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COMMENT

SETTLING WITH YOUR HANDS TIED: WHY JUDICIAL INTERVENTION IS NEEDED TO CURB AN EXPANDING INTERPRETATION OF THE FOREIGN CORRUPT PRACTICES ACT

PETE J. GEORGIS[*]

FCPA enforcement is stronger than it's ever been—and getting stronger.[**]

INTRODUCTION

The United States has been combating corruption in international business transactions for over thirty years.[1] By adopting legislation

[*] J.D. Candidate, May 2012, Golden Gate University School of Law, San Francisco, California; B.A. 2007, Economics, The George Washington University, Washington, D.C. I would like to thank my family and friends for their boundless love and support. I would also like to thank the *Golden Gate University Law Review* Editorial Board, without whose guidance this paper would not have been published. I am especially grateful to Professor Wes Porter who provided helpful comments on a previous draft.

[**] Assistant Attorney General Lanny A. Breuer, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[1] *See* Ann Hollingshead, *A Brief History of U.S. Policy Toward Foreign Bribery*, TASK FORCE ON FINANCIAL INTEGRITY AND ECONOMIC DEVELOPMENT (July 28, 2010), www.financialtaskforce.org/2010/07/28/a-brief-history-of-u-s-policy-toward-foreign-bribery. The United States took an assertive position to become the first country to criminalize global corporate bribery. *Id.* During the 1980s and 1990s, Congress negotiated with the Organization of Economic Cooperation and Development (OECD) to seek an agreement with major trading partners that anti-corruption legislation would be enacted. *Id.* The United States has led the way in criminalizing the

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criminalizing the payment of bribes overseas, the United States has been a leader in setting anti-corruption policies.[2] Although the United States has endeavored to combat the unethical payment of bribes through the Foreign Corrupt Practices Act (FCPA),[3] the vagueness of the statute—specifically the business nexus requirement—has led to corporate uncertainty and unnecessarily expensive compliance programs.[4] One factor motivating Congress's staunch support for criminalization has been the devastating effect these bribes are having on global economies.[5] The World Bank conservatively estimates that the annual amount of worldwide bribery flowing from the private sector to the public sector is approximately $1 trillion.[6]

In 1977, Congress enacted the FCPA as a component of the 1934 Securities and Exchange Act.[7] The principal goal of the law is to hold U.S. companies and individuals criminally liable for bribing foreign officials in exchange for lucrative business agreements.[8] The FCPA's efforts to criminalize bribery payments to foreign officials stem from the inimical effects such payments have on economic and political stability.[9]

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act of bribing a public official, and has garnered the support of thirty-seven countries spanning six continents. *See* ORG. OF ECON. COOPERATION & DEV., OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF MARCH 2009, *available at* www.oecd.org/dataoecd/59/13/ 40272933.pdf.

[2] Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 3 (1999).

[3] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m (Westlaw 2012)).

[4] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 259 (1997); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1001 (2010). Statutory vagueness has caused business entities to bar all payments to foreign officials. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 259. For example, after settling with the government for $500,000, a U.S. advertising firm established a policy of prohibiting its employees from making any payments to government officials. *Id.* at 259 n.198. This policy decision was aimed at avoiding potential liability in the FCPA's grey areas. *Id.*

[5] *See* S. REP. NO. 95-114, at 4 (1977) (Conf. Rep.).

[6] *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, THE WORLD BANK, http://go.worldbank.org/KQH743GKF1 (last visited Jan. 7, 2012).

[7] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m (Westlaw 2012)).

[8] Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 230.

[9] Mark J. Murphy, Comment, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 391 (1995).

These destabilizing effects stretch beyond a single country's borders and permeate the global system.[10] For instance, between 1994 and 1999, the U.S. Department of Commerce found that American exporters lost $45 billion of international business to overseas competitors who paid bribes.[11] Additionally, bribery is thought to have influenced the outcome of 294 international contracts involving $145 billion in trade.[12] The significant effect that bribery has on the markets has also led to investors exiting areas with intense graft in search of less risky environments.[13] Such evidence illustrates that corruption aggravates capital flight and discourages foreign investment, thereby significantly increasing business transaction costs.[14] Furthermore, by threatening legitimacy and eroding confidence in market institutions, foreign bribery negatively impacts the entire international community.[15] Through FCPA enforcement, the U.S.

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[10] *See* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 85-87 (2007).

[11] Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 256.

[12] Ambassador Cynthia P. Schneider, The Global Fight Against Bribery And Corruption: U.S. Law and Policy, Address at the Transparency Unveiling Corruption Conference in Amsterdam (Oct. 1, 1999), *available at* http://ihcrp.georgetown.edu/lifesciandsociety/pdfs/bribery100199.pdf.

[13] *See* United Nations Crime and Justice Information Network, Press Kit, The Cost of Corruption, Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Feb. 2000), *available at* www.un.org/events/10thcongress/2088b.htm ("'It is widely acknowledged that corruption scares away foreign investment and development aid,' according to Pino Arlacchi, Executive Director of the Vienna-based United Nations Office for Drug Control and Crime Prevention (ODCCP). 'Obviously, it is wiser to invest in countries with more transparency, independent and well-regulated banks and strong court systems.'").

[14] Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 183-84 (1996) ("The former director general of development at the European Commission has asserted that the losses caused by corruption far exceed the sum of individual profits derived from it because the graft distorts the entire economy."). The prevalence of corruption affects a country's resources, revenues, and government procurement. *Id.* As a result, public works contracts contain a costly premium that raises the price of a project by a significant amount. *Id.* The distortion of government procurement misallocates public resources and accumulates a devastating long-term debt. *Id.* Foreign investment is also reduced because companies are hesitant to enter a market when the cost of doing business is unpredictable. Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 441 (2010). Risk-averse companies would refuse to be at the mercy of corrupt foreign officials when large amounts of capital hinge on government cooperation. *Id.*

[15] Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. at 184 (stating that corruption threatens democracy and erodes public trust in state-owned institutions and government officials); Assistant Attorney General Lanny A. Breuer, Statement Before the Senate Committee on the Judiciary (Jan. 26, 2011), *available at* www.justice.gov/criminal/pr/testimony/2011/crm-testimony-110126.html ("[C]orruption and bribery works to the detriment of us all, stifling competition, imposing an insidious and illegal fee on business transactions, and undermining the transparency and honesty of corporate culture."); Assistant Attorney General Lanny A. Breuer, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* www.justice.gov/criminal/pr/speeches/

government is able to punish sordid business practices while encouraging more ethical values amongst the American public.[16] More importantly, the United States' interest in enforcing the FCPA is to curb economic waste and protect the integrity of American political institutions.[17] Despite this interest, however, prosecutions for FCPA violations have been lax until recently.[18]

Since 2004, the U.S. government has devoted vast resources toward prosecuting FCPA violations.[19] The Fifth Circuit's decision in *United States v. Kay*[20] precipitated the Department of Justice's (DOJ's) renewed focus on curtailing the corporate payment of bribes.[21] Specifically, *Kay*'s broad interpretation of the business nexus requirement—a provision in the FCPA that requires a connection between the bribery payment and its anticipated effect[22]—paved the way for prosecutors to indict companies based on payments that directly or indirectly "obtain or

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2010/crm-speech-101116.html ("[B]ribery in international business transactions weakens economic development, . . . undermines confidence in the marketplace, and . . . distorts competition.").

[16] *See* H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.) (stating that the purpose of the Act is to prohibit corrupt business practices because they run counter to the "moral expectations and values of the American public").

[17] *See* S. REP. NO. 95-114, at 4 (1977) (Conf. Rep.).

[18] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 256 (1997); *see also* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) (stating that before 2000, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) averaged only three FCPA prosecutions per year); GIBSON, DUNN & CRUTCHER LLP, 2011 YEAR-END FCPA UPDATE (Jan. 3, 2012), *available at* www.gibsondunn.com/publications/Pages/2011YearEndFCPAUpdate.aspx (noting that 2010 and 2011 have been the most prolific years for FCPA enforcement with seventy-four actions in 2010 and forty-eight in 2011); GIBSON, DUNN & CRUTCHER LLP, 2010 MID-YEAR FCPA UPDATE (July 8, 2010), *available at* www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx (noting that since 2000, FCPA enforcement has been trending upward, with thirty-eight actions brought in 2007, thirty-three in 2008, and forty in 2009).

[19] Assistant Attorney General Lanny A. Breuer, Address at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011), *available at* www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html (stating that the Fraud Section of the Department of Justice has hired a number of experienced prosecutors devoted solely to combat bribery, and has implemented changes that have significantly increased FCPA enforcement); Attorney General Alberto R. Gonzales, Address at the American Bar Association White Collar Crime Conference (Mar. 1, 2007), *available at* www.justice.gov/archive/ag/speeches/2007/ag_speech_070301.html ("The Department [of Justice] has substantially increased its focus and attention on [FCPA violations.]").

[20] United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

[21] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 921 (2010) ("[T]he [*Kay*] decision clearly energized the enforcement agencies and post-*Kay* there has been an explosion in FCPA enforcement actions . . . .").

[22] *Kay*, 359 F.3d at 744.

retain business."[23] In light of increased FCPA enforcement, the scarcity of legislative history and judicial scrutiny regarding the business nexus requirement has effectively conferred ultimate discretionary authority on the DOJ and the Securities and Exchange Commission (SEC) to determine the nexus's scope.[24]

Accordingly, the lack of legislative and judicial guidance has given rise to a climate of apprehension and fear for American businesses.[25] Corporate compliance with the FCPA is difficult, given the ambiguous nature of the statute, yet the legislature and courts have nonetheless failed to clearly define what conduct is prohibited by the statute.[26] As a result, U.S. businesses are left to fill in the gaps.[27] Ultimately, risk-averse companies have been forced into an environment where heightened levels of risk and over-compliance have led to the formation of intricate and expensive corporate compliance programs.[28]

This Comment therefore argues that the broad interpretation of the FCPA's business nexus requirement, which criminalizes payments that both directly and indirectly "obtain or retain business," encourages prosecutorial abuse and deviates from the intended purpose of the Act. The Justice Department's expansive approach to FCPA enforcement has cost companies tremendously,[29] even though the Act's drafters intended for a more balanced approach.[30] Part I of this Comment will discuss the history and background of the Foreign Corrupt Practices Act of 1977 and its amendments in 1988 and 1998. Part II will examine the application of the business nexus requirement in *United States v. Kay*[31] and argue that

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[23] *See id.* at 755.

[24] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 918 (stating that the DOJ and SEC aggressively interpret the business nexus requirement).

[25] *See* Sarah Johnson, *Deal-Breaker: Fear of the FCPA*, CFO.COM (Feb. 15, 2011), www.cfo.com/article.cfm/14555334 (stating that businesses have become "wary of the potential business partner's lack of transparency, payment structures in contracts, or relationships between its executives and government officials or third parties").

[26] Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 101-03 (2010).

[27] *See id.* at 103 (noting that during the first decade of enforcement, the ambiguity of the statute had dissuaded companies from venturing overseas to do business). Since then, the business nexus requirement has still never been defined, and the FCPA has never been amended to clarify this term. *See* 15 U.S.C.A. §§ 78dd-1 to -3 (Westlaw 2012).

[28] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 1001.

[29] *Id.* at 1001-02 (stating that risk-averse companies that seek to do business in foreign markets feel compelled to implement costly and unnecessary FCPA compliance programs only to appease prosecutors and to avoid formal charges *ex ante*).

[30] *See* H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.) (creating the "facilitating payments" exception to ensure that despite the prohibition on corrupt payments, companies would still be able to make payments to receive favorable treatment from low-level officials).

[31] United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

its interpretation is inconsistent with the FCPA's purpose. Part III will examine enforcement measures used by the DOJ and the SEC in a post-*Kay* world. Finally, Part IV will propose that judicial intervention in these enforcement measures is necessary to alleviate some of the challenges that currently exist, as well as to guide companies in distinguishing lawful from unlawful conduct.

I. THE FOREIGN CORRUPT PRACTICES ACT

President Jimmy Carter signed the Foreign Corrupt Practices Act into law in 1977,[32] making the United States the first country to outlaw the payment of bribes to foreign officials.[33] The political will of Congress had shifted toward reining in these unethical activities.[34] In essence, federal legislators sought to prohibit the type of bribery that influences public officials to abuse their discretionary authority and disrupts market efficiency and foreign relations.[35] To better understand the drafters' intent, this Comment will discuss the origins of the FCPA, its subsequent amendments, and the business nexus requirement.

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[32] *See* Jimmy Carter, Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977), *available at* www.presidency.ucsb.edu/ws/index.php?pid=7036 ("[B]ribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.").

[33] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 230 (1997) (stating that the United States is the first country to criminalize the extraterritorial payments of bribes by domestic companies). It took almost twenty years before other countries enacted their own anti-bribery statutes. In 1997, thirty-eight countries signed the OECD Anti-Bribery Convention, including most European Union countries, Canada, and the United States. *See* ORG. OF ECON. COOPERATION & DEV., OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF 24 NOVEMBER 2005, *available at* www.oecd.org/dataoecd/59/13/40272933.pdf (listing ratifying countries).

[34] Once the SEC and IRS investigations uncovered the questionable payments, Congress spent the next two and half years hearing testimony and considering House and Senate versions of the proposed bill. *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 913 (2010).

[35] *Kay*, 359 F.3d at 747 & n.33 (citing Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990) (stating that the "FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets")).

A. ORIGINS OF THE ACT

The FCPA was enacted as a response to rampant unethical corporate conduct occurring during the 1970s.[36] Based on a number of corporate corruption scandals discovered during the Watergate era, the SEC conducted multiple investigations to assess how widespread the misuse of corporate funds had become.[37] As a result of these investigations, the SEC and the Internal Revenue Service (IRS) uncovered several "slush funds"[38] used by U.S. multinational corporations for the purpose of bribing foreign government officials to obtain lucrative business agreements.[39] Congress was troubled by these exchanges because they were harmful to the U.S. economy while, at the same time, permissible under federal law.[40] Members of the Senate Committee on Banking, Housing and Urban Affairs concurred with then-Treasury Secretary W. Michael Blumenthal's position that "paying bribes—apart from being morally repugnant and illegal in most countries—is simply not necessary for the successful conduct of business here or overseas."[41] The

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[36] Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 239.

[37] SEC. & EXCH. COMM'N, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 94th Cong., 1st Sess., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976); S. REP. NO. 95-114, at 1-2 (1977) (Conf. Rep.).

[38] A "slush fund" is defined as "a fund for bribing public officials" or "an unregulated fund often used for illicit purposes." *Slush Fund Definition*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/slush%20fund (last visited Mar. 3, 2012).

[39] *See* UNLAWFUL CORPORATE PAYMENTS ACT OF 1977: HEARINGS BEFORE THE SUBCOMM. ON CONSUMER PROT. & FIN. OF THE H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 95th Cong. 1-184 (1977); S. REP. NO. 95-114, at 3 (1977) (Conf. Rep.) (noting that SEC report revealed that over 300 U.S. companies made questionable payments to foreign officials involving hundreds of millions of dollars); S. REP. NO. 95-114 (1977) (Conf. Rep.) (revealing that U.S. oil companies and defense contractors made large payments to high-ranking government officials in Japan, Netherlands, and Italy); *see also Scandals: A Record of Corporate Corruption*, TIME, Feb. 23, 1976, *available at* www.time.com/time/magazine/article/0,9171,918067-1,00.html (stating that the SEC and IRS have exposed voluminous bribes, kickbacks, and political payoffs involving Northrop Corp., Gulf Oil, 3M Co., Exxon, General Motors, and IBM). In many countries, the idea of making cash gifts in exchange for government contracts is ingrained in the business culture. Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 5 (1999). The industries typically involved in these illicit payments were health care, oil and gas production, food products, aerospace, airlines and air services, and chemicals. UNLAWFUL CORPORATE PAYMENTS ACT OF 1977: H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 95th Cong. 1-184 (1977).

[40] *See, e.g.*, H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.); S. REP. NO. 95-114, at 4 (1977) (Conf. Rep.).

[41] S. REP. NO. 95-114, at 4 (1977) (Conf. Rep.) (internal quotation marks omitted).

committee based its agreement with Secretary Blumenthal on the following:

> Many U.S. firms have taken a strong stand against paying foreign bribes and are still able to compete in international trade. Unfortunately, the reputation and image of all U.S. businessmen has been tarnished by the activities of a sizeable number, but by no means a majority of American firms. A strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.[42]

Accordingly, Congress took a bold stance to criminalize behavior it deemed unethical, regardless of the customs and routine practices of the foreign country where business took place.[43]

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[42] *Id.*

[43] UNLAWFUL CORPORATE PAYMENTS ACT OF 1977: HEARINGS BEFORE THE SUBCOMM. ON CONSUMER PROT. & FIN. OF THE H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 95th Cong. 1-184 (1977) ("The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public."). Transparency International, a German-based global corruption watchdog group, conducts a global opinion poll aimed at gauging how exposed respondents' lives are to a culture of official graft. *See 2008 Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL (Sept. 22, 2008), www.transparency.org/news_room/in_focus/2008/cpi2008. In Korea, a culture of bribery is deeply ingrained in the business community. *See* Yoolim Lee, *Samsung Bribery Probe Points to Pattern of Graft in South Korea*, BLOOMBERG (Apr. 17, 2008, 5:52 PM), www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aH3aDwXXnvqc. Many label the system as "crony capitalism" and argue that Korea is fundamentally corrupt. *Id.* Although illegal, bribery in Korea is socially acceptable and often the preferred means of conducting business. *Id.* The same holds true for Albania, Greece, and Japan. *See* Tom Zeller Jr., *If You're Thinking of Living in Albania . . . Bring Bribe Money*, N.Y. TIMES BLOG (Dec. 7, 2006 9:17 AM), http://thelede.blogs.nytimes.com/2006/12/07/if-youre-thinking-of-living-in-albania-bring-bribe-money/?scp=4&sq=global%20culture%20of%20bribery&st=cse.
Basic services in Albania, such as electricity, even require the payment of a small bribe. *Id.* In Greece, a deep reputation of corruption costs Greek citizens $1 billion per year. *Near-Bankrupt Greece a Culture of Corruption; $1 Billion a Year in Bribes*, NEW EUROPE (Mar. 7, 2010), www.neurope.eu/articles/99469.php. Many civil servants, doctors, and lawyers have been found to evade taxes through the payment of bribes. *Id.* In Japan, the practice of "Amakudari" runs rampant. *See* Hiroko Nakata, *"Amakudari" Crackdown Called Toothless, Poll Ploy*, THE JAPAN TIMES ONLINE (Apr. 14, 2007), http://search.japantimes.co.jp/cgi-bin/nn20070414a3.html. "Amakudari" is the institutionalized practice under which Japanese bureaucrats retire to high-paying public or private sector positions. *Id.* The costly corruption fostered in this system allows politicians and companies to collude on business agreements, ultimately favorable to the politician once hired. *Id.* Despite enactment of the Unfair Competition Prevention Law (UCPL), which criminalizes the bribery of foreign officials, this unethical business practice still occurs. *See* Tetsuya Morimoto, *OECD Criticized Japan for its Laxness in Implementing the Anti-Bribery Convention*, 21 INT'L ENFORCEMENT L. REP. 249 (2005). A March 2005 OECD Report that evaluated Japan's implementation of the OECD Anti-Bribery Convention found that Japan had not made sufficient efforts to enforce the prohibition against bribing public officials. *Id.* The lack of investigative and

However, Congress created an exception to prevent U.S. companies from being disadvantaged where insignificant monetary payments were a social norm.[44] The "facilitating payments" exception permitted payments to officials whose duties were considered "clerical" or "ministerial."[45] This provision was created under the assumption that low-level government positions entailed little discretion and that payments to them were harmless.[46] These payments allowed U.S. companies to adapt to the cultural norms of the foreign country.[47] Unfortunately, Congress left the terms "clerical" and "ministerial" undefined, and American businesses were forced to draw their own line as to how much discretion a government employee needed before falling outside the exception.[48] After a decade of confusion surrounding the vague and undefined terms of the Act, Congress provided pivotal guidance through subsequent amendments.[49]

B. THE 1988 AND 1998 AMENDMENTS TO THE FCPA

The government's lack of enforcement yielded criticism by many who later called for clarification and changes to the FCPA.[50] The growing trade deficit in the United States caused concern among members of Congress, so modifications to the Act were made in an

prosecutorial resources being devoted to enforcing the UCPL has resulted in no formal investigations or charges against Japanese corporations. *Id.*

[44] *See* 15 U.S.C. § 78dd-2(d)(2) (1982) (current version at 15 U.S.C.A. § 78dd-2 (Westlaw 2012)).

[45] *Id.* The "facilitating payments" exception was imbedded in the definition of "foreign official." *Id.* The term "foreign official" was defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially *ministerial* or *clerical*." *Id.* (emphasis added).

[46] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 242 (1997) (stating that illicit payments became a part of the pay that low-level government employees received because their salaries alone were inadequate).

[47] *Id.* at 266.

[48] *See* 15 U.S.C. § 78dd-2(d)(2) (1982). The only guidance given from the legislature came from a House Report that distinguished corrupt payments from facilitating payments. *See* UNLAWFUL CORPORATE PAYMENTS ACT OF 1977: H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong. 1-184 (1977). For instance, the bill would not proscribe gratuity payments to customs officials to speed processing and secure permits or licenses. *Id.*

[49] Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 243.

[50] *Id.*

attempt to eliminate export obstacles facing U.S. companies.[51] Consequently, the FCPA was amended twice, once under the Omnibus Trade and Competitiveness Act of 1988[52] and again under the International Anti-Bribery and Fair Competition Act of 1998.[53]

The Omnibus Trade and Competitiveness Act was Congress's initial attempt to resolve the harsh economic effects of the FCPA.[54] The principles behind the 1988 amendments were to promote the participation of U.S. corporations in international trade, to prevent FCPA violations in international business transactions, and to send a congressional signal to the executive branch that foreign nations should also enact anti-corruption laws.[55] To effectuate these principles, Congress amended and clarified the terms of the FCPA.[56] One of these amendments altered the scienter requirement for payments made to third parties.[57] The 1977 version of the FCPA prohibited payments to third parties that the payor actually knew or had reason to know were for purposes proscribed by the Act.[58] Because legislators did not want to impose criminal liability for simple negligence or to encourage the willful blindness of corrupt third-party payments, Congress sought to amend the state-of-mind requirement.[59] As a result, the 1988 version of the Act criminalizes the payment of third-party bribes only if the payor

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[51] *Id.*

[52] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 15 U.S.C. §§ 78dd-1 to -2 (1994)) (enacting the 1988 amendments negotiated between the House and the Senate).

[53] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2000)).

[54] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[55] Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 98 (2010). The 1988 amendment recommended that the executive branch promote global adherence to FCPA policies and request the cooperation of the OECD in adopting U.S. anti-corruption standards. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 248.

[56] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[57] H.R. REP. NO.100-576, at 919 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952.

[58] *Id.*; *see also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. The original language of the FCPA included both a subjective and objective mens rea requirement for a third-party bribe. *Id.* If the company knew or had reason to know that the payment made to a third-party would be used for purposes of official graft, a violation occurred. *Id.*

[59] H.R. REP. NO.100-576, at 919 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

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has actual knowledge of the intended results or acts with a conscious disregard for the truth.[60]

In addition to this amendment, Congress clarified the "facilitating payments" exception by setting forth what constitutes an "essentially ministerial or clerical" duty[61] and added two more defenses to shield corporations from liability.[62] The Conference Report explained that the exception applies to "routine governmental action," defined as "ordinarily and commonly performed" duties.[63] The 1988 amendment provided a set of specific examples regarding payments for "routine governmental action," including the processing of government papers, loading and unloading cargo, and scheduling inspections associated with contract performance.[64] Moreover, Congress created two affirmative defenses to liability for what would otherwise be illicit payments: reasonable and bona fide expenditures,[65] and legality in the host

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[60] H.R. REP. NO.100-576, at 919-21 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952. The conferees clarified the conscious-disregard standard as the "deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act." *Id.*; *see also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. *Contra* Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. at 244 (contrasting the 1977 scienter requirement, which required the payor to know or have reason to know that the payments were for the purpose of influencing or inducing foreign officials to act).

[61] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. The exception for routine governmental action stated that "[15 U.S.C. § 78dd-2(a)] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (Westlaw 2012).

[62] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[63] *See id.* The conferees make clear that "'ordinarily and commonly performed' actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of 'obtaining or retaining business for or with, or directing business to, any person.'" H.R. REP. NO.100-576, at 921 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547; *see also* 15 U.S.C. § 78dd-2(h)(4)(B) (1994).

[64] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. In the 1988 amendment, Congress made explicitly clear what "routine governmental action" did not include. 15 U.S.C. § 78dd-2(h)(4)(B) (1994). "[T]he term 'routine governmental action' means only an action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature." 15 U.S.C. § 78dd-2(h)(4)(A) (1994).

[65] The "reasonable and bona fide expenditures" defense applies to travel and lodging expenses associated with the promoting, demonstrating, and explaining of products or services.

country.[66] These defenses were Congress's attempt to balance a resolute opposition to global corporate bribery with the promotion of U.S. economic interests abroad.[67]

A decade after the 1988 amendment, Congress amended the FCPA a second time.[68] With the encouragement of President Clinton,[69] the Organization of Economic Cooperation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[70] Thirty-three member countries—including the United States—signed the Convention, thereby agreeing to enact legislation in their respective countries that prohibits the bribery of foreign officials.[71] In October 1998, Congress consequently amended federal law to conform to international standards promulgated by the OECD Convention.[72]

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (Westlaw 2012).

[66] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. The legality defense permits a U.S. company to make payments to a foreign official only if the payments are lawful under the written laws and regulations of the foreign official's country. *Id.*; 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

[67] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (stating that congressional findings and conclusions include an unnecessary concern by U.S. companies regarding the scope of the FCPA, and that the principal objectives of the FCPA should be maintained).

[68] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[69] The 1988 Amendment to the FCPA charged the U.S. President with pursuing the negotiation of an international agreement to govern corporate bribery. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[70] *See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00&&en-USS_01DBC.html (last visited Jan. 5, 2012).

[71] *See* William J. Clinton, Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998 (Nov. 10, 1998), *available at* www.presidency.ucsb.edu/ws/index.php?pid=55254&st=&st1=. As of March 2011, thirty-four OECD countries had signed the OECD Anti-Bribery Convention. These countries include Australia, Austria, Belgium, Canada, Czech Republic, Chile, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, Norway, New Zealand, Poland, Portugal, Slovak Republic, Spain, Switzerland, Slovenia, Sweden, Turkey, United Kingdom, United States, and four non-OECD countries (Argentina, Brazil, South Africa, and Bulgaria). *See* ORG. OF ECON. COOPERATION & DEV., OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF MARCH 2009, *available at* www.oecd.org/dataoecd/59/13/40272933.pdf.

[72] *See* International Anti-Bribery Act of 1998, S. 2375, 105th Cong. § 2 (as passed by House, Oct. 9, 1998); *Id.*, S. 2375, 105th Cong. § 2 (as passed by Senate, July 31, 1998).

The 1998 amendment expanded the FCPA's substantive and jurisdictional scope.[73] First, Congress broadened the meaning of bribery to include illicit payments that secure "any improper advantage."[74] Unlike the prior language of the provision ("influencing [or inducing] any act or decision of [a] foreign official"[75]), the new language is much broader and focuses on the competitive advantage gained, not on the payor's intention to influence the official.[76] Second, the 1998 amendment expanded the FCPA's jurisdiction beyond U.S. borders to allow for greater enforcement.[77] The alternative jurisdiction provision functions as a global enforcement mechanism that permits the U.S. government to prosecute any U.S. national who violates the FCPA, even if the acts are committed while outside the United States.[78] These expansions of power subject even more corporate payments to FCPA enforcement, despite harsh criticism that the statute is vague.[79]

After much debate and years of congressional testimony aimed at clarifying and redefining the scope of the Act, the law consists of two main kinds of provisions: (1) accounting provisions,[80] and (2) antibribery provisions.[81] First, the accounting provisions, commonly known as the "books and records and internal control provisions,"[82] require a publicly

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[73] *Compare* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302, *and* 15 U.S.C.A. §§ 78dd-1 to -3 (Westlaw 2012), *with* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, *and* 15 U.S.C. § 78dd-2(h)(4)(B) (1994).

[74] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[75] "It shall be unlawful . . . [to give] anything of value to any foreign official for purposes of (i) influencing any act or decision of such foreign official in his official capacity, [or] (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official." 15 U.S.C. § 78dd-2(a)(1)(A) (1994).

[76] *See* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 448 (2010). The definition of "foreign official" was also broadened to include "persons employed by international organizations." *Id.*; *see* 15 U.S.C.A. § 78dd-2(h)(2) (Westlaw 2012).

[77] 15 U.S.C.A. §§ 78dd-1(g), 78dd-2(i) (Westlaw 2012).

[78] *See* 15 U.S.C.A. §§ 78dd-1(g), 78dd-2(i); Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. at 448.

[79] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (recognizing the complaints by U.S. corporations that the FCPA is vague).

[80] 15 U.S.C.A. § 78m(b)(2)(A), (B) (Westlaw 2012). The accounting provisions were intended to detect illicit payments through the disclosure of accurate company records. Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 5 (1999).

[81] 15 U.S.C.A. §§ 78dd-1 to -3 (Westlaw 2012).

[82] The books and records and internal controls provisions apply only to entities with registered classes of securities under securities laws. 15 U.S.C.A. § 78m(b)(2)(A), (B). These

traded corporation to maintain books and records that "accurately and fairly reflect the transactions and dispositions of the assets of the [corporation]."[83] These stringent accounting controls apply only to entities with registered classes of securities pursuant to federal securities laws.[84] Second, the antibribery provisions[85]—the operative portions of the FCPA—prohibit corporations from acquiring foreign business through under-the-table deals.[86] Because these provisions help federal agencies collect millions in criminal and civil penalties,[87] and effectively force U.S. businesses to adopt intricate compliance programs,[88] this Comment will discuss the antibribery provisions in further detail below.

C. ANTIBRIBERY PROVISIONS AND THE BUSINESS NEXUS REQUIREMENT

The antibribery provisions of the FCPA, intended as the primary enforcement measure in prohibiting foreign bribery,[89] apply to three groups of actors: (1) issuers, (2) domestic concerns, and (3) any person who acts in furtherance of the bribery payment while on U.S. territory.[90] First, issuers are both U.S. companies that have securities registered in the United States, and foreign businesses[91] with shares listed on a U.S.

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entities are publicly held companies with shares that trade on U.S. exchanges. *Id.* The SEC can impose only civil penalties on a U.S. company unless the company knowingly fails to implement a system of internal accounting controls. 15 U.S.C.A. § 78m(b)(4), (5) (Westlaw 2012).

[83] 15 U.S.C.A. § 78m(b)(2)(A).

[84] 15 U.S.C.A. § 78m(b)(2)(A), (B). A publicly held corporation must comply with the accounting provisions if it has securities registered with the SEC under section 12 of the Securities and Exchange Act of 1934 or is required to file periodic reports under section 15(d) of the same Act. *Id.*; *see* 15 U.S.C.A. § 78o(d) (Westlaw 2012). The SEC is responsible for enforcing the books and records and internal control provisions. 15 U.S.C.A. § 78m(a), (b) (Westlaw 2012).

[85] In contrast to the accounting controls, the antibribery provisions apply to U.S. companies (both public and private), U.S. citizens, and any person while in a U.S. territory. *See* 15 U.S.C.A. §§ 78m(b), 78dd-1 to -3 (Westlaw 2012). The DOJ and SEC enforce the antibribery provisions through the use of criminal and civil penalties. *Id.*

[86] *See* 15 U.S.C.A. §§ 78dd-1 to -3 (Westlaw 2012).

[87] *See, e.g.*, Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), *available at* www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-mt-dt-press-release.pdf (stating that the federal government recovered more than $95 million in a parallel enforcement action with the SEC).

[88] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1001-02 (2010).

[89] *See* S. REP. NO. 95-114, at 10 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4107-08.

[90] 15 U.S.C.A. §§ 78dd-1 to -3.

[91] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* www.sec.gov/news/press/2008/2008-

stock exchange in the form of American Depository Receipts.[92] Second, domestic concerns are defined as U.S. citizens or companies incorporated in the United States.[93] Third, Congress expanded the FCPA to cover "any person," usually a foreign national, over whom the DOJ has jurisdiction.[94] Enforcement actions against issuers and domestic concerns are more common than actions against foreign nationals.[95] Consequently, when this Comment mentions "actors" it will refer collectively to issuers and domestic concerns.

The FCPA's antibribery provisions bind issuers and domestic concerns even if they act outside the United States.[96] These actors are prohibited from (i) corruptly[97] making use of interstate commerce in furtherance of an offer, payment, promise to pay, or authorization of a monetary payment, or anything of value (ii) to a foreign official or foreign political party (iii) in order to "obtain or retain business."[98] Congress intended the FCPA to be an expansive criminal law, prohibiting both the actual payment of bribes by corporations and their agents, as well as attempts to make such bribes.[99] Additionally, the

294.htm (charging Siemens Aktiengesellschaft, a German-based manufacturer, with violating the FCPA and ordering it to pay $800 million in criminal and civil penalties).

[92] *See* 15 U.S.C.A. §§ 78dd-1(a), 78*l*, 78o(d) (Westlaw 2012); 17 C.F.R. § 239.36 (Westlaw 2012).

[93] 15 U.S.C.A. § 78dd-2(h)(1) (Westlaw 2012).

[94] 15 U.S.C.A. § 78dd-3(f)(1) (Westlaw 2012). Any foreign national in the United States who commits an act in furtherance of a bribe is subject to DOJ and SEC enforcement. Matthew J. Kovacich, Comment, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act ("FCPA") on Minnesota and Wisconsin*, 32 HAMLINE L. REV. 529, 536-37 (2009). U.S. courts have jurisdiction over foreign companies or persons who make these illegal payments in the United States, even though they are not domiciled in the United States and do not maintain any place of business in the United States. Wynn Pakdeejit & Timothy Breier, *Continued FCPA Enforcement Sends Clear Message Around the Globe*, THE NATION (Sept. 14, 2010), *available at* www.nationmultimedia.com/home/2010/09/14/opinion/Continued-FCPA-enforcement-sends-clear-message-aro-30137919.html. The FCPA defines the term "person" as "any natural person other than a national of the United States . . . or any corporation . . . organized under the law of a foreign nation or a political subdivision thereof." 15 U.S.C.A. § 78dd-3(f)(1).

[95] *See* GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END FCPA UPDATE (Jan. 3, 2011), *available at* www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx. A summary of the largest FCPA settlements in history shows that nine out of the ten corporations were considered "issuers" with shares registered with the SEC or trading on an exchange as an American Depository Receipt.

[96] 15 U.S.C.A. §§ 78dd-2(i)(1), (2) (Westlaw 2012).

[97] The legislative history of the FCPA describes the term "corruptly" in order to make clear that "the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client." S. REP. NO. 95-114, at 10 (1977) (Conf. Rep.).

[98] 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (Westlaw 2012).

[99] 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

statute prohibits any person from using a third party or intermediary to consummate the exchange.[100]

A successful prosecution under the FCPA requires the DOJ to prove three core elements.[101] First, the term "anything of value" has been interpreted to encompass both tangible and intangible benefits to the individual receiving the value.[102] Second, a "foreign official" is any officer or employee of a foreign government or public international organization.[103] Third, the term "to obtain or retain business"—commonly referred to as the "business nexus requirement"—directs the government to prove that the illegal payments will assist the company in acquiring or keeping business.[104] Strictly speaking, "anything of value" corruptly offered to any "foreign official" must be for one of the following purposes:

> [1] influencing any act or decision of [the] foreign official in his official capacity; [2] inducing [the] foreign official to do or omit to do any act in violation of [his] lawful duty . . . ; [3] inducing [the] foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government . . . ; or [4] securing

[100] 15 U.S.C.A. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (Westlaw 2012) (prohibiting payment to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office").

[101] *See* 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[102] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 914-16 (2010). Congress has not established a minimum value for this element. *Id.* DOJ enforcement has ranged from the most egregious cases to the most subtle. In an action against Kellogg Brown & Root LLC (KBR), corporate officials provided cash-stuffed briefcases or cash-stuffed vehicles to various Nigerian foreign officials. *Id.* On the other hand, in an enforcement action brought against Paradigm B.V., the DOJ considered a "thing of value" as providing employment to a client's brother, and leasing a house owned by the client's wife. *Paradigm B.V. Agrees to Pay Penalty to Resolve Foreign Bribery Issues in Multiple Countries*, FCPA ENFORCEMENT (Oct. 2, 2007), www.fcpaenforcement.com/documents/document_detail.asp?ID=4459&PAGE=2.

[103] *See* 15 U.S.C.A. §§ 78dd-2(h)(2)(A), (B) (Westlaw 2012). This element is the source of much criticism of the FCPA. The lack of judicial scrutiny has permitted the DOJ to apply the FCPA when employees of state-owned corporations receive payments. AGA Medical was forced to pay a criminal penalty when it made payments to doctors at state-owned hospitals for purchasing AGA products. Press Release, U.S. Dep't of Justice, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), *available at* www.justice.gov/opa/pr/2008/June/08-crm-491.html.

[104] United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004); *see also* Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS: INT'L TRADE L.J. 14, 17 (2008).

> any improper advantage, in order to assist [the payor] in *obtaining or retaining business* for or with, or directing business to, any person.[105]

The connection or "linkage" between the anticipated effects that flow from these purposes and the payment provided in completion or expectation of such effects functions as the "nexus" that is at the heart of the "to obtain or retain business" element.[106]

Although these elements are most important, critics have argued that they are among the most ambiguous.[107] This issue reached the courts in 2004 when, after applying the principles of statutory construction, the Fifth Circuit held that the FCPA is ambiguous as a matter of law and fails to clearly define the scope of the business nexus requirement.[108] Congress's failure to define the business nexus requirement has forced companies to attempt compliance with an amorphous prohibition.[109] Nonetheless, little guidance has been given as to the reach of the nexus,[110] and such uncertainty continues to increase transaction costs for U.S. companies wishing to conduct business abroad.[111] Many would agree that the most basic form of bribery—a

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[105] 15 U.S.C.A. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1) (Westlaw 2012) (emphasis added).

[106] *Kay*, 359 F.3d at 744.

[107] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 916-18; Jeffrey L. Snyder, *International Operations: Managing the Risks*, N.Y. L.J., May 20, 1996, *available at* www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_677.pdf; Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 390-93 (2010).

[108] *Kay*, 359 F.3d at 746 (holding that the statutory language is amenable to more than one interpretation).

[109] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 907-10 (noting the lack of FCPA case law); *see also* 15 U.S.C.A. §§ 78dd-1(f), 78dd-2(h), 78dd-3(f) (Westlaw 2012) (omitting "to obtain or retain business" from defined terms).

[110] *See, e.g.*, Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS: INT'L TRADE L.J. 14, 17-18 (2008); Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 917-18.

[111] *See* Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 155 (2010) ("Statutory clarity is essential to factoring the costs associated with investment decisions by enabling corporations to accurately consider the costs of complying with the law."). For companies wishing to engage in a merger or acquisition, the ambiguity in the FCPA may have dire consequences for the deal. *See* Jeffrey L. Snyder, *International Operations: Managing the Risks*, N.Y. L.J., May 20, 1996, www.crowell.com/documents/ DOCASSOCFKTYPE_ARTICLES_677.pdf. Limiting potential liability demands an increased scrutiny in premerger due diligence, which entails digging through many of the target company's records. *Id.* If a potential problem appears to be within the purview of the FCPA, the acquiring company may offset the transaction price. *Id.* This imposes a considerable cost on the target company. *See id.*

suitcase full of cash in exchange for lucrative government contracts[112]—would undoubtedly be in violation of the FCPA.[113] On the other hand, some have engaged in business transactions not as blatant as the above example, yet equally punishable in the eyes of the law.[114] Business's inability to interpret the scope of the nexus has caused much confusion;[115] yet, there appears to be little judicial scrutiny to clear the air.[116]

Given the lack of case law defining the FCPA's business nexus requirement, issuers and domestic concerns are faced with the difficult task of formulating their own interpretation. The scant guidance from the 1988 and 1998 amendments to the FCPA provide no refuge to those seeking to avoid liability.[117] Since Congress's adoption of the Act in 1977, the business nexus requirement has been one of the few provisions subjected to limited judicial scrutiny.[118] However, in the past decade, the issues confronting corporate officials have only been inflamed.[119]

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[112] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Willbros Group and Former Employees with Foreign Bribery (May 14, 2008), *available at* www.sec.gov/news/press/2008/2008-86.htm (charging Willbros Group for violating the FCPA when it allegedly engaged in a scheme to pay $6 million in bribes to the Nigerian government in exchange for two significant contracts worth $9 million).

[113] United States v. Kozeny, 493 F. Supp. 2d 693 (S.D.N.Y. 2007); Information at 12-13, United States v. BAE Systems plc, No. 10-CR-00035 (D.D.C. Feb. 4, 2010) (alleging that BAE wired $9 million to a Swiss bank account with a high degree of awareness that the money would ultimately be transferred to Saudi Arabian government officials in exchange for their purchase of military jets); Information at 18, United States v. Kellogg Brown & Root LLC, No. 09-CR-00071 (S.D. Tex. Feb. 6, 2009) (alleging that $500,000 in cash was put into a vehicle and left in a hotel parking lot for Nigerian government officials to pick up).

[114] *See* John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007), www.abajournal.com/magazine/article/battling_bribery_abroad/ (opining that most bribery attempts are subtle and difficult to detect).

[115] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 1002 ("When the statute with uncertain terms and defenses is a criminal statute, such as the FCPA, the risk of over-compliance is greatest.").

[116] *Id.* at 909-10.

[117] *See* 15 U.S.C.A. §§ 78dd-1(f), 78dd-2(h), 78dd-3(f) (Westlaw 2012). The amendments to the FCPA failed to provide any definition or guidance as to what the business nexus requirement means. *See id.*

[118] Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 918.

[119] *See* Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS: INT'L TRADE L.J. 14, 18 (2008) (stating that since the Fifth Circuit's decision in *Kay*, the DOJ has used a broad reading of the business nexus requirement); *see also supra* note 18 and accompanying text (FCPA enforcement has been trending upward since *Kay*).

II. A BROADENING OF THE FEDERAL GOVERNMENT'S AUTHORITY TO PROSECUTE FCPA VIOLATIONS

In 2004, the seminal case addressing the vagueness of the business nexus requirement came before the U.S. Court of Appeals for the Fifth Circuit.[120] In *United States v. Kay*, the court considered whether payments made to Haitian government customs officials for the purpose of reducing import duties fell within the scope of this element.[121] The Fifth Circuit held that making payments to a foreign government customs official to reduce taxes and customs duties can provide an unfair advantage to the business and thereby assist in "obtaining or retaining business."[122]

A. *UNITED STATES V. KAY*

In *Kay*, the federal government charged two corporate executives from American Rice, Inc. (ARI) with bribing customs officials in Haiti.[123] ARI was a publicly held company that exported rice to foreign countries, including Haiti.[124] Standard importation procedures in Haiti required customs officials to assess import duties based on the quantity and value of rice brought into the country.[125] Additionally, Haiti required rice importers to pay an advance deposit against Haitian sales taxes, for which credit would be given when tax returns were filed.[126]

In 1999, David Kay, ARI's vice president of Caribbean Operations, disclosed in an interview with outside counsel that ARI had taken steps to reduce its tax liability to the Haitian government.[127] These steps included underreporting ARI's imports and paying Haitian officials to accept false documentation that intentionally understated the amount of

[120] *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

[121] *Id.* at 740. The issue presented in *Kay* was in contrast to the common FCPA scenario, where a U.S. company would make payments to a "foreign official" in exchange for a government contract. Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 918.

[122] *Kay*, 359 F.3d at 756.

[123] *Id.* at 740.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Michael J. Gilbert & William Gibson, *"Kay III" Highlights Reach of FCPA to Payments Abroad*, N.Y. L.J., Dec. 24, 2007, at 4, *available at* www.dechert.com/library/Gilbert%20and%20Gibson%2012-2407%20Kay%20III%20Highlights.pdf.

rice shipped to Haiti.[128] Kay explained that this was part of the cost of doing business in that country.[129]

After later self-disclosing the payments to the U.S. government, Kay and Douglas Murphy, ARI's president, were indicted and charged with violating the FCPA.[130] The U.S. District Court for the Southern District of Texas granted the defendants' motion to dismiss and held that there was an insufficient nexus between the payments and a specific contract.[131] Therefore, the court reasoned, the payments to reduce ARI's tax liability were outside the scope of the FCPA's "obtain or retain business" provision.[132] On appeal, the Fifth Circuit reversed and held that, in addition to payments that directly influenced a government contract, Congress intended to proscribe a much broader range of payments.[133] Based on legislative history, the court of appeals ruled that Congress intended to extend criminal liability to instances where bribes provide a competitive advantage.[134]

As a result of *Kay*, the DOJ and the SEC are aggressively enforcing the FCPA.[135] There has been a dramatic increase in prosecutions involving customs duties and tax payments, or other payments intended to assist the company in securing government licenses, permits, and

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[128] *Kay*, 359 F.3d at 741.

[129] Gilbert & Gibson, *"Kay III" Highlights Reach of FCPA to Payments Abroad*, N.Y. L.J., Dec. 24, 2007, at 4.

[130] *Id.*

[131] United States v. Kay, 200 F. Supp. 2d 681, 684, 686 (S.D. Tex. 2002), *rev'd*, 359 F.3d 738 (5th Cir. 2004).

[132] *Id.*

[133] *Kay*, 359 F.3d at 755-56.

[134] *Id.* at 756.

[135] *See* GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END FCPA UPDATE (Jan. 3, 2011), *available at* www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx; *News and Its Critics: A Tabloid's Excesses Don't Tarnish Thousands of Other Journalists*, WALL ST. J., July 18, 2011, http://online.wsj.com/article/SB10001424052702303661904576451812776293184.html?mod=djkeyword ("The foreign-bribery law has historically been enforced against companies attempting to obtain or retain government business. But U.S. officials have been attempting to extend their enforcement to include any payments that have nothing to do with foreign government procurement. This includes [the] case [*United States v. Kay*.]"); Mike Koehler, *Archive for the "U.S. v. Kay" Category*, FCPA PROFESSOR, July 19, 2011, www.fcpaprofessor.com/category/u-s-v-kay ("During the FCPA's first 20 years, every FCPA enforcement action concerned allegations that payments to a 'foreign official' assisted the payor in 'obtaining or retaining business' with a foreign government or alleged foreign government 'department, agency, or instrumentality.' FCPA enforcement then changed—most notably with the *U.S. v. Kay* prosecution."). FCPA enforcement actions in 2010 rose 85% over actions in 2009. GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END FCPA UPDATE (Jan. 3, 2011), *available at* www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx. Many of the investigations and prosecutions in 2010 involved multiple defendant cases with industry-wide bribery. *Id.* As a result, the DOJ brought forty-eight actions and recovered more than $1 billion in penalties. *Id.*

certifications.[136] However, the Fifth Circuit's broadening of the business nexus requirement contravenes Congress's attempt to carefully balance the ban of foreign bribery payments with a corporation's ability to remain competitive in the global market.

B. THE *KAY* INTERPRETATION DOES NOT SUPPORT THE FCPA'S PURPOSE

The majority of the *Kay* opinion focused on congressional intent at the time the bribery law was drafted.[137] The Fifth Circuit agreed with the district court that, because the statutory provisions are subject to multiple reasonable interpretations, the text of the FCPA is ambiguous.[138] While parsing the legislative history, the court discovered that widespread bribery was causing foreign policy problems in the United States,[139] because corporate graft prompts foreign officials to abuse their authority, inevitably leading to the disruption of market efficiency and foreign relations.[140] The proposed Senate version of the bill banned payments intended to induce foreign officials to "act so as to *direct* business to any person, maintain an established business opportunity with any person, [or] *divert* any business opportunity from any person."[141] Given the pervasiveness of foreign bribery at the time the bill became law, the Fifth Circuit believed that federal legislators took a broad position to

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[136] *See, e.g.*, Complaint ¶ 1, Sec. & Exch. Comm'n v. Nature's Sunshine Prods., Inc., No. 2:09-CV-00672 (D. Utah July 31, 2009), *available at* www.sec.gov/litigation/complaints/2009/comp21162.pdf (paying Brazilian customs agents to import unregistered company products into Brazil); Complaint ¶ 9, Sec. & Exch. Comm'n v. Con-Way Inc., No. 1:08-CV-01478 (D.D.C. Aug. 27, 2008), *available at* www.sec.gov/litigation/complaints/2008/comp20690.pdf (paying officials at the Philippines Bureau of Customs to allow the freight company to store shipments longer than otherwise permitted, and to settle company disputes with the Customs Bureau); Information at 9-10, United States v. Vetco Gray Controls, Inc., No. 4:07-CR-00004 (S.D. Tex. Jan. 5, 2007), *available at* www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-info.pdf (payments to Nigerian Customs Officials to provide preferential treatment in the customs clearance process with respect to the importation of goods into Nigeria).

[137] *See Kay*, 359 F.3d at 742-56.

[138] *Id.* at 743-44. The lack of clarity in the antibribery provisions of the FCPA cannot support a finding that subtle forms of bribery are within the purview of the Act. *Id.* Although the statute has not been ruled void for vagueness, the Fifth Circuit and the U.S. District Court for the Southern District of Texas agreed that the plain language of the text would lead reasonable minds to differ as to its interpretation. *See id.* at 743-44; United States v. Kay, 200 F. Supp. 2d 681, 683 (S.D. Tex. 2002), *rev'd on other grounds*, 359 F.3d 738 (5th Cir. 2004).

[139] *Kay*, 359 F.3d at 746.

[140] *Id.*

[141] *Id.* (citing S. REP. NO. 95-114, at 17 (1977) (Conf. Rep.)) (emphasis added) (internal quotation marks omitted).

criminalize *all* forms of bribery.[142] The court also referenced a 1988 House Conference Report that stated that the "obtain or retain business" language was not limited to the renewal of government contracts, but included payments made for the purpose of obtaining favorable tax treatment.[143]

Although this language in the 1988 House Report concerning "favorable tax treatment" would appear to shed light on the prohibitions covered, Congress decided to leave the business nexus requirement unchanged in both of the subsequent amendments.[144] The failure to include the relevant tax language in the text of the statute evidences the legislature's inability to garner bicameral support for inclusion in the agreed-upon amendment.[145] Notwithstanding the lack of any formal change to the nexus requirement through the legislative process, the Fifth Circuit found the tax language relevant in defining the scope of the FCPA.[146] While doing so, the court cited *Red Lion Broadcasting Co. v. FCC*[147] for the proposition that "'[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction.'"[148]

However, in discussing *Red Lion Broadcasting*, the U.S. Supreme Court explicitly stated that "[a] mere statement in a *conference report* of such legislation as to what the Committee believe[d] an earlier statute meant is obviously less weighty."[149] The guidance in *Red Lion Broadcasting* hinged on the existence of *formally* enacted legislation due

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[142] *Id.* at 749; *see also* United States v. Kozeny, 493 F. Supp. 2d 693, 705 (S.D.N.Y. 2007) (finding that Congress intended the FCPA's business nexus requirement to be construed broadly).

[143] *Kay*, 359 F.3d at 751 (citing H.R. REP. NO. 100-576, at 918-19 (1988) (Conf. Rep.)). The Fifth Circuit found persuasive the House Conference Report that accompanied the 1988 amendment to the FCPA. *Id.* That Report stated that the business nexus requirement was "not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment*." *Id.*

[144] Although Congress amended a number of provisions in 1988, it refused to make any formal changes to the "obtain or retain business" element. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1994).

[145] *See generally* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[146] The court believed that Congress's attempt to narrowly define the exceptions and affirmative defenses, against a backdrop of broad applicability, authorized the FCPA to apply to payments that indirectly assist in obtaining business. *Kay*, 359 F.3d at 756.

[147] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

[148] *Kay*, 359 F.3d at 752 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81 (1969)) (emphasis added).

[149] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 n.13 (1980) (discussing the *Red Lion Broadcasting* proposition cited by the Fifth Circuit) (emphasis added).

to the rigorous bicameral process.[150] Moreover, the Court noted that subsequent legislative history of a *less formal* type serves as an "extremely hazardous basis for inferring" congressional intent.[151] Despite the Supreme Court's position with respect to subsequent legislative history, the Fifth Circuit heavily relied on the same type of conference report that—according to the Court—typically would not be very "weighty."[152] This reliance on the 1988 House Report was important to the Fifth Circuit's holding in *Kay* that payments, which indirectly "obtain or retain business," fall within the scope of the FCPA.[153]

Furthermore, *Kay* interpreted government reports that highlighted the SEC investigation when evaluating the breadth of the nexus.[154] The SEC report issued in 1976 identified four types of illegal payments made by U.S. companies: (1) payments made to secure an advantage in the administration of foreign tax laws, (2) payments made for the purpose of obtaining or retaining government contracts, (3) payments to a low-level

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[150] *Id.* ("Petitioners invoke the maxim that states: 'Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.' With respect to subsequent *legislation*, however, Congress has proceeded formally through the legislative process." (emphasis in original)).

[151] *Id.*

[152] *Kay*, 359 F.3d at 752; *Consumer Prod. Safety Comm'n*, 447 U.S. at 117-18 n.13. The Fifth Circuit justified its reliance on the conference report by noting that, "The amendments Congress passed in 1988 . . . expressly sought to clarify Congress's intent from 1977. Thus, the views and amendments of Congress in 1988 are necessary to our analysis of the precise scope of the original law." *Kay*, 359 F.3d at 752 n.53. But see the Supreme Court's caution to lower courts in using statements in a subsequent conference report to determine the meaning of a statute:

> A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.
>
> The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. While such history is sometimes considered relevant, this is because, as Mr. Chief Justice Marshall stated in *United States v. Fisher*, 2 Cranch 358, 386 (1805): "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *See* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980). Such history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Consumer Prod. Safety Comm'n, 447 U.S. at 117-18 n.13 (holding that a congressional member's remarks during a 1976 committee hearing regarding a section of federal law enacted in 1972, are not entitled to much weight where the member was not a sponsor of the original legislation).

[153] *See id.* at 752 (stating that Congress's views and amendments in 1988 are necessary to analyze the scope of the FCPA's business nexus requirement); H.R. REP. NO. 100-576, at 918-19 (1988) (Conf. Rep.).

[154] *See id.* at 747-49.

official to expedite the responsibility, and (4) political contributions.[155] The government has explicitly criminalized the second and fourth categories, yet permitted the third.[156] With respect to the first category, *Kay* noted that Congress intended to incorporate payments that contravened foreign tax laws (i.e. the first category) into the business nexus requirement.[157] In doing so, the court emphasized the different terms used in the SEC report ("government contracts")[158] and in the enacted law ("business").[159] When examining the legislature's intent in using different terms, the court determined that obtaining or retaining *business* was meant to be much broader and include payments made for *government contracts*.[160] Because this intent was so broad, the court notes, payments made to affect the administration of foreign tax laws fall within the purview of business nexus requirement.[161]

However, this interpretation does not take into consideration one of the most dramatic bribery schemes that took place in the 1970s. In an infamous scandal, corporate officials of United Brands Company[162] paid $1.25 million to Honduran President Oswaldo Arellano in an effort to reduce the export tax on bananas.[163] Once this bribery was uncovered, a Honduran coup overthrew the government, and United Brands became known as one of the most far-reaching bribery scandals at the time.[164] Congress was well aware of the details involving United Brands,[165] yet

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[155] *Id.* at 747-48.

[156] *See* 15 U.S.C. § 78dd-2(d)(2) (1982) (defining the term "foreign official" to exclude government officials whose duties were clerical or ministerial).

[157] *Kay*, 359 F.3d at 748.

[158] The SEC report issued in 1976 only spoke of payments made for the purpose of "obtaining or retaining government contracts." *Id.* at 747-48.

[159] The FCPA as originally enacted referred to payments made for the purpose of obtaining or retaining business. *See* 15 U.S.C. § 78dd-2 (1982). *Cf. supra* note 158 and accompanying text.

[160] *Kay*, 359 F.3d at 748.

[161] *Id.* at 748-49 ("[T]he concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid.").

[162] United Brands Company was a fruit exporting business that imported bananas from Honduras into the United States. The company later changed its name and is currently known as Chiquita Brands International, Inc. *100 Years and Counting*, CHIQUITA, www.chiquitabrands.com/companyinfo/History.aspx (last visited Jan. 9, 2012).

[163] *Honduras: A Genuine Banana Coup*, TIME, May 5, 1975, *available at* www.time.com/time/magazine/article/0,9171,913028,00.html?promoid=googlep.

[164] *Scandals: A Record of Corporate Corruption*, TIME, Feb. 23, 1976, *available at* www.time.com/time/magazine/article/0,9171,918067-1,00.html.

[165] *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 349-50 (2000). The SEC initiated an investigation of United Brands Co. after its then-Chairman, Eli M. Black, threw himself out of the twenty-second floor of a New York City building. *Id.* The investigation uncovered the bribery payments made to President Arellano,

there was no mention of "favorable tax treatment" in the FCPA's text or legislative history, as originally enacted.[166] In fact, congressional hearings were held in the context of illicit payments being made as a *quid pro quo* for new business or continuation of ongoing business.[167] Many courts have applied the principle that "obtaining or retaining business" relates to the buying and selling of goods, acquiring or retaining government contracts, or other similar situations in which a business agreement would not have existed absent the payment.[168] In cases where the existence of a business relationship between the host country and the U.S. entity is *not* dependent on the payment of money, application of the FCPA is inappropriate and not what the statute was intended to criminalize.

The Fifth Circuit's holding that the FCPA applies "broadly to payments intended to assist the payor, either *directly or indirectly*, in obtaining or retaining business"[169] opens the door for the U.S. government to prosecute much less egregious behavior under the same statute. Although U.S. businesses may hope that future judicial scrutiny will realign the business nexus interpretation with congressional intent, the U.S. government has turned that hope into an unattainable dream. The use of diversion agreements to resolve alleged FCPA violations prevents these cases from ever reaching court dockets and provides little incentive for businesses to vigorously defend their conduct.

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and on April 9, 1975, the SEC charged United Brands with securities fraud for failing to report the payment. *Id.*

[166] *See* S. REP. NO. 95-114 (1977) (Conf. Rep.).

[167] *See id.* at 4; H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.) (committee hearings regarding the FCPA were held against the backdrop of an SEC report issued in 1976 detailing hundreds of multinational corporations bribing foreign government officials to assist the corporations in gaining business). The majority of bribery cases that Congress investigated when it enacted the FCPA involved government contracts. *See* SEC. & EXCH. COMM'N, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 94th Cong., 1st Sess., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976); S. REP. NO. 95-114, at 1-2 (1977) (Conf. Rep.).

[168] *See, e.g.*, United States v. Castle, 925 F.2d 831, 832-33 (5th Cir. 1991) (per curiam) (bus company made a payment to Saskatchewan government in return for a contract); Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988) (payment to Nigerian government to influence award of a Nigerian defense contract); Petroleos Mexicanos v. Crawford Enters., Inc., 826 F.2d 392 (5th Cir. 1987) (payments made to the national oil company of Mexico in order to acquire several multi-million-dollar equipment contracts); United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990) (payments made to officials of the Jamaica Tourist Board to retain advertising contract).

[169] United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004) (emphasis added).

III. THE USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS

For the first twenty-five years of the FCPA, the DOJ brought only fifteen cases against citizens and corporations.[170] Since the *Kay* decision in 2004, the U.S. government has aggressively stepped up enforcement and is collecting millions in civil and criminal penalties.[171] However, the term "enforcement" does not mean that prosecutors are obtaining criminal convictions or even indictments; in fact, these cases rarely make it to trial.[172] DOJ prosecutors are instead opting for deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) (collectively known as "diversion agreements") in an effort to bypass costly litigation in favor of alternative dispute resolution.[173] Accordingly, the U.S. government's forceful engagement in DPAs and NPAs has created a system that encourages prosecutorial abuse and deters corporate behavior originally intended by Congress in 1977 to be permissible.[174]

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[170] Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 102 (2010).

[171] Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 540 (2011) ("The apparent broadening [in *United States v. Kay*] of the business purpose element 'energized' enforcement agencies and contributed to 'an explosion in FCPA enforcement actions' relating to customs duties and tax payments."); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 918 (2010); Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. at 104-06 (noting that in 2010, ABB Ltd, a Swiss engineering company, paid $39 million in civil and $19 million in criminal fines).

[172] Thomas Fox, *2009—The Year of the Trial*, FCPA COMPLIANCE AND ETHICS BLOG (Dec. 31, 2009, 12:37 AM), http://tfoxlaw.wordpress.com/tag/frederick-bourke/.

[173] Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 932-33. A 2005 report released by the Corporate Crime Reporter found that from 2002 to 2005, prosecutors entered into twice as many DPA and NPAs with large business institutions than during the previous ten years. CORPORATE CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (Dec. 28, 2005), *available at* www.corporatecrimereporter.com/deferredreport.htm. Among the many, these companies include Aetna, Bank of New York, Hilfiger, Merrill Lynch, Salomon Brothers, Shell Oil, American International Group, KPMG, and PNC Financial. *Id.*

[174] *Compare* H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.) (creating the "facilitating payments" exception to allow corporate payments to receive favorable treatment from low-level officials), *and* H.R. REP. NO. 100-576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1954 (discussing amendment of the "facilitating payments" exception to include a list of discrete examples where payments for "routine governmental action" would not apply), *with* Complaint ¶ 1, Sec. & Exch. Comm'n v. Nature's Sunshine Prods., Inc., No. 2:09-CV-00672 (D. Utah July 31, 2009), *available at* www.sec.gov/litigation/complaints/2009/comp21162.pdf (paying Brazilian customs agents to import unregistered company products into Brazil), *and* Information at 9-10, United States v. Vetco Gray Controls, Inc., No. 4:07-CR-00004 (S.D. Tex. Jan. 5, 2007), *available at* www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-info.pdf (payments to Nigerian Customs Officials to provide preferential treatment in the customs clearance process with respect to the importation of goods into Nigeria).

A. DIVERSION AGREEMENTS DEFINED

In recent years, the DOJ and the SEC have used diversion agreements as a means of holding businesses criminally and civilly liable without entering the courtroom.[175] These agreements are often the preferred method of resolving a dispute because of the dire consequences a formal indictment would have on the company's business.[176] The U.S. Attorneys' Manual ("Manual") states that the primary objectives of diversion agreements are

> [1] To prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services. [2] To save prosecutive and judicial resources for concentration on major cases. [3] To provide, where appropriate, a vehicle for restitution to communities and victims of crime.[177]

Although the Manual was written in the context of diverting the prosecution of an individual, the government has extended the scope of these agreements to cover corporations.[178]

DPAs and NPAs are privately negotiated contracts between government enforcement agencies and U.S. corporations.[179] In an NPA, the government agrees to postpone indictment for a specified period of time so long as the corporation satisfies compliance and pecuniary

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[175] Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 932-33. In 1992, the DOJ and SEC entered into their first corporate NPA with Salomon Brothers for violating federal antitrust and securities laws. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863-65 (2005).

[176] *See* 48 C.F.R. § 9.406-2 (Westlaw 2012). Indictment of a U.S. corporation can cause a debarment or suspension of government contracts or subcontracts. *Id.*

[177] EXEC. OFFICE FOR U.S. ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL § 9-22.010, *available at* www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm (last visited Jan. 9, 2012).

[178] *See, e.g.*, Press Release, U.S. Dep't of Justice, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), *available at* www.justice.gov/opa/pr/2010/September/10-crm-1096.html (stating that ABB Ltd entered into a DPA with the DOJ and agreed to pay $19 million in criminal and $38 million in civil penalties for paying $1.9 million in bribes to Mexican state-owned utility officials).

[179] *See, e.g.*, Letter from U.S. Dep't of Justice, Criminal Div., Fraud Section, to Edward J. Fuhr, Attorney for Alliance One International, Inc. (Aug. 6, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-npa.pdf (memorializing non-prosecution agreement); Deferred Prosecution Agreement, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla. Feb. 18, 2009), *available at* www.jdsupra.com/post/documentViewer.aspx?fid=f25be713-a4c8-4685-80b0-9a8579ed228a.

measures.[180] The agreement states the simple facts, legal conclusions, an acknowledgment of responsibility, and a detailed compliance program that the corporation agrees to implement.[181] In contrast, a DPA defers the prosecution of an already indicted defendant;[182] the agreement is filed with the court and contains a short statement of facts along with legal conclusions and an acknowledgment of responsibility.[183] Because of these diversion agreements, FCPA cases are rarely litigated; corporations would rather pay a penalty and implement compliance programs than engage in costly legal action.[184] The U.S. government's use of DPAs and NPAs has therefore impaled corporations with a "Morton's Fork"[185] and fostered an environment in which prosecutors abuse their discretion.[186]

B. *KAY* ENCOURAGES PROSECUTORIAL ABUSE

The guiding principles underlying a prosecutor's decision to charge have evolved in the last decade.[187] The DOJ's issuance of four key memoranda has provided prosecutors with formal guidance—albeit broad—with respect to corporate enforcement.[188] These memos have not

[180] *See, e.g.*, Letter from U.S. Dep't of Justice, Criminal Div., Fraud Section, to Edward J. Fuhr, Attorney for Alliance One International, Inc. (Aug. 6, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-npa.pdf.

[181] *See, e.g.*, *id.*

[182] *See, e.g.*, Deferred Prosecution Agreement, United States v. UBS AG, No. 09-60033-CR-COHN (S.D. Fla. Feb. 18, 2009), *available at* www.jdsupra.com/post/documentViewer.aspx?fid=f25be713-a4c8-4685-80b0-9a8579ed228a.

[183] *See, e.g.*, *id.*

[184] *See* John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007), www.abajournal.com/magazine/article/battling_bribery_abroad/.

[185] A "Morton's Fork" is defined as "a dilemma, especially one in which both choices are equally undesirable." *Morton's Fork Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/Morton%27s+Fork (last visited Jan. 15, 2012).

[186] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 971-75 (2010) (criticizing a number of government prosecutions where the alleged illegal payments appeared attenuated for any specific nexus required under the Act).

[187] Memorandum from Larry D. Thompson, Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.justice.gov/dag/cftf/corporate_guidelines.htm; Memorandum from The Deputy Attorney Gen., Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* http://federalevidence.com/pdf/2008/06-June/Holder1999BringingCrimCharges.pdf.

[188] Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863 (2005) ("Federal prosecutors have extended deferred prosecution to corporations amidst the recent wave of corporate crime . . . ."); *see also* Memorandum from The Deputy Attorney Gen., Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* http://federalevidence.com/pdf/2008/06-June/Holder1999BringingCrimCharges.pdf; Memorandum from Larry D. Thompson, Deputy

only precipitated the use of DPAs and NPAs, but have also served as the foundation for the government to broadly interpret the FCPA without interference from the judiciary.[189]

Beginning in 1999, the U.S. Department of Justice has taken various positions regarding its use of diversion agreements for corporate defendants. Initially, Deputy Attorney General Eric Holder circulated an internal memorandum ("Holder Memo") that provided eight factors to consider in deciding whether to indict a corporation.[190] The Holder Memo does not mention a prosecutorial preference for engaging in diversion agreements, but instead emphasizes how criminal prosecutions provide deterrence on a "massive scale."[191] Four years later, Deputy Attorney General Larry Thompson issued a different memorandum that made two significant changes to its predecessor.[192] First, the document mandated that prosecutors weigh the factors in every federal corporate charge.[193] Second, prosecutors were permitted to grant corporate immunity or engage in diversion agreements.[194]

The third memorandum, issued in December 2006 by Deputy Attorney General Paul McNulty, established a procedure that required prosecutors to obtain approval from Justice officials in Washington, D.C., when a waiver was sought for a corporation's attorney-client and

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Attorney Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.justice.gov/dag/cftf/corporate_guidelines.htm.

[189] *See* Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 907 (stating that diversion agreements not subject to judicial scrutiny are typically used to resolve an FCPA enforcement and are directly related to the absence of FCPA case law).

[190] Memorandum from The Deputy Attorney Gen., Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* http://federalevidence.com/pdf/2008/06-June/Holder1999BringingCrimCharges.pdf. The eight factors articulated by the Deputy Attorney General are (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing in the corporation; (3) whether the corporation has a history of similar conduct; (4) the timely and voluntary disclosure of wrongdoing; (5) the adequacy of the corporate compliance program; (6) the corporation's remedial actions, including efforts to correct illegal behavior; (7) collateral consequences to shareholders and employees; and (8) the adequacy of non-criminal enforcement. *Id.*

[191] *Id.*

[192] *See* Memorandum from Larry D. Thompson, Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.justice.gov/dag/cftf/corporate_guidelines.htm.

[193] Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision over Corporate Conduct*, 116 YALE L.J. POCKET PART 306, 308 (2007), *available at* www.yalelawjournal.com/images/pdfs/529.pdf.

[194] Memorandum from Larry D. Thompson, Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.justice.gov/dag/cftf/corporate_guidelines.htm.

work-product privileges.[195] Such a waiver provides prosecutors with significant leverage in being able to obtain the information they want when determining whether to defer prosecution. Although this course of conduct was reversed in a subsequent memorandum issued by Deputy Attorney General Mark Filip, many believe that prosecutors continue to retain broad discretion in compelling privilege waivers because a corporation may still waive privileges if it "voluntarily chooses to do so."[196] As a result of these memoranda, the use of DPAs and NPAs to resolve corporate crimes has escalated toward forgoing litigation and opting for massive agreed-upon penalties.

The discretionary authority high-ranking Justice officials give to prosecutors facilitates a broad interpretation of the business nexus requirement, thereby leading to abuse. The DOJ expressly states that it "interprets 'obtaining or retaining business' broadly, such that the term encompasses more than the mere award or renewal of a contract."[197] Keeping this announced interpretation in mind, the question now becomes, How much more does the term encompass? Given the lack of any clear answer to this question, businesses can only speculate as to the scope of this element by conducting a retrospective analysis of existing diversion agreements.[198]

At a time when the DOJ expresses a clear policy of increased enforcement in white-collar crime,[199] corporations are rushing to

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[195] Memorandum from Paul J. McNulty, Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

[196] *See, e.g.*, Mark L. Rotert & Bradley E. Lerman, *New Ethical Challenges in Internal Investigations*, 1745 PLI/CORP 857, 862-63 (2009) ("[T]he Filip Memo says to corporations, we will decide whether and to what extent you have been cooperative by measuring the quality and quantity of the evidence you bring to us. Because corporations have this incentive to produce a comprehensive account of the findings of their internal investigations, the corporation has as much incentive as before to waive its privileges."); *see also* Memorandum from Mark Filip, Deputy Attorney Gen., Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), *available at* www.justice.gov/dag/readingroom/dag-memo-08282008.pdf ("[W]hile a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.").

[197] U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS (LAY-PERSON'S GUIDE), www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Jan. 10, 2012).

[198] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 998 (2010) (stating that privately negotiated settlements serve as *de facto* case law even though they are subject to little or no judicial scrutiny).

[199] Assistant Attorney General Lanny A. Breuer, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

cooperate in order to avoid criminal liability.[200] Once the government becomes suspicious of wrongdoing, a company is subjected to the will of the government because of the immense damage that an indictment can inflict on a corporation's social image and existing business agreements.[201] Central to a decision of whether to settle is a cost analysis: if the cost of litigation—which includes the value of lost business and intangible harm to the corporation's social image—is greater than the cost of paying fines and implementing compliance programs, then entering into a diversion agreement most efficiently resolves the dispute and quietly allows the corporation to continue with its business.[202] The potential harm to corporate shareholders and long-term growth also plays a role in the company's willingness to go along with the DOJ's aggressive interpretation of "obtaining or retaining business."[203]

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[200] *See* John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007), www.abajournal.com/magazine/article/battling_bribery_abroad/. For businesses accused of FCPA violations, staying in business is more important than going to court and creating precedent. *Id.* As a result, they will cooperate with the government and enter into diversion agreements rather than risk potentially ruinous consequences. *Id.*

[201] *See* Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, *available at* http://online.wsj.com/article/SB116468395737834160.html; Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1884-86 (2005); Corporate Crime Reporter, *Interview with David Pitofsky*, 19 CORP. CRIME REP. 46(8) (2005), *available at* www.corporatecrimereporter.com/pitofskyinterview010806.htm (noting that immediately following the announcement of a criminal investigation, a company typically loses half its market value). In arguing that the use of DPAs unduly punishes corporations, Richard A. Epstein states that

> filing an indictment triggers huge collateral repercussions sufficient to drive the firm out of business, as teams of state and federal regulators are now duty-bound to suspend the licenses and permits under which the corporation does business. Thus, the corporation that has strong protections against false convictions—proof beyond a reasonable doubt of the elements of the crime, the ability to examine evidence or cross-examine witnesses—is helpless to protect itself. A conviction carries at most a million-dollar fine, but simple indictment, which lies wholly within the prosecutor's discretion, imposes multibillion-dollar losses.

Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006. Furthermore, a corporate indictment can trigger debarment or suspension from eligibility for government contracts. *See* 48 C.F.R. § 9.406-2(a) (Westlaw 2012).

[202] *See* John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007), www.abajournal.com/magazine/article/battling_bribery_abroad/ ("Staying in business is more important than setting precedent to most companies, so they typically plead guilty or settle with the government rather than risk the potentially ruinous consequences of going to trial. The dearth of case law and widening intolerance of bribery can turn compliance into an international game of pin the tail on the donkey. 'As a lawyer, I expect laws to be readily transparent and easily predictable' . . . . 'The FCPA is neither.'" (quoting attorney Alexandra A. Wrage)).

[203] *See* David Voreacos, *Swiss Shipper Finds Resistance Futile in U.S. Bribery Probe*, BLOOMBERG (Nov. 12, 2010), www.bloomberg.com/news/2010-11-12/swiss-shipper-panalpina-finds-resistance-is-futile-in-u-s-bribery-probe.html ("No company has risked an FCPA court fight in

Such a willingness to settle has only been exacerbated by the absence of judicial oversight in the negotiation of diversion agreements. Although the Speedy Trial Act grants the judiciary approval rights for DPAs,[204] a Government Accountability Office report found judicial scrutiny of these agreements to be nonexistent.[205] In fact, every NPA and DPA that the government negotiated with a U.S. company has been approved without judicial modification.[206] Accordingly, prosecutors have replaced judges in the existing adjudicative system, effectively stripping companies of any bargaining power during the negotiation process.[207] David Pitofsky, former Principal Deputy Chief of the Criminal Division of the U.S. Attorney's Office, stated that companies have no say in defining the terms of a diversion agreement because of the government's averseness to negotiation and its propensity to quickly withdraw from a settlement.[208] Operating unconstrained, the government is able to dictate the terms of the agreement without review by the courts.

This tremendous power allows the DOJ and the SEC to collect FCPA penalties based on their sole interpretation of the Act.[209] By engaging in diversion agreements and interpreting the business nexus requirement to include payments that indirectly "obtain or retain business," the DOJ brands corporations and their executives as criminal without having to satisfy strict criminal law standards.[210] The broad

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two decades out of fear that a conviction could lead to a loss of public contracts and higher penalties, lawyers said. After resolving two or three cases a year, the U.S. settled 47 corporate cases since 2005 without trial, reaping $3.3 billion for the U.S. treasury.").

[204] *See* 18 U.S.C.A. § 3161(h)(2) (Westlaw 2012) ("The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: . . . . (2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.").

[205] Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 935 (2010).

[206] *Id.* at 936.

[207] *See id.* at 937; Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, *available at* http://online.wsj.com/article/SB116468395737834160.html.

[208] Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. at 937.

[209] *See, e.g.*, Press Release, U.S. Dep't of Justice, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), *available at* www.justice.gov/opa/pr/2010/September/10-crm-1096.html (stating that ABB Ltd entered into a DPA with the DOJ and agreed to pay $19 million in criminal and $38 million in civil penalties for paying $1.9 million in bribes to Mexican state-owned utility officials).

[210] *See* GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (Jan. 4, 2011), *available at* www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf ("[B]ecause FCPA allegations against corporations rarely, if ever, go to trial, and DPAs and NPAs are subject only to minimal judicial scrutiny, the DOJ's sometime expansive interpretations of the FCPA [are] never truly

discretion given to prosecutors under the Deputy Attorney Generals' memoranda, combined with the shift in DOJ policy to combat corporate bribery, locks companies into diversion agreements. An absence of judicial scrutiny of DPAs and NPAs allows the DOJ to command the outcome of any negotiation and ultimately creates an illusion of choice whereby businesses end up adopting government-stamped settlement agreements.[211] In order to create more certainty in the corporate arena and to discourage an environment that fosters prosecutorial abuse, the courts must become involved.

IV. SOLUTION: JUDICIAL INTERVENTION

Despite Congress's renewed efforts in holding committee hearings regarding the FCPA,[212] legislative gridlock and scant approval ratings make it unlikely that congressional members will address criticisms.[213] Nonetheless, judicial intervention in the enforcement of diversion agreements is available to alleviate some of the challenges that exist in this environment. In particular, corporations would finally be given guidance as to how vague FCPA provisions—for example, the business nexus requirement—will be construed by the courts. Such a solution would help to clearly demarcate the line between lawful and unlawful conduct, providing some certainty in FCPA compliance and

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tested."); Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006 (stating that a DPA undermines the separation of powers by eroding the protections of criminal law and turning the prosecutor into a judge).

[211] *See* David Voreacos, *Swiss Shipper Finds Resistance Futile in U.S. Bribery Probe*, BLOOMBERG, Nov. 12, 2010, www.bloomberg.com/news/2010-11-12/swiss-shipper-panalpina-finds-resistance-is-futile-in-u-s-bribery-probe.html; *see also* Joe Palazzolo, *Corporate News: FCPA Settlements Can Become Costly Burdens*, WALL ST. J., Oct. 20, 2011, *available at* http://online.wsj.com/article/SB10001424052970204618704576641414241674164.html (stating that corporations would rather forgo government prosecution in exchange for a long and costly settlement process that will require years of government supervision and millions to implement); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 825 (2011) ("Commentators suggest that a climate where firms feel they must accept DPAs and NPAs embolden the DOJ and SEC to advance broad and vague theories of FCPA liability that rarely, if ever, receive judicial scrutiny.").

[212] Thomas O. Gorman, *FCPA Enforcement: Crafting Incentives to Foster Compliance*, SEC ACTIONS BLOG (Dec. 2, 2010, 4:48 AM), www.secactions.com/?p=2839 ("Hearings before the Senate Judiciary Committee, Subcommittee on Crime and Drugs, on November 30, 2010 considered testimony about FCPA enforcement and possible reform.").

[213] Ashley Portero, *Congress' Approval Rating Reaches New Low at 10%: Gallup*, INT'L BUS. TIMES (Feb. 9, 2012, 3:27 PM), www.ibtimes.com/articles/296136/20120209/congress-approval-rating-2012-gallup-10-percent.htm (noting that only ten percent of Americans approve of Congress's job performance).

enforcement.[214] Furthermore, corporate defendants would have leverage to negotiate mutually agreeable terms for their diversion agreements.[215]

If the government continues to settle FCPA cases with deferred and non-prosecution agreements,[216] the courts must become more involved to prevent prosecutorial overreaching and to ensure that FCPA claims contain a strong legal foundation. Currently, these agreements are deficient in explaining whether the defendant's conduct satisfies each element of the crime and whether there is proper legal precedent to punish the corporate defendant. Instead, DPAs and NPAs simply recite legal conclusions.[217] Once prosecutors and a corporate defendant have settled the terms of their compliance and corporate monitoring programs, the court should engage in a review of all admitted facts and legal analyses to ensure that the elements required for a successful FCPA action are satisfied by a greater weight of the evidence.[218] Under this

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[214] In 2009, Dow Jones Risk and Compliance conducted a survey that found 51% of businesses delayed, and 14% abandoned, their business initiatives abroad due to confusion surrounding anti-corruption laws, including the FCPA. *See* Press Release, Dow Jones, Dow Jones Survey: Amid Confusion About Anti-Corruption Laws, Companies Abandon Expansion Plans (Dec. 9, 2009), *available at* http://fis.dowjones.com/risk/09survey.html. Furthermore, 40% of companies avoided expansion into emerging markets out of fear of noncompliance with bribery laws. *Id.*

[215] *See* Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. at 825 (noting that the current FCPA environment, where diversion agreements rarely receive judicial scrutiny, encourages federal prosecutors to assert broad and vague theories of liability); GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (Jan. 4, 2011), *available at* www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf (noting that because diversion agreements receive little to no judicial scrutiny, the government inevitably takes expansive and untested positions).

[216] *See* GIBSON, DUNN & CRUTCHER LLP, 2011 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (Jan. 4, 2012), *available at* http://gibsondunn.com/publications/pages/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.aspx (noting that in 2011, DOJ agreements that settled FCPA charges accounted for approximately 41% of all settlement agreements).

[217] *See, e.g.*, Letter from U.S. Dep't of Justice, Criminal Div., to Paul Gerlach & Angela T. Burgess, Attorneys for Smith & Nephew, Inc. (Feb. 1, 2012), *available at* www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew/2012-02-01-s-n-dpa.pdf (outlining the terms of the deferred prosecution agreement and providing a statement of facts, yet providing no analysis as to why the alleged facts prove an FCPA violation); Deferred Prosecution Agreement, United States v. Marubeni Corp., No. 12-CR-022 (S.D. Tex. Jan. 17, 2012), *available at* www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf (diversion agreement providing only legal conclusions that the FCPA has been violated).

[218] Under 18 U.S.C. § 3161(h)(2), federal courts have the authority to scrutinize diversion agreements prior to giving their approval. *See* 18 U.S.C.A. § 3161(h)(2) (Westlaw 2012). Also, the criminal sentencing phase of trial provides a useful analogy where detailed pre-sentence reports are created and a hearing is held to determine upward or downward departures from the Sentencing Guidelines range. During these reviews of pre-sentence reports, judges are permitted to make additional factual findings by a preponderance of the evidence under an advisory Sentencing Guideline scheme. United States v. Booker, 543 U.S. 220 (2005).

approach, judicial review of all DPAs and NPAs stemming from FCPA violations would be a requirement for an enforceable agreement.[219]

As part of its review process, a federal court should demand detailed information as to how the admitted facts violate the specific provisions of the Act. This information should include (1) the specific portions of the FCPA alleged to have been violated, (2) the factual assertions supporting the government's allegation of corporate wrongdoing, (3) how the admitted facts prove that each element of the relevant FCPA provisions has been violated, and (4) the legal precedents supporting the agency's interpretation of the FCPA and its elements.[220] The parties may provide this requisite information to the judiciary through a letter to the court or a request for a hearing to brief the judge on the record. Efficient parties would ultimately include this information in the diversion agreement to facilitate more rapid approval.

The detailed information necessary to the review process is beneficial for two reasons: first, the courts will be able to more effectively scrutinize diversion agreements if the government is transparent about how it is interpreting specific provisions and the legal authority for its interpretation, and second, a detailed legal analysis would equip corporations with a framework from which they will be better able to mount defensive arguments, as well as provide critical guidance as to how prosecutors are construing relevant provisions.

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[219] *See* Robert Plotkin et al., *A New Era of Global Anti-Corruption Enforcement: FCPA and UK Bribery Act Spur a Worldwide Focus on Corruption Prevention*, N.Y. L.J. (Feb. 14, 2012), *available at* www.newyorklawjournal.com/PubArticleNY.jsp?id=1202541875631&A_New_Era_of_Global_AntiCorruption_Enforcement&slreturn=1 ("[Richard Alderman, Director of the Serious Fraud Office in the United Kingdom,] does not . . . advocate a U.S.-style system in which prosecutors and corporations enter into 'private agreements.' *Judicial oversight and approval is paramount*, he says, for '[o]nly a judge can decide whether the terms are appropriate.'") (emphasis added). See also the GAO report, which finds that judicial scrutiny on diversion agreements is basically nonexistent and that judges have never modified a DPA or NPA. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 935 (2010).

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> For many years the DOJ also has faced critiques regarding the lack of clarity surrounding the factors considered when deciding whether to enter a DPA or an NPA. In October 2010, the OECD publicly validated those concerns when it released its Phase 3 review of the United States' anti-bribery enforcement. In its report, the OECD noted that "[g]uidance on when prosecutors may use PAs, DPAs and NPAs exists but is slightly uneven and indirect." The OECD also noted that "[p]ublishing more detailed reasons for entering into DPAs and NPAs would give more insight into the DOJ's choice of settlement agreements and, thus, enhance accountability and transparency of the process."

GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (Jan. 4, 2011), *available at* www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf (footnote omitted).

This detailed information would be especially useful for the vague FCPA provisions, namely the business nexus requirement. Expansive and broadening interpretations of the nexus would remain in check because the DOJ's allegations as to what payments are prohibited would no longer be the driving force behind the law. Based on the legal authority cited by the government, the court can assess whether the DOJ's interpretation is impermissibly far-reaching and thus unfair to the weaker party in a one-sided deal.

In determining the nature and extent of their review of diversion agreements, courts must draw from other securities laws due to the meager FCPA case law that currently exists.[221] Looking outside the bounds of the case and into another area of law for guidance on a legal issue is not foreign to the courts when those two areas are analogous.[222] The overwhelming majority of civil and criminal FCPA actions are resolved almost identically, typically through parallel proceedings.[223] In

[221] *See* United States v. Nacchio, 573 F.3d 1062, 1079 (10th Cir. 2009) ("[W]e consider it to be appropriate in some situations to seek guidance from civil jurisprudence in performing the criminal sentencing function, and do not hesitate to do so in this case . . . ."); United States v. Leonard, 529 F.3d 83, 93 n.11 (2d Cir. 2008) ("[T]he district court may look to principles governing recovery of damages in civil securities fraud cases for guidance in calculating the loss amount for purposes of the Guidelines.").

[222] *See* Oregon v. Ashcroft, 368 F.3d 1118, 1146 (9th Cir. 2004) ("As the district court observed, there is a paucity of appellate court decisions analyzing section 877's requirements for review. In order to respond to the district court's argument, therefore, I must reason by analogy and look to general principles of administrative law formulated under the APA." (citation omitted)); Fernandez de Iglesias v. United States, 96 Fed. Cl. 352, 359 (2010) ("In ruling on Mexican law, a judge must look to the code, but '[i]f there are gaps or *lacunae* in the code (that is, there are no statutes which specifically pertain to the particular case), the judge must nevertheless decide the case, either by use of general clauses, by analogy, or by applying general principles of law.'" (citation omitted)); *In re* USACafes, L.P. Litig., 600 A.2d 43, 48 (Del. Ch. 1991) ("While I find no corporation law precedents directly addressing the question whether directors of a corporate general partner owe fiduciary duties to the partnership and its limited partners, the answer to it seems to be clearly indicated by general principles and by analogy to trust law.").

[223] In an enforcement action where the DOJ and SEC conduct parallel proceedings, the corporate defendant must pay millions in disgorgement, civil and criminal penalties, and the implementation of compliance and monitoring programs. *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Armor Holdings, Inc. with FCPA Violations in Connection with Sales to the United Nations (July 13, 2011), *available at* www.sec.gov/news/press/2011/2011-146.htm; *see also SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Feb. 7, 2012) (listing all FCPA enforcement actions from 1978 to 2012 and whether each case was a parallel proceeding). Furthermore, in May 2011, the SEC entered into its first DPA to resolve an FCPA violation. Press Release, U.S. Sec. & Exch. Comm'n, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), *available at* www.sec.gov/news/press/2011/2011-112.htm. The settlement agreement entered into between Tenaris and the SEC contains many of the same terms as the DPAs executed by the DOJ. *Compare* U.S. Sec. & Exch. Comm'n, Deferred Prosecution Agreement (May 17, 2011), *available at* www.sec.gov/news/press/2011/2011-112-dpa.pdf (civil DPA), *with* Letter from U.S. Dep't of Justice, Criminal Div., to Paul Gerlach &

settlement agreements that treat matters more akin to civil enforcement rather than traditional criminal prosecutions, the DOJ becomes a quasi-civil regulator.[224] This is because—in the context of corporate conduct—both parties are negotiating and agreeing from the outset as opposed to reaching an agreement after preparing for litigation.[225] Thus, federal judges may borrow principles from other civil securities laws when scrutinizing a corporate defendant's settlement agreement in an FCPA case.

Federal District Court Judge Jed S. Rakoff's widely publicized denial of a proposed settlement in *S.E.C. v. Citigroup Global Markets Inc.*[226] can serve as a guidepost for judges seeking to review a DPA. In that case, the court determined that the applicable standard of review for a settlement of securities fraud charges is "whether the proposed Consent Judgment . . . is fair, reasonable, adequate, and in the public interest."[227] Judge Rakoff emphasized that before approving a consent decree the court must be satisfied that sufficient information has been provided to ensure that the government's requested relief is justified.[228] This is so "the court [does not] become a mere handmaiden to a settlement [that is] privately negotiated . . . ."[229]

Although *Citigroup Global Markets* involved a civil securities fraud issue, federal courts reviewing FCPA diversion agreements should apply

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Angela T. Burgess, Attorneys for Smith & Nephew, Inc. (Feb. 1, 2012), *available at* www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew/2012-02-01-s-n-dpa.pdf (criminal DPA).

[224] *See* Gabe Friedman, *White-Collar Lawyers Await New FCPA Guidance*, DAILY J., Mar. 2, 2012 (noting that FCPA enforcement focuses on settlement rather than litigation, and that "'[i]t hasn't been a decision of do we charge or don't charge a company.' . . . 'There's been all these gradations of how can we strike agreements with these companies.'" (quoting professor of law Wes Porter)).

[225] *See* Mike Koehler, *FCPA 101: How Are FCPA Enforcement Actions Typically Resolved?*, FCPA PROFESSOR, www.fcpaprofessor.com/fcpa-101#q15 (last visited Feb. 7, 2012) ("Nearly every FCPA enforcement action against a company in this era of FCPA enforcement is resolved through a non-prosecution agreement ('NPA') or a deferred prosecution agreement ('DPA')"); John Gibeaut, *Battling Bribery Abroad*, A.B.A. J. (Mar. 18, 2007), www.abajournal.com/magazine/article/battling_bribery_abroad/ (noting that because corporations accused of FCPA violations are more interested in staying in business, they prefer to settle rather than engage in costly litigation).

[226] U.S. Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc., No. 11 Civ. 7387 (JSR), 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011).

[227] *Id.* at *2.

[228] *See id.* at *3.

[229] *Id.* at *4. The court in this case was troubled by the SEC's long-standing policy of allowing corporate defendants to neither admit nor deny the allegations of the complaint when entering into a consent judgment. *Id.* at *1.

the same standard.[230] Now that the SEC has shifted its policy of civil settlement in securities fraud cases to require admissions of conduct,[231] these settlements appear almost identical to the DPAs handed down by Justice officials where admissions of fact and agreements to implement corrective programs exist in both. Because these two types of agreements impact corporate defendants in an analogous manner, courts should borrow the civil standard to review a criminal diversion agreement.

Accordingly, a diversion agreement or the ancillary information requested by the courts must be "fair, reasonable, adequate, and in the public interest."[232] Using its discretion, a court can evaluate whether the agreement is fair to both the parties and the public.[233] In determining whether the agreement is "reasonable," the court should examine whether the DOJ's legal interpretations are consistent with congressional intent and statutory construction of the FCPA.[234] Although courts provide deference to the government's legal interpretation, the judiciary must still review agreements where one party has the obvious bargaining advantage. Doing so serves as a critical check and balance designed to prevent federal prosecutors from unilaterally expanding the interpretation of any provision of the FCPA, particularly the business nexus requirement.[235]

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[230] The author recognizes that the civil settlement agreement in *Citigroup Global Markets* varied from traditional DOJ DPAs because of a corporate defendant's ability to neither admit nor deny the alleged facts.

[231] Edward Wyatt, *S.E.C. Changes Policy on Firms' Admission of Guilt*, N.Y. TIMES, Jan. 6, 2012, *available at* www.nytimes.com/2012/01/07/business/sec-to-change-policy-on-companies-admission-of-guilt.html. It is important to note that this policy shift applies only to civil settlement agreements where defendants have admitted wrongdoing in a corresponding criminal proceeding. *Id.* The SEC is continuing to use the "neither admit nor deny" settlement process when they are the only agency reaching a deal with a defendant. *Id.*

[232] *See Citigroup Global Mkts. Inc.*, 2011 WL 5903733, at *2.

[233] *See id.* at *3 ("Before the Court determines whether the settlement is fair, it must ask a preliminary question: fair to whom? . . . [T]he answer is, fair to the parties *and* to the public.").

[234]

> [I]f the statute is ambiguous and Congress's intent is not clear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the agency's interpretation of the statute is reasonable and permissible, then the court should defer to the agency's interpretation.

Julia Di Vito, Note, *The New Meaning of* New Process Steel, L.P. v. NLRB, 46 WAKE FOREST L. REV. 307, 323 (2011) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984)).

[235] *See* Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, *available at* http://online.wsj.com/article/SB116468395737834160.html (stating that a DPA undermines the separation of powers by eroding the protections of criminal law and turning the prosecutor into a judge).

Georgis: The Foreign Corrupt Practices Act

CONCLUSION

Congress's attempt at curtailing foreign bribery with the passage of the Foreign Corrupt Practices Act of 1977 was initially greeted with an abundance of optimism.[236] The primary function of the FCPA was twofold: first, to prohibit improper business practices, and second, to encourage more ethical business activity.[237] In spite of Congress's attempts at reining in unethical bribery payments, the FCPA was burdened with vague and ambiguous terms, leading to lax enforcement. In an effort to strengthen enforcement, Congress amended the FCPA in 1988 and 1998.[238] These congressional amendments, however, were silent as to a crucial component of the FCPA: the business nexus requirement.[239] Because of this devastating omission, the vagueness of the Act persists, forcing American businesses to establish intricate and expensive compliance programs. These programs have the effect of drastically increasing transaction costs, thus leading to inefficient markets.[240]

The Fifth Circuit's 2004 decision in *United States v. Kay* sought to clarify the business nexus requirement and to enhance enforcement of the FCPA. Though *Kay* has had an enormous impact on how the U.S. government prosecutes FCPA violations,[241] these efforts have been accompanied by unintended consequences. As a result of the sharp increase in FCPA cases post-*Kay*, the Department of Justice has favored deferred prosecution and non-prosecution agreements.[242] Though these

[236] S. REP. NO. 95-114, at 4 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4098 ("A strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.").

[237] *See* H.R. REP. NO. 95-640, at 4-5 (1977) (Conf. Rep.); S. REP. NO. 95-114 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4098.

[238] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[239] *See* H.R. REP. NO. 100-576 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547. The conferees decided not to adopt the House bill that clarified the nexus requirement, leaving the Act unchanged with respect to this provision. *Id.*

[240] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1001-02 (2010) ("[C]ompliance based solely on an enforcement agency's untested or dubious interpretation of a law is wasteful and diverts corporate resources from other value-added endeavors.").

[241] *See* GIBSON, DUNN & CRUTCHER LLP, 2010 MID-YEAR FCPA UPDATE (July 8, 2010), *available at* www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx (detailing the increasing trend in FCPA enforcement post-*Kay*).

[242] *See* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863 (2005) (due to a wave of white-collar crime, federal prosecutors have increased their use of diversion agreements for corporate defendants); GIBSON, DUNN & CRUTCHER LLP, 2010 MID-YEAR FCPA

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agreements help to bypass costly litigation, they have essentially created a system that encourages prosecutorial abuse and deters behavior never intended by Congress in 1977 to fall within the scope of the FCPA.

In order to combat these effects, the judiciary must take an active role in scrutinizing the settlement agreements entered into by corporate defendants. The prevalence of such agreements prevents these cases from ever being litigated and creates an environment where prosecutors can broadly interpret the FCPA. However, requiring the parties to a diversion agreement to provide the court with detailed information justifying the government's allegations creates transparency and provides corporations with guidance as to how the FCPA and its provisions are interpreted.

Ultimately, U.S. businesses should not be subject to the whims of an idle legislature and aggressive executive. Whether a company's payments directly or indirectly obtain business, one fact remains clear: the lack of clarity regarding what types of behavior are prohibited has made the Foreign Corrupt Practices Act a highly feared law. In an effort to calm these fears, federal courts must act to protect the rights of defendants.

UPDATE (July 8, 2010), *available at* www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx (detailing the increasing trend in FCPA enforcement post-*Kay*).