright was with him at the time, I think he was one of his top people and he said to me, "Stan, why is it that you with the SEC can get all these laws and we in the Trade Commission, we get killed by Congress?" And I said, "Mr. Chairman, it's very simple. We don't get a law until we show the need for the law. And we put it in with so much so called schmutz that people are not going to go and fight and say we are in favor schmutz and..."

PAUL BERGER: Schmutz is the Latin term.

STANLEY SPORKIN: It is Latin, yes. And so what happened is that, for example, when he would want to reign in the undertakers, you had a law of... all the undertaker people came from the U.K. to do that and they go to the Congress. And it's because he showed no, nothing that they were doing which would require a legislation, it's not needed. And so the whole concept was to get ahead of the game and that the laws would follow. Once you showed the need, the laws would follow.

PAUL BERGER: And in your situation, both the Japanese and the Netherlands governments fell as a result of the bribes that were being paid.

STANLEY SPORKIN: Yeah.

JEFFREY MANNS: That's pretty powerful, persuasive evidence though. One kind of caveat that would be this, is that its true that there certainly were some amazing cases of bribery that were exposed during this period. But for the most part, the first 20 years of the FCPA, the U.S. was going it alone. Up until the OECD convention, the U.S. really stood out as being the only major country that had this law in the books and was, to some extent at least, actively enforcing it. And were there pressures from that?

STANLEY SPORKIN: Oh yeah. Because ten years later, you had the amendment in which they put in some kind of an intent component, even on the Books and Records. And yeah, sure there is a lot of pressure. We are losing business, we are doing this. The same kind of pressure you are getting now, on this business of changing the... of excluding small companies from internal controls. I don't know why anybody would want buy a stock of the companies that didn't have internal controls but that's really... yeah, of course it's always.

PAUL BERGER: When I was at the SEC, I was sympathetic to the argument when companies would come in and they would say, "Look, sure we shouldn't be paying bribes. The fact of the matter is we are up against companies in Europe and elsewhere that are paying bribes and so we are at a comparative disadvantage and the more you prosecute, the greater at disadvantage we are at." And I think that was the impetus then in the late '90s, early 2000 to really get out to the OECD countries and get the kind of legislation that was necessary to be in place, so that the culture could change and the prosecutors in Europe could start investigating and where appropriate prosecuting. And I think frankly you are seeing the results of all that work back in the late '90s, early 2000s now, I think you are seeing a lot of countries in Europe that are undertaking investigations. You are seeing the new head of the Serious Fraud Office in the U.K., that's taking an active role in these types of matters. You are seeing the German prosecutors conducting dawn raids now and other prosecutors in Europe are seeing the U.S. model where prosecutors are looking at these issues and understanding that there maybe some benefits in prosecuting and sending messages. So, I think, while the playing field is still not an even one, I think its gaining some leverage so that in the future, in the next three or five years you are going to see a much more even playing field.

STANLEY SPORKIN: Oh, you are absolutely right and I think our government has phoned down both the Commerce Department and the State Department in not trying to get some kind of a semblance of a program where these countries that are the so-called the companies where the bribes are taking place, would not come forth with the system whereby all contracts would have to be vetted and making sure that payments have not been made and there has got to be some way of giving a carrot to those companies if they would do it. And I do think, I would hope that the State Department and Congress would try to develop a program and it won't be a difficult one, whereby that all such contracts would have to be scrutinized by an independent group who would make sure that no bribes took place to get their contracts. And I think, if that could be done, it could be rare. So, you really need two components. You need the enforcement component but also you need the prudential component which would say, "Here is the way that we can cut this, we can cut this down."

PAUL BERGER: Another thing I worry about, Judge and Jeffrey is that with the change that's taking place and the increase in legislation abroad and the investigation and prosecution, there is the possibility that companies that are listed in the U.S. are going to be subject to multiple prosecutions. And we have already seen a little bit of that and I worry about what that's going to look like in the future. And I think that if, if the U.S. regulators are going to occupy that space with respect to foreign private issuers, there needs to be a lot of cooperation and insensitivity to the issues of multiple prosecutions for the same misconduct and there needs to be some sensitivity to fashioning sanctions that while meet the goal of deterrence aren't oppressive.

STANLEY SPORKIN: Yeah, but even, just I want to add to what you are saying. You are finding foreign companies withdrawing their stock from our market.

PAUL BERGER: That's right.

STANLEY SPORKIN: And I think part of it is because they don't want to comply with, they don't want to be under our jurisdiction.

JEFFREY MANNS: And the danger, of course, is that there's not kind of coordination between international authorities then you will have a flood of companies potentially exiting listings in the United States.

PAUL BERGER: Yeah.

JEFFREY MANNS: There is a legitimate concern in terms of the reach of the SEC.

PAUL BERGER: No, I think you are both absolutely right. I mean, there is a legitimate concern. I think the SEC, who is the custodian for the public companies in this country, have to be concerned not only from the enforcement front, the law enforcement program, they have to be concerned about making sure this is a strong, viable and robust capital market. And so you want people, you want foreign private issuers here and you don't want them fleeing because they are considering that the prosecutions are oppressive, that there is an extra territorial reach. There has to be a happy meeting. I think the U.S. has to obviously fulfill its function in prosecuting where appropriate but I think that the countries that are... French company or Belgian company, that's listed here has to understand and appreciate, that they have some ability to engage in the kind of business they have been engaging in but still in a compliant way. And my fear is just what you have raised that these companies will say this is too much, there is too much cost associated with compliance. And that's why I think the U.S., particularly the SEC has to make known what compliance is necessary, so that companies understand and can really make a difference with their compliance programs. If they understand what's involved and what the cost is going forward, I think it's easier for them to list and stay here. If they think the cost is going to be huge or in effect oppressive, I can understand the impetus to leave the market.

JEFFREY MANNS: And that certainly is a significant point and one related point, though in terms of cooperation, is there a concern as other countries get more involved in terms of enforcing, the equivalent of the FCPA abroad, that you will have favoritism such as the United Kingdom protecting BAE when it was in trouble or other foreign governments going about it, imposing sanctions, the token sanctions that effectively are used to insulate those companies from further prosecutions abroad?

PAUL BERGER: The interesting thing is that I have never seen that in the U.S., at least in my experience, Judge, I would be interested in your perspective. But at least in my experience, the U.S. regulators when it comes to prosecution, they are interested in prosecuting and pursuing particularly high profile companies and individuals. So, I don't think that's been an issue. It may well be an issue in foreign jurisdictions and I think that that's something that the U.S., both the Department of Justice and the SEC and again the Department of State have to pay attention to, in their relationships with their sister regulators.

JEFFREY MANNS: There is one related question. Do you think the OECD convention needs to be amended to heighten cooperation to avoid of this double jeopardy problem? Is that an issue in terms of the actual convention itself or is that an issue that simply has to be worked out in adhoc basis much as the DoJ/SEC cooperation worked out on an ad hoc basis?

PAUL BERGER: Yeah, I mean, I don't think that the OECD can fix it through laws. I think this has to be, regulators have to sit down and understand because regulators are always going to want to fulfill their function in protecting their markets and that's reasonable and that's necessary. But they also have to understand the consequences to the company from both a business perspective, finance perspective and so there has to be some appreciation on both sides. I think as there is more regulation and prosecution in Europe, there will more attention paid to this.

JEFFREY MANNS: Very good. So, on a slightly different note and this will probably focus on Judge Sporkin. One of the main criticisms of the SEC's enforcement strategy has been its focus on inducing settlements, so that we effectively undercut judicial review of FCPA actions. And is there anything distinctive about FCPA violations that justify the settlement focus in the minimal judicial accountability?

STANLEY SPORKIN: It's always been a criticism that's been hurled at the SEC's enforcement program. You can't prevent someone from wanting to settle their problem and we don't have a judicial gauze. I mean why would anybody, if they can resolve it, want to spend five years or so, at tremendous cost and anybody representing a company, as I am sure Paul and I do, is always if we can get out of it, we get out of it. I don't think the... somehow that precedent because a court says certain things, that's going to be helpful, I will tell you this.

JEFFREY MANNS: The challenge is this, from an individual client lens, you are completely right. Each individual client wants to settle, wants to move on and put this unfortunate business behind them, the challenge though is that if we have very few precedents dealing with the FCPA, that may end up being something that does end up hurting clients in the future. In the sense, there is less guidance as to what it is that one can do and one cannot do. Doesn't have to be judicial, in terms of the guidance but certainly judicial precedents offer one way to go about and give corporations a clear sense of what their obligations are.

PAUL BERGER: I mean, I think it's a problem because you are very dependent on the particular moment in time of that law enforcement program. If the law enforcement program says, the law means x and there is no case law of their supporting that and your clients incline to settle, then you have to agree that the law means x. And that's not the way that law should develop. Our system is a system where case law develops what the laws Congress passes means and so, I do have a general concern as a policy matter that particularly in an area which is a very fast growing area and where the prosecutors are very aggressive, the government says, this is what the law means and sometimes even rational, reasonable arguments are not good rebuttals to that and that's an unfortunate situation.

STANLEY SPORKIN: There is a provision, as you know to get an opinion from the Department of Justice on certain conduct, maybe they have to exercise that authority more. But it sort of bothers me that our American system is such, that we have to go as close to that line between legality and illegality as possible. And then in order to gain an advantage, we want to have one foot over the line. Many of these issues shouldn't even be close, if someone has to start raising these and I think there's where, regrettably that the private legal practice has not stepped up. And instead of being there to promote their clients to doing what they want to do, take a more affirmative position to say, "Hey, look, you can't go there and let's not." And so, I don't look at it as a challenge that how close

to the line can we get? Is it going to be good if we pay it on Monday but if we don't pay it on Tuesday? What happens if we bring a guy over and give him some... and treat him nicely, can we take him to a ball game or can we take him to a show? I think it is somebody who said, "What are you doing it for? I mean why is it that you are doing it? Are you doing it to get business? Are you doing it for them to see what your business is all about? And it seems to me, that if you have the right motive and a proper vetting of that with your counsel, I think you could be all right. I don't think anybody is going to try to say, "Maybe they would but again at least you build up a case. But I think that if its just question, well, let's see how close we can get to that line." I cringe when I think because I think a lot of the problems we have seen recently in this whole sub-prime area is because people were pushing this thing to the point where it broke. People say, "We don't have to look at it if some rating agency gives say properly. So, forget about all this other stuff. No, you can't operate that way.

JEFFREY MANNS: No, I agree with you that kind of, we shouldn't be, kind of moving towards a world where everything is about pushing the envelope and attacking the loopholes. However that being said, the stakes at FCPA prosecutions have grown exponentially in recent years, which brings us to the topic of the disgorgement of profits which seems to be one of the biggest themes that's popped up in recent SEC enforcement and I believe Paul is a bit of an expert on that from his time at the SEC. So, a couple of questions about that, one kind of about the logic for why the remedy of disgorgement of profits was introduced and has been used so expansively. And then two kind of follow ups about that would be, how does the SEC calculate the degree to which violations of the FCPA are the basis for a given company's profits? Does that seem hard to do and that might seem like its something where a court might have just as much expertise as the SEC in overseeing...

PAUL BERGER: Fair questions and it's interesting just as background, obviously disgorgements in equitable remedy and its been available for many, many years. But the SEC in the FCPA context had not brought as a sanction, disgorgement until the ABB case which was roughly in the 2001/2002 time frame. And it occurred to some of the staff at the time that why not, I mean if there is one situation where there is clear benefit to the issuer is, if you pay a bribe and get a contract that yields a revenue stream of a \$100 million, why shouldn't you be paying disgorgement for the ill gotten gains? So, and the Commission adopted that as a policy matter, in fact, I think basically they were curious why the staff hadn't pursued that in the past. And so, I think that's become a staple now of FCPA cases and I think it has a very sound logic too. So, I expect, we will see that to continue in the future.

In terms of calculation, I think that that's a much more difficult subject. The fact of the matter is, in most instances where bribes are paid, there is still consideration for the contract, assuming we are just talking about a contract. There are expenses associated with that contract. A lot of costs are associated with gaining the contract, other than just the bribe and services are rendered. And whether it's a pipeline or its oil services or its insurance or any other area, certain services are provided and for the most part they are generally good, reasonable, reliable services. So, calculating disgorgement, at least in my view should not be... well, if you paid the bribe you should get 100% back on the... for disgorgement, I think that's really very narrow minded view of how you approach disgorgement. I think the appropriate methodology is and ultimately its going to be one of rough justices, calculating what is a good, in effect, even though deterrence is generally associated with penalties, what is a good deterrence here for disgorgement.

Let's take some of that profit, we can't take all of it because you are actually providing a service and both parties are benefiting. And so, at the end of the day, at least, I know when I was at the Commission, we engaged in what I would describe it as rough justice in trying to come up with a reasonable amount that sent the right message and informed the market that disgorgement would be a part of sanctions in the future.

JEFFREY MANNS: Now, I mean is there a given... you may not be able to speak to this point, is there a give and take between the corporation and the SEC in terms of figuring out these numbers? Do they present evidence going about substantiating what percentage of their compensation was based on actual work performed?

PAUL BERGER: Sure. And I think it's fair to say, just generally speaking, that there is a give and take. I mean, I think the SEC may take a very aggressive view at times that we need a 100% disgorgement and I think the counter view of that is, "Look, we have got a real product, we have a real sale. We are providing regular service. There needs to be some acknowledgement of that in determining what is an appropriate disgorgement number.

JEFFREY MANNS: Enough and then, I guess one last follow up on this point would be kind of the role of judicial review and reviewing kind of the disgorgement of profits. Is that a larger consideration in this context, both because the dollar values and the inherently speculative nature of disgorgement as a remedy?

PAUL BERGER: Well, so far there has been no judicial review and I think we have seen in a few matters that the SEC has brought where judges, in settled matters where the judges have actually opened up those settlements for further review. I don't know if that's a trend but that's certainly something I think that the SEC has to be thinking about in the future when they file a settled case, they are going to have to have some legitimate basis to argue before the judge. If the judge says I want to look at the settlement, why they have determined that x number is the appropriate number for disgorgement and why the penalty is the appropriate number.

STANLEY SPORKIN: Well, but on that you do get some inkling, if there is a criminal component because the sentencing guidelines come into play and you have to look at the tier they are in based upon the amount of money they make. And the other point that's extremely important to realize, what happens when the company is involved in a bribe that goes over many years, they find out about it, they are continuing to do the work. Suppose, for example, the government hasn't found out about it. One of the toughest things that a company has to do is to stop. I have had to advise clients that, you can't continue to accept the benefit of a contract that was obtained through bribery. And that's a tough thing for a company, a very tough thing.

PAUL BERGER: That's particularly tough in M&A transactions where a company is acquiring another company and they discover that the company they have acquired had engaged in inappropriate conduct and they have to deal with that situation because as you say there is still a beneficiary of the bribe.

JEFFREY MANNS: So, we have talked a little bit about the risk of over deterrence and kind of both in pushing foreign companies out of listing in the United States, in terms of the impact they may have on American companies' competitiveness abroad. One question would be, the disgorgement of profits would seem to have ratcheted up

significantly the deterrence and the risk of over deterrence. Is there an argument for in some way putting limits or caps on the degree to which we will have penalties for the FCPA?

PAUL BERGER: The interesting thing about and actually, Judge, you might want to weigh in here. The interesting thing I have always found about the penalties piece of this is that when Congress passed the legislation, the penalties for bribery. Well, I guess we could argue they are severe, they are not huge on civil side and the penalties for Books and Records in internal controls can be enormous penalties and, in fact, the way that I think the SEC gets the really big numbers on penalties is through the Books and Records and internal controls provisions which allow significant penalties. I don't know how it is that Congress kind of balances that. One would think just looking from the outside, the bribe would be more severe than the Books and Records violation but the penalties go the other way.

STANLEY SPORKIN: Well, when that was initiated there were no penalties.

PAUL BERGER: That's right. That came in much later.

STANLEY SPORKIN: It was strictly an injunctive action and if we had thought it like you thought, we would have had the disgorgement and so that has evolved when they put in the sanctions provisions in the law.

PAUL BERGER: Yeah.

STANLEY SPORKIN: And I haven't really realized that, I think you have got a very good point there and how do you cap it. And I guess through a settlement with the SEC.

PAUL BERGER: Yeah. I mean I don't think as a practical matter you are going to be in a position to cap these things but I think that if these are going to be negotiated, settlements and the SEC will come in with a number, you are going to be back and forth with them on what's the appropriate number. But I think defense counsel has an obligation to push back and say, "Look, what is the right number here and how are you getting there?" You know the SEC can be very aggressive because the act provides that for each violation. Well, what does that mean, each violation is that each time it appears in a document or is it just one statement? I think the SEC can get very aggressive and that's how they get the number so high. And I think the defense counsel have to push back. But clearly the message that the agencies are sending is that this is of such an important area that the penalties are getting ratcheted up and so that's why you are seeing higher and higher penalties.

STANLEY SPORKIN: This business about the competitive issue that you mentioned where all companies are being disadvantaged, but now because there are so many foreign companies that are trading in the United States, that has been eased, that concept of a competitive disadvantage.

JEFFREY MANNS: So long as you don't de-list and...

STANLEY SPORKIN: Well, yeah and that's going to be a big issue because remember you could trade your anywhere in the world now. You don't need to come to the United States. But I do think the SEC needs to think about some kind of a proactive type of

program which would give, what Paul says, some kind of an idea of what a company has to do to avoid getting involved and I, over the years have been trying to push, the so called immunization program where a company would know exactly what it has to do one could be immunized, if they did it and so, yeah, I think that could be helpful. But again what we now see with the... what has happened with this explosion in the sub-prime, in this catastrophic thing that took place in the past two years, which almost brought down the world market or the Greek government is imploding that people would want to go to that country which has the best regulation rather than the worst. And I really think that people are going to see now what happens when deregulation is there and it takes down the markets. So, I think there is a rebirth of good, smart regulation. And I think that, that again would commend our laws to the world. And I think you see, I think is it you mentioned that the Brits are now saying they want to have a tougher type of this arbitrage of regulation, it didn't work or is not working. And look, we were told, was not too long ago that we were driving because the SEC regulates. It's so tough that we are driving all our business away. And that was in the same year that we had everything that implode. Paulson was saying, "You at the SEC are driving everything away." And I think Cox to his great credit stood up and said, "No, we are not going to cut back on our regulation."

JEFFREY MANN: Very good. So, we focused a bit in terms of disgorgement and high dollar amount in sanctions. One other issue, that was the number of prosecutions and open investigations which has also exponentially grown, I think that at any given moment there are a 100 open FCPA investigations going through the system. Now, does this reflect a dedication of more resources to prosecuting FCPA violations or greater commitment to enforcement?

PAUL BERGER: Well, I think both. I agree with you, there are certainly more companies and individuals under investigation. I have heard the Department of Justice say over a 130. Interestingly enough, only a very small percentage though is less than a quarter of a percent are self report companies and I think that there are a variety of factors that are going on here. Back in the late '90s, early 2000s when there was a lot of M&A activity, there were more self reports, there were more companies under investigation and there were more prosecutions. As the prosecutions continued and the sanctions were ratcheted up, more companies in the market started to take notice and started to pay attention to these issues and then some companies would self report, more companies would do things to remediate their issues. And I think that both agencies, the DoJ and the SEC, decided frankly as a matter of policy to devote more resources to these issues because they noticed there was a huge problem. They saw that they were having some success with the OECD countries and felt more comfortable prosecuting these cases and so I know DoJ has beefed up its staff, I know the SEC has close to 1,200 people in the Division of Enforcement around the country and they are spending a lot of resources on this and as you know they have just created a unit devoted just to FCPA. So, I think that both agencies have made policy decisions that they are going to devote resources to this and they are going to highlight this as an issue.

STANLEY SPORKIN: The other thing is that everybody has got to realize is the tactics that are being used now are a lot different than what the SEC uses. We are now seeing tapping of phone calls, sting operations, those are foreign to the SEC but you are going to have a lot of that.

PAUL BERGER: They are still foreign to the SEC. I mean I don't think SEC is, they have the authority to do that and I don't think they should be doing that. But I agree with you, you are now seeing tactics that are used by DoJ, that you used to see in organized crime type of investigations and they are using it in the area of FCPA and I think that's going to have a dramatic change.

STANLEY SPORKIN: And insider trading.

PAUL BERGER: And insider trading, absolutely.

STANLEY SPORKIN: So, the Justice Department, when they set up this white collar crime is really saying that we got to do something now. And so I think that the... again it's another challenge for the companies and their lawyers to be able to deal with it. And that's why they have to get proactive and get more counseling as opposed to more advises to how to get around things. They have to get more advice out of compliance so you are not going to take a... look, we had the Siemens case and my understanding is that in fees just to, that they had to pay when they got, when they were investigating, I think they were in a billion dollar area, it's a lot of money. Even today it's a lot of money. So, I mean companies have got to realize, these are tremendous costs that if they don't take good counseling, good advise, that's involved.

PAUL BERGER: In fact, what they paid in Siemens is also reflected in the fact that their cooperation reduced what they had to pay by probably a \$1 billion or more as reflected in the DoJ papers.

JEFFREY MANNS: One related question would be this. It's often said in the IRS context that if the IRS had more money for enforcement, they could go and pick apples off the trees and there is widespread tax fraud that exists. Does the same situation exist with the FCPA landscape? If the FCPA and the DoJ dedicate even more resources, is there ample fraud that could be ferreted out? And is it still an issue where dramatic under utilization of resources?

PAUL BERGER: Well, you know if you read some of the publications and transparency in international talks about bribery resulting in over a trillion dollars of contracts on an annual basis, one can conclude or at least surmise that there is a fair amount of misconduct out there. I think that the challenge for the regulators will be in, for example, the SEC has said they want to, where there is a new FCPA unit to become proactive. So, how do you become proactive? Its kind of... it is difficult for a law enforcement agency by definition to be proactive. A violation or a crime is committed then law enforcement agency steps in, how do you prevent the act or how do you get in ahead of the curves, so to speak? That's going to be a challenge. I mean some of the things that SEC and DoJ have done have conducted sweeps in certain areas where they were concerned about issues. They may actually look at particular transactions that are publicized to see if there is something going on in high risk jurisdiction. But I think that's going to be the area where the agencies are going to have to find a way to kind of get ahead of the curve on this.

JEFFREY MANNS: And Judge Sporkin, I know from early in your career you have worked on gatekeepers in enlisting private enforcement. Is that a solution potential in the FCPA context, giving bounties for people coming forward for violations?

STANLEY SPORKIN: I am not a bounty guy but I know they are doing it. Yeah, a whistle blower is as Paul says, a whistle blower will come in and that's why any company that's engaged in this activity subjects itself to blackmail and extortion.

JEFFREY MANNS: Sure.

STANLEY SPORKIN: I mean why, when I was at the CIA, we were always worried about somebody can hold something against somebody that can extract a secret. And so yeah, companies got to make sure that it's doing the right thing. If it doesn't, it's going to subject itself to tremendous problems. But the companies can do something here and I am hopeful that the SEC and the department will realize this is the kind of thing I mentioned before that what ought to happen here, is a company you agree to do certain things, agree to look at its operations, agree to once it finds out what they find over the past several years to determine if they are going to self report or not. If they do, to go to the SEC and see if they can get amnesty for reporting and agreeing with the SEC that they will take certain steps such as putting in a FCPA compliance officer and agreeing to monitor their conduct for the next five years or so. There are certain things that I would hope... we found ourselves back when this program started with... we brought 65 prosecutions and that's in the '70s and early '80s, when we went to a volunteer program, we asked companies to come in and volunteer. When we gave them amnesty, 650 companies came forth. So, it seems to me if it's the SEC's objective to stop this kind of conduct or cut it down to as much as possible, then I would hope they will think about a second coming of the volunteer program along the lines that I just mentioned. I have been working on another program and that is having companies when they do their financial audit to include a forensic component in it because as we are now told, and we now know that a financial audit doesn't look for fraud in this sense and because they are looking for materiality which is a big number. In these cases, we found out, it's under the radar screen, it comes out of the... a lot of times it comes out of petty cash and what not. No, they are not looking at it. And so that's why, you need a forensic component in the audit. And I have been working with one accounting firm, where we were working on this and we looked at one year's results and they have been good and now we are going to look at the second year's results. And if so, we are going to hopefully we will get to the public and say, this makes sense. And so I think there are a number of things that can be done, as Paul says in a proactive way and counseling all these things rather than using the gatekeepers as a... they were not called gatekeepers, by using the lawyers and the accountants as a way to get around the law, to try to face the challenges and deal with the compliance rather than trying to relate it.

PAUL BERGER: Judge, when I was at the SEC and I think that this is still true for the agencies. When they saw a company that came in with a robust compliance program, one that did the risk assessment, had the policies and procedures in place, had the training, had the testing of their program. I think those were the companies that generally weren't prosecuted because they did everything that you would expect a company to do and it had no value from a deterrence or otherwise, in effect to prosecute those companies. And I think that if companies understand that because the fact of the matter today is, if you are operating in a multi jurisdictional environment, you are in 50 or 60 different countries, something will go wrong and even with the best compliance program something will go wrong. So, what companies need to have some comfort in is that if they have a strong compliance program, if they have spent some dollars to ensure that they are doing the right things, that even when something goes wrong, they are not going to get prosecuted or if they get prosecuted it's not going to be severe. That will go

a long way, I think, toward getting companies. If they have that understanding, getting companies to take those actions and be in a good position before a regulator or should there...

STANLEY SPORKIN: Absolutely. You are absolutely right. And I would only like to see that gatekeeper approach blossom as opposed to using the legal talent were not to circumvent the law and or to be giving advise on disclosure, don't go to the SEC. And that's why, I think of the SEC could do what we did back then and announce the volunteer program, "If you come forth we are going to treat you differently." I think it would go a long way. I just don't think its in anybody's interest to just keep getting more and more and more of these cases if they can be avoided and allow the right... and the thing is that the gatekeeper, the lawyer and the accountant wants to do the right thing, needs help.

PAUL BERGER: Right.

STANLEY SPORKIN: Needs the government force behind it, needs something where they can look to, so to say and what we will take it to them and if they like what you are doing, its okay. But they need some kind of help and say, hey look, this is the way we think it ought to go.

JEFFREY MANN: Very good. So, now, what do you think the significance of the formation of the new FCPA unit at the SEC will be for future enforcement?

PAUL BERGER: Well, it remains to be seen. I think it's a great question. They have a terrific new head of the program with Cheryl Scarborough. I think that she along with Rob Khuzami and his deputy Ron Reisner are going to develop a good, strong program. They have a lot of people at the agency who know the law and understand the law. They are going to devote a lot of resources. The one thing that they publicly said is that they want to become more proactive and that's the question that I raised earlier as to how do you do that as a law enforcement agency. I mean it's not an easy task to take on. I think that they can continue to do sweeps, I think that they can focus on specific transactions that are publicized to gain some insight. But, none of this is a secret the big issues tend to be, use of agents, distributors, consultants, joint venture relationships. These are the types of things that generally tend to be the areas where you can find issues. So, I am not sure exactly how they are going to become any more proactive than they have been in the past. But they have set that task up for themselves and it will be interesting to see how it develops.

STANLEY SPORKIN: Well, you had that program by yourself when you were there. You did a pretty good job, Paul. But let me say this to you and I think Paul would agree with this. The SEC is the finest agency of its kind, there is nobody like it. You can't get me another agency in government that is so devoted to enforcement of the law, as they are. They might miss a step here or there. And so you got it, this program in the right hands and I am sure they will see the benefits of how to do the proactiveness, at the same time as showing the corporate America how to comply. And when you have a guy like a Berger who ran the program and he's out there now on the other side. He's going to be able to give that kind of advice to clients and there are others besides Paul and those, but that's really what's going to happen.

PAUL BERGER: Okay and I agree with the Judge.

STANLEY SPORKIN: I am sure you would do.

PAUL BERGER: Of course. I would hear from him if I did. But no, it's a great agency with great people who are really dedicated to doing their best for investors and the marketplace. And I think that the new program with the FCPA will be, I think it will be a success. I think they will do a splendid job and the marketplace will benefit.

STANLEY SPORKIN: And you got good leadership, that's important. We got good leadership. We got good leadership at the division and at the Commission. And we will see what happens. The problem you are going to have now as this pendulum swings and as the pendulum is swinging pro-regulation now because of the almost catastrophic situation we had, is now starting to come back the other way.

PAUL BERGER: So, just get out of the way of that pendulum.

STANLEY SPORKIN: And you are going see a lot of pressure on the SEC to cut back a little bit.

JEFFREY MANNS: Yes, Sir. One kind of follow up about this is Roger Blanc of Willkie, Farr and Gallagher had kind of a concrete question about what it means for the SEC to be proactive on FCPA issues. And his question is, has the SEC done a wise or a foolish thing in delegating to the enforcement staff, the power to issue formal orders and subpoenas?

PAUL BERGER: Well, the staff always had the powers. Once the formal orders are issued, they always had the power and discretion to issue the subpoenas. So, that won't really change. What's changed is now the staff has the discretionary senior level to issue the formal order. I have talked with the Judge about this and frankly I am persuaded that I would rather have the Commission issuing the formal order. I don't think it's that big a deal in order to go up and ask for the power but I think the five commissioners should be taking the responsibility to issue the formal order. I don't think in the way the Commission should run. I don't think it would take a lot of time. It never did when I was there. Generally speaking you go up and you get your formal order. It is almost pro forma, I mean it is very rare that the Commission would be opposed to a formal order. And I like the idea of the Commission as a policy matter taking the responsibility for issuing or authorizing the issuance of a formal order.

JEFFREY MANNS: We are almost out of our time for today but last question would be this. You talked a little bit about the importance of international cooperation. Do you think that will be the dominant theme for FCPA enforcement in the years to come?

PAUL BERGER: I think so.

STANLEY SPORKIN: I have seen a lot of cooperation among the various countries. And I think, again this financial debacle that we had, that all these countries that have had lapse regulation and not regulation as good as us are looking towards SEC to now beef up their regulations, because they have realized what can happen.

PAUL BERGER: I agree, I mean I think that the future is certainly cooperation enhanced consultation on sanctions. I think that that's what, when you are representing a company

now in an FCPA matter, you are going to be dealing with counsel and the company and various jurisdictions because there may well be investigations and prosecutions in those jurisdictions.

STANLEY SPORKIN: I once asked a foreign client of mine while this thing was happening and he told me that that's a U.S. problem, it's not happening here. Of course, a year later when their government almost collapsed, their whole internal system was challenged, I asked him that same question. He realized this is one global marketplace now and we got to realize it.

JEFFREY MANN: Great. Well, thank you very much, Judge Sporkin and Paul, really appreciate your insights on the Foreign Corrupt Practices Act. I know that today's audience as well as museum visitors who access the program in the future will benefit from your thoughts on this important subject.

Today's Fireside Chat is now permanently preserved in audio format in the virtual museum and archive at www.sechistorical.org; a transcript will be added later on. On behalf of the SEC Historical Society, let me thank Debevoise & Plimpton LLP again for their generous support in making today's broadcast possible.

Looking ahead, the virtual museum and archive will next broadcast 'Self Regulation In the Securities Industry' with James Brigagliano, SEC Division of Trading and Markets; William Brodsky from the Chicago Board Options Exchange; James Duffy from NYSE Regulation, Inc.; and Richard Ketchum from FINRA on Thursday June 3rd at 12 noon Eastern Time. Like today's broadcast, the 'SEC Regulation in the Securities Industry' online broadcast will be free and accessible worldwide without prior registration. Unlike today, it will be a live video broadcast. It will be moderated by Professor Donna Nagy of the Indiana University Maurer School of Law. Please plan to join us www.sechistorical.org on June 3rd. Thank you for being with us today.