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NEGOTIATING BRIBERY: TOWARD INCREASED TRANSPARENCY, CONSISTENCY, AND FAIRNESS IN PRETRIAL BARGAINING UNDER THE FOREIGN CORRUPT PRACTICES ACT

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I. INTRODUCTION

Wal-Mart is one of the wealthiest and most powerful companies in the world. And billionaire gambling magnate Sheldon Adelson is one of the wealthiest and most powerful individuals in the world. So what do these two have in common besides wealth and power? They are both being investigated for possible violations of the U.S. Foreign Corrupt Practices Act ("FCPA"), a federal law prohibiting the payment of bribes to foreign government officials to obtain (or retain) business. [1] If either party is ultimately indicted, the case might not be addressed through a traditional courtroom trial. Instead, the matter could be resolved through an Alternative Dispute Resolution vehicle currently being employed by the U.S. Department of Justice: The Deferred Prosecution Agreement ("DPA") or the Non-Prosecution Agreement ("NPA").

The use of such agreements is not guaranteed; rather, they are awarded to defendants through elaborate negotiations with the Justice Department. Indeed, Forbes magazine describes parties who are accused of wrongdoing, but who ultimately manage to secure an ***348** NPA or DPA, as parties that have been "inducted into Club Fed Deferred." [2]

According to the Department of Justice, DPAs and NPAs are said to occupy an "important middle ground" between declining to prosecute on the one hand, and obtaining a conviction on the other. [3] Since 2000, the Department has dramatically increased its use of DPAs and NPAs, entering into a total of 257 publicly disclosed agreements during that time. [4] Monetary recoveries related to DPAs and NPAs over that thirteen-year period total more than $37 billion. [5] And while they might seem similar to plea bargains, DPAs and NPAs are substantively quite different. In a plea bargain, defendants negotiate for a lesser charge, penalty, or sentence, but they ultimately accept guilt [6] and conviction. [7] With DPAs and NPAs, on the other hand, there are no looming trials, no guilty pleas, and no convictions.

Instead, DPAs and NPAs represent the opportunity for the ultimate negotiation: It's an opportunity for parties accused of FCPA violations to agree to clean up their respective acts, usually by (1) adopting or enhancing internal anticorruption programs; (2) carrying out self-policing audits and investigations; and (3) voluntarily disclosing compliance issues and information to federal authorities. [8] In addition to agreeing to implement various rules, policies, and procedures to prevent bribery from taking place, the accused parties ***349** oftentimes agree to pay hefty monetary fines. [9] In exchange, the Justice Department agrees to hold off (perhaps forever) on prosecution. Ultimately, if all aspects of the negotiated agreement are successfully carried out, the party initially accused can move forward without fear of further legal consequences on the matter. [10]

But here is the problem: This ultimate negotiation between prosecutor and accused can sometimes be unfair to the point where any "bargaining" taking place is merely illusory. This is because in many instances, the government has too much power, too much leverage, and too much discretion in presenting, negotiating, and implementing DPAs and NPAs. There is not enough transparency or consistency within these two negotiation processes. As Federal Appeals Court Judge Harry T. Edwards warned nearly three decades ago, settling matters through Alternative Dispute Resolution is not always "fair and just." [11] Indeed, former DOJ prosecutor David Pitofsky points to an "imbalance of negotiating power" that prosecutors have in these processes, stating:

> One of the problems with the process of negotiating a deferred prosecution agreement is that it is not really a negotiation. Any push back by the company on a provision that the government requests is not only going to be shot down, but the government may see it as a reflection that the company's claimed contrition is not genuine. So, you don't even want to make the argument for fear that it will cause the government to look at you differently and decide that a deferral isn't appropriate. [12]

This article will explore the factors that contribute to less-than-optimal transparency, consistency, and fairness in pretrial bargaining under the Foreign Corrupt Practices Act. The article will conclude with recommendations to strengthen the current system and make it more fair.

The article is divided into four Parts: Part II will discuss the extent of the bribery problem worldwide; the history of the FCPA; and the reasons behind the recent dramatic increase in FCPA enforcement.

***350** Part III will discuss the elements that make up FCPA "jurisprudence" given that so few cases are litigated in court; the history of using DPAs and NPAs to address corporate wrongdoing; and the development of the guidelines and principles underlying DOJ prosecutors' charging decisions with respect to corporate law enforcement.

Part IV will delve more deeply into the guidelines underlying DOJ prosecutors' charging decisions, questioning if recent steps taken by DOJ have mistakenly led to a decrease in procedural protections offered by the Department to parties accused of corporate wrongdoing, thereby resulting in increased negotiation power imbalances. This Part will also consider whether a corporate "compliance defense" similar to that enacted in the United Kingdom would be an appropriate and effective way to counterbalance DOJ's superior negotiation power in the FCPA context. Finally, this Part will discuss potential consequences of increasing judicial review within the DPA and NPA negotiation and implementation processes. Part V will discuss possible solutions to the overall dilemma posed by the article, namely, how to increase transparency, consistency, and fairness in pretrial negotiations between DOJ and parties accused of FCPA violations.

II. HISTORY AND EXTENT OF THE PROBLEM

A. Extent of the Bribery Problem

Given that bribe givers and bribe takers generally do not discuss their activities, it is difficult to know the true extent of the bribery problem worldwide. In 2012, according to Ernst & Young's 12th Global Fraud Survey, thirty-nine percent of seventeen hundred corporations across forty-three countries reported that bribery or corrupt practices occur frequently in their countries. [13] The percentage is far higher in rapid-growth markets--like in Brazil, where eighty-four percent responded that corruption was widespread. [14] In 2010, approximately twenty-three of the corporations surveyed worldwide by Ernst & Young admitted their organizations had been approached to pay a bribe to retain or obtain ***351** business during the prior two years. [15]

The World Bank Institute estimates that the total amount of bribes paid per year, worldwide, is approximately $1 trillion. [16] This figure is obtained from worldwide surveys of a wide range of corporations and enterprises. The surveys ask questions about bribes paid for day-to-day operation of the firm (e.g., acquiring necessary licenses, meeting code and regulation standards, etc.), as well as bribes paid to get favorable decisions on public procurement. [17]

Note that the $1 trillion dollar figure is for bribery alone and not for corruption more generally, i.e., the figure does not include activities such as embezzlement, financial fraud, and self-dealing. [18] Also, there is no attempt to include the extent of bribery that is taking place within the private sector itself, but only bribery transactions that take place between the private sector and the public sector. Finally, the $1 trillion figure includes bribery that is taking place worldwide, (meaning within industrialized economies, within emerging economies, and between industrialized and emerging economies). [19]

B. History of the FCPA

The World Bank identifies corruption as "the single greatest obstacle to economic and social development." [20] Specifically, the Bank states that "[t]hrough bribery, fraud, and the misappropriation of economic privileges, corruption taxes poor people by diverting resources from those who need them most." [21]

By no means has the United States been immune from the ravages of corruption. Indeed, the U.S. Congress passed the FCPA in 1977 following a series of corruption scandals surrounding the Watergate break-in and the resulting resignation of President Richard ***352** Nixon. Specifically, while investigating contributions to the President's reelection campaign, the U.S. Congress discovered that over four hundred U.S. companies had paid bribes in excess of $300 million in order to win contracts overseas. [22] Congress responded by passing the FCPA, which would make it unlawful to pay bribes to foreign government officials to obtain (or retain) business and thereby "restore public confidence in the integrity of the American business system." [23] The Act consists of two sets of provisions: the anti-bribery provisions [24] and the books and records and internal control provisions. [25]

The anti-bribery provisions of the Act criminalize the act of making an
offer, payment, promise to pay, or authorization of the payment of any money" to "any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity . . . or . . . inducing such foreign official to use his influence with a foreign government . . . in order to assist . . . in obtaining or retaining business. [26]

Both the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") are responsible for enforcing the anti-bribery provisions of the Act. [27]

The books and records and internal control provisions of the Act, both of which are enforced by the SEC, mandate that U.S. issuers [28] "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." [29] Issuers must also devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
(i) transactions are executed in accordance with management's general or specific authorization;

***353** (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . . [30]

C. Increased FCPA Enforcement

During the first two decades after its passage, enforcement of the FCPA was somewhat limited. [31] Indeed, as of 1997, only seventeen companies and thirty-three individuals had been charged under the Act and "numerous commentators were bemoaning the paucity of prosecutions." [32] A decade later, however, enforcement of the FCPA began to surge. The total number of cases brought by the DOJ and SEC from 2007 to 2009 more than doubled the total of all such cases brought in the statute's first thirty years. [33]

Since the record-holding $800 million penalty for Siemens in 2008, each subsequent year has seen at least one corporate FCPA case with a penalty of several hundred million dollars. [34] In January 2009, the DOJ announced that "enforcement of the FCPA was [its] top priority, second only to fighting terrorism." [35] In 2010, the SEC and DOJ collectively charged forty-seven companies with FCPA violations, leading to over $1 billion in fines, penalties, and ***354** disgorgement. [36] By 2012, the average penalty for a transgressing company amounted to $17.7 million. [37] The pace and strength of enforcement actions taken in the last several years appears to confirm a leading Justice Department official's comment that: "FCPA enforcement activity is stronger than it's ever been--and getting stronger." [38]

But why did FCPA enforcement rise so suddenly and dramatically at the beginning of the 21st century? Clearly, one reason was simply increases in international trade and investment. [39] Concerns of bribery around the globe were addressed by the 1997 establishment of the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. [40] One commentator notes an "explosion" in transnational bribery arising partly from "the offer of bribes and export of corruption by investors from Western countries." [41] Other commentators have argued that responses to U.S. domestic terrorism and domestic corporate scandals also played a role: First, the terrorist attacks of September 11, 2001, and second, passage of the Sarbanes-Oxley Act in 2002.

1. Terrorist Attacks of September 11, 2001

The horrific events surrounding the terrorist attacks of September 11, 2001 ("9/11") led to high levels of cooperation among governments throughout the world. To prevent similar attacks of terrorism, it would be useful to implement coordinated, multinational investigations--especially in the area of finance, as access to money can oftentimes be the lifeblood of terrorist organizations. Prior to 9/11, only four countries had ratified the International Treaty on the Suppression of Terrorism Financing. [42] By 2012, 174 nation-states ***355** were signatories of the Treaty. [43]

Moreover, experts have long suggested that the financing of terrorism can be linked to (and sometimes facilitated by) the corruption of foreign officials. [44] This led, in 2003, to the United States becoming an initial signatory to the United Nations Convention Against Corruption. [45] Ninety-six other countries signed the treaty in that same year, leading to increased cooperation and collaboration in multinational efforts to root out and combat both corruption and terrorism worldwide. [46] At the signing ceremony, Attorney General John Ashcroft stated that the treaty was a "permanent enshrinement of the new global attitude toward corruption" and that "[c]orruption is now unacceptable in any form, and international cooperation is considered a key element of our respective efforts to combat this scourge." [47]

This cooperation and collaboration among various national authorities helped pave the way for intergovernmental and transnational regulatory networks [48] that are a necessary precursor to effective worldwide FCPA enforcement. [49] Today, the U.S. Department of Justice has Resident Legal Advisors ("RLAs") in thirty-seven countries (including, among others, Iraq in the Middle East; Liberia and Zambia in Africa; Afghanistan and Indonesia in Asia; Bosnia and Serbia in Eastern Europe; and Mexico and Colombia in South America) [50] who are supported by FBI agents in seventy-five foreign cities. [51] The DOJ can request evidence or other assistance under a mutual legal assistance treaty ("MLAT"), a type of bilateral ***356** intergovernmental agreement that obligates foreign jurisdictions to provide assistance. [52] Such agreements have played a key role in the FCPA enforcement context; senior DOJ officials note that in 2009, at least twenty-five cooperation requests to foreign governments were made pursuant to mutual legal assistance treaties. [53] Regarding the outcomes of requests for cooperation, the DOJ reports it has experienced "the gamut of cooperation-- from full-scale sharing of domestic investigative files on short notice to outright noncompliance." [54] Nevertheless, the "vast majority" of requests have been granted. [55]

In addition, the U.S. Securities and Exchange Commission has entered into a network of memoranda of understanding ("MOUs") with securities regulators in twenty foreign countries. [56] These agreements, according to the SEC, "delineate the terms of information-sharing between and among MOU signatories and create a framework for regular and predictable cooperation in securities law enforcement." [57] While both MLATs and MOUs have been helpful in bringing about trans-governmental cooperation, there is a difference between the two, with one commentator contrasting the hard and legally binding nature of MLATs with the soft, more flexible, and legally nonbinding nature of MOUs:

> Non-legally binding [MOUs] structure much of transgovernmental cooperation. While regulators occasionally employ [MLATs], binding treaties that may address a wide array of legal issues, MOUs are frequently used to create a loose and adaptable framework in which to share information, ideas, and resources. MOUs are soft law agreements: non-binding as a legal matter, but, at least in the view of many regulators, highly effective and far more flexible. [58]

***357** Together, these developments have led to increased cooperation and collaboration among both U.S. and non-U.S. regulators in international FCPA enforcement. The prosecutions of Siemens AG, BAE Systems PLC, Alcatel-Lucent, Innospec, and others are testament to the dramatic impact that the 9/11 tragedy has had in spurring international treaties and cooperation necessary for more efficient and effective FCPA enforcement.

2. Sarbanes-Oxley

A second reason for the sudden and dramatic rise is FCPA prosecutions is the passage of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), [59] which was enacted by Congress in response to the scandalous ethics lapses and financial collapses surrounding firms such as Enron, WorldCom, and Adelphia. Commenting on the economic reform laws passed by Congress, starting with Sarbanes-Oxley, one commentator puts it thusly: "[I]n response to the corporate and accounting scandals that began with Enron, but appear to have no end in sight, the legislature attempted to restore faith in America's financial markets by enacting new criminal statutes and mandating stiffer penalties for economic crimes." [60]

Sarbanes-Oxley attempted to remedy and prevent corporate misbehavior by, among other things, requiring that (1) companies maintain internal controls for financial reporting and (2) that corporate executives certify the accuracy of such reporting. The law impacted numerous areas of corporate governance, especially regarding voluntary disclosures of FCPA violations. [61] Specifically, because Sarbanes-Oxley requires officers to disclose to the board of directors "any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls," [62] voluntary disclosure of FCPA violations (such as improper payments to foreign officials) increased. [63]

*358 III. ALPHABET SOUP: FCPA, NPAS, DPAS, AND DOJ

A. FCPA "Jurisprudence"

The primary way jurisprudence (meaning precedents, legal opinions, and foundational principles and theories pursuant to a particular statute or area of the law) is developed is through litigation trials, jury verdicts, and appellate court decisions. That is not happening with the FCPA because cases are generally not going to trial but are instead being resolved mostly through DPAs and NPAs. According to one commentator, legal precedent is very important because of "its continuous development through case law as courts clarify the boundaries of permissible legal conduct by resolving questions of ambiguity and vagueness; striking down overreaching laws as unconstitutional; and signaling to legislators where legal gaps exist." [64]

According to Judge Richard Posner, it is the development of precedent that ultimately defines the boundaries of permissible legal behavior. [65] Moreover, says Judge Posner, legal precedent is the important byproduct of the process of litigation, wherein attorneys battle through argument and advocacy, and judges render legal decisions and opinions. [66] It seems, then, American firms operating abroad are having difficulty gauging the boundaries of the FCPA because the continued use of DPAs and NPAs means decreased litigation, thereby limiting the development of precedent that would otherwise define these boundaries. [67] Professor Carrie Menkel-Meadow ***359** sums up the point succinctly: "When an authoritative rule is necessary, . . . the courts must adjudicate and provide clear guidance for all . . . ." [68]

Instead, the jurisprudence or "law" of the FCPA is developing primarily through (1) the terms and conditions set forth in NPAs and DPAs currently used to resolve FCPA matters; [69] (2) the reasons and justifications for issuing "declination decisions," or decisions where DOJ decides to drop the matter altogether rather than address it through a diversion agreement or prosecution; [70] and (3) the opinions and reasoning being set forth by the DOJ through "Opinion Procedure Releases." [71] More detailed information regarding each of these follows.

1. Non-Prosecution Agreements

Under a Non-Prosecution Agreement, or NPA, the DOJ "maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA." [72] Unlike a DPA, an NPA is not filed with a court of law. [73] For FCPA-related offenses, DOJ places on its official website any and all NPAs negotiated with companies. [74]

The requirements of an NPA are similar to those of a DPA and generally require (1) a waiver of the statute of limitations; (2) ongoing cooperation; (3) admission of the material facts; (4) compliance and remediation commitments; and (5) payment of a monetary penalty. [75] If the company fully complies with the agreement, then DOJ will not pursue criminal charges. [76]

2. Deferred Prosecution Agreement

Under a Deferred Prosecution Agreement, or DPA, the DOJ files a charging document with the court [77] and simultaneously ***360** requests that the prosecution be deferred, meaning "postponed for the purpose of allowing the company to demonstrate its good conduct." [78] DPAs typically require a defendant to (1) agree to pay a monetary penalty; (2) cooperate with the government; (3) waive the statute of limitations; (4) admit the relevant facts; and (5) "enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor." [79]

DPAs describe the company's conduct, cooperation, remediation (if any), and provide a calculation of the penalty under the U.S. Sentencing Guidelines. All DPAs are publicly filed, and DOJ places them on its official website. [80] If the company successfully completes the term of the agreement (typically two to three years in length), DOJ will then act to have the filed charges dismissed. [81]

3. Declination Decisions

In connection with a June, 2011, U.S. House of Representatives hearing on the FCPA, Congresswoman Sandy Adams and Congressman James Sensenbrenner requested the DOJ to provide information on cases that had been "brought to the attention of DOJ, but [the DOJ] decided, for one reason or another, not to investigate or pursue prosecution within the last year along with the rationale for those decisions." [82] The Members of Congress were referring to "declination decisions," or decisions to decline to pursue action in a given matter. Learning why the DOJ feels justified in declining to prosecute a particular matter would be quite instructive for the individuals and corporations attempting to draw up and implement policies, rules, and regulations enabling them to steer clear of possible violations (and prosecutions) themselves.

Assistant Attorney General Ronald Welch responded to Representatives Adams and Sensenbrenner by generally referring to ***361** the Principles of Prosecution of Business Organizations, [83] and by pointing out that those principles require Federal prosecutors to consider the following when determining whether or not to prosecute a corporate entity for an alleged FCPA violation: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrong doing within the corporation; (3) the corporation's history of similar conduct; (4) the existence and effectiveness of the corporation's pre-existing compliance program; and (5) the adequacy of remedies, such as civil or regulatory enforcement actions. [84] Mr. Welch added that during the two years prior to the June 2011 Congressional Hearing, the DOJ declined matters in which "some or all of the following circumstances existed:" [85]

A corporation voluntarily and fully self-disclosed potential misconductCorporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct

A parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries

A parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries

A company provided information to the Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries

A company agreed to a civil resolution with the Securities and Exchange Commission, while also demonstrating that a declination was appropriate for additional reasons

A single employee, and no other employee, was involved in the provision of improper payments; moreover, the improper payments involved minimal ***362** funds compared to the overall business revenues. [86]

At the end of the letter, Mr. Welch points out that the DOJ has a "long-standing policy" of not providing nonpublic information on matters it has declined to prosecute, and, consequently, the Department "cannot comment more specifically about FCPA matters where prosecution was declined." [87] This is unfortunate. The more specific and detailed DOJ can be in offering reasons why it declines to prosecute a given case, the more helpful it is in giving guidance to other individuals and corporate entities trying to stay within legal bounds vis-á-vis the FCPA.

Interestingly, it appears the DOJ might be opening up more regarding matters it has declined to prosecute. In April 2012, the Department offered its first-ever publicly stated declination. In the context of an individual enforcement action against Garth Peterson, the Department publicly stated it declined to prosecute Peterson's employer, Morgan Stanley. The DOJ stated the following regarding the declination:

> After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation. [88]

Indeed, the Department goes into a fair bit of detail on the various internal controls and training programs put into place by Morgan Stanly in order to prevent employees from bribing:

> According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were ***363** updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies fifty-four times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least thirty-five times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners. [89]

It is unclear why the DOJ was willing to make public its reasons for declining to prosecute Morgan Stanley, the employer of Garth Peterson. At least one practitioner suggests that the DOJ might have been more transparent than usual because it felt pressure from ongoing campaigns to convince the U.S. Congress to amend the FCPA. Specifically, Larry Boyd, Executive Vice President, Secretary & General Counsel of Ingram Micro, Inc., stated in a 2012 Chief Legal Officer Leadership Forum:

> I suspect that this announcement by the Justice Department had as much to do with the effort that the U.S. Chamber of Commerce has been mounting over the last 18 months to try to get Congress to amend the Foreign Corrupt Practices Act as it does with Morgan Stanley's good conduct. [90]

Whatever the motivation might be, it seems clear that the more specific and detailed the DOJ can be in offering reasons why it declines to prosecute a given case, the more helpful it is in giving ***364** guidance to other individuals and corporate entities trying to adhere to the FCPA.

4. Opinion Procedure Releases

When the FCPA was enacted, the law directed the U.S. Attorney General to establish a procedure to provide responses to inquiries by those subject to the law regarding how a particular behavior or plan of action might (or might not) conform with the DOJ's "present enforcement policy." [91] In other words, a process needed to be put into place whereby subjects of the law could write in and get a sense, in the form of a DOJ Opinion Procedure Release, of whether or not "specified, prospective--not hypothetical--conduct" would run afoul of the FCPA law. [92]

The DOJ has published Opinion Procedure Releases on a number of FCPA issues and in nearly all of them, the DOJ states it will not bring enforcement action with respect to the proposed conduct, usually based on the proactive compliance measures set forth by the company or individual seeking the opinion. [93] Moreover, if the opinion states that the contemplated conduct conforms with the FCPA, that opinion is then entitled to a rebuttable presumption should an enforcement action later be brought as a result of the contemplated conduct. [94]

There is, however, a crucial caveat: Opinion Procedure Releases do not have precedential value. Therefore, while the DOJ makes the opinions available to the general public through its web site, [95] neither ***365** individuals nor corporate entities can rely upon those opinions, as a matter of law, to protect themselves from federal prosecution for engaging in similar conduct. Indeed, every opinion specifically states that it "has no binding application to any party which did not join in the request [of the opinion]. . . ." [96] Again, this is unfortunate because if these opinions had precedential value, they would be more helpful in giving guidance to other individuals and corporate entities trying to follow the law under the FCPA.

The difficulty with FCPA "jurisprudence" being created mostly through NPAs, DPAs, declination decisions, and Opinion Procedure Releases is that these various vehicles do not provide enough guidance to the general public. Although the DOJ and the SEC published a much-anticipated "guidance" [97] to the FCPA in November 2012, that, too, "breaks little new ground" in terms of shedding light on what can sometimes be a subtle and complicated area of the law. [98] Indeed, Steven Tyrrell, former Chief of the DOJ's Fraud Section, called the guidance "more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing by the rules." [99]

B. History of Using DPAs and NPAs

In the early twentieth century, DPAs and NPAs emerged as courts sought alternatives to prosecution for juvenile defendants and first-time offenders. [100] These alternative processes helped to manage busy court dockets, and they allowed juveniles to avoid the stigma of criminal conviction. [101] During the last half century, DPAs became an increasingly popular way for prosecutors to deal with a growing number of drug offenders. [102]

DPAs were initially used for individuals. In the Speedy Trial Act of 1974, Congress officially recognized the practice of deferral by ***366** including assessment of deferrals among the tasks of pretrial service agencies. [103] These agencies evaluated individual defendants and helped determine the progress being made (including the extent to which agreement terms were being followed) by individuals whose prosecutions had been deferred. [104]

In 1977, the DOJ promulgated standards for deferral of prosecution, citing three principal objectives--and using language clearly suggesting that diversion agreements were designed to monitor individuals rather than corporations or business entities. The objectives include:
[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; and

(3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime. [105]

One could hardly imagine that the phrase "diverting them from traditional processing into community supervision and services" was written in reference to corporations. And yet, over time, the government clearly extended the scope of these agreements so they could be applied to corporate and other business entities. One of the earliest uses of DPAs in the corporate context was in 1994 when Mary Jo White, then the United States Attorney for the Southern District of New York, entered into a DPA with Prudential Securities, Inc. [106]

While that agreement helped blaze a trail for other prosecutors to negotiate pretrial diversion agreements, the DOJ initially used the agreements quite sparingly. Indeed, between 1994 and 1996, the DOJ entered into only ten corporate DPAs and NPAs all together. [107] Between 1996 and 2002, the DOJ filed only six more. [108] However, starting in 2002, DOJ's use of corporate DPAs and NPAs increased dramatically, peaking in years 2007 (with thirty-nine filings), 2010 (with thirty-nine filings) and 2012 (with thirty-seven filings). [109] With ***367** respect to the FCPA alone, since 2004, DPA and NPA agreements have been used to resolve a vast majority (seventy-seven percent) of enforcement actions involving corporate defendants. [110]

C. DOJ Guidelines Concerning Corporate Prosecution

Since beginning in 1999, the DOJ has issued four key memoranda setting forth prosecution guidelines or principles underlying prosecutors' charging decisions with respect to corporate enforcement. [111] The frameworks of the memos could be applied to all areas of corporate criminal conduct, including securities fraud, health care fraud, environmental crimes, antitrust and FCPA violations, and more. These four memos--each refining the arguments and reasoning of its respective predecessor--have, as a group, served to clear a path for increasing DOJ's use of DPAs and NPAs, especially in the context of FCPA cases. The memos give prosecutors great leeway in whom to charge, what to charge, and what terms to set forth within DPAs or NPAs if such agreements are ultimately negotiated. Perhaps most importantly, the four memos have served as a foundation for the DOJ to broadly interpret the FCPA with limited judicial scrutiny or interference. [112]

1. The Holder Memo

The first memo, entitled "Federal Prosecution of Corporations," was issued in 1999 by then-Deputy Attorney General Eric Holder (the "Holder Memo"). The memo aimed to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case." [113] The memo set forth the following eight factors for prosecutors to consider:

The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution ***368** of corporations for particular categories of crime:

The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation (sic) of, the wrongdoing by corporate management;

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

The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product protections;

The existence and adequacy of the corporation's compliance program;

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

Collateral consequences, including dispropo-rtionate harm to shareholders and employees not proven personally culpable; and,

The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions. [114]

Deputy Attorney General Holder acknowledged the eight factors listed could change over time, and stated that "federal prosecutors are not required to reference [the] factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision." [115]

One of the more controversial aspects of the Holder Memo was the somewhat vague definition of "willingness to cooperate" discussed within the fourth of the eight factors. [116] Specifically, it was controversial that the DOJ's assessment of a company's willingness to cooperate depended in part on (1) whether the company would be willing to waive its work product and attorney-client protections; [117] ***369** (2) whether the company "appeared to be protecting its culpable employees and agents" by advancing their attorneys' fees, retaining them without sanction, or providing them with information about the government's investigation pursuant to a joint defense agreement; [118] and (3) whether the company engaged in sufficient remedial actions such as paying restitution, improving corporate compliance programs, and disciplining or terminating wrongdoers within the company. [119]

It was problematic for some companies that, according to the Holder Memo, "willingness to cooperate" was only one of eight different factors considered in the DOJ's charging decision. That meant that even if a company provided significant cooperation, the government could nonetheless decide to charge based on any combination (or weighting) of the remaining seven factors listed in the memo. The Holder Memo, then, was heavily criticized for its lack of detail and guidance regarding what would be considered "authentic cooperation" in the eyes of the DOJ during a given investigation. [120]

2. The Thompson Memo

The DOJ's second advisory memo, "Principles of Federal Prosecution of Business Organizations," was issued in 2003 by then-Deputy Attorney General Larry D. Thompson ("Thompson Memo"). The main focus of the memorandum was "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation." [121] To this end, the Thompson Memo left intact the factors put forth in the Holder Memo regarding assessing a company's willingness to cooperate (discussed supra), and then added one more: Prosecutors should consider whether the corporation engages in conduct "that impedes the investigation (whether or not rising to the level of criminal obstruction)." [122]

There was a good deal of criticism from academics, practicing lawyers, and members of the U.S. Congress aimed at the Thompson ***370** Memo for failing to provide guidance on when and how privilege waiver would be required, and for failing to provide standards by which a corporation could determine when an employee was culpable enough to warrant withholding his or her legal fees stemming from a DOJ investigation. [123] In response to the criticism, then-Acting Deputy Attorney General Robert McCallum issued a memorandum in October 2005, entitled Waiver of Corporate Attorney-Client and Work-Product Protection ("McCallum Memo"). [124]

The McCallum Memo suggested that, in order to ensure federal prosecutors exercise "appropriate prosecutorial discretion" under the principles of the Thompson Memo, some United States Attorneys have

established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process for your district or component. [125]

The Memo went on to state that the review processes implemented may vary from district to district (or component to component) so each United States Attorney or component head "retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations." [126]

The Thompson Memo and the McCallum Memo combined to form a DOJ policy that was still somewhat aggressive in seeking ***371** waivers of attorney-client and work product protections. This policy came under dramatic scrutiny in the 2006 case of United States v. Stein. In Stein, the DOJ indicted, among others, Jeffrey Stein, a former partner of the accounting firm KPMG. [127] The corporate policy of KPMG was to pay all of Mr. Stein's legal fees associated with the case. [128] In accordance with DOJ policy, the prosecutors in the case (1) inquired as to KPMG's obligation to pay Stein's legal fees in assessing the authenticity of KPMG's cooperation, [129] and (2) insisted that KPMG as well as its current and former employees waive their attorney-client privilege. [130] KPMG agreed to waive the privilege in order to obtain a DPA, which the DOJ granted. [131]

Judge Lewis Kaplan of the United States District Court for the Southern District of New York sharply criticized the DOJ for infringing upon KPMG employees' Sixth Amendment right of access to counsel, and Fifth Amendment right to a fair trial. [132] Specifically, Judge Kaplan found that the Thompson Memo interfered with KPMG's policy of paying for employee access to legal counsel, thereby undermining the adversarial process required for a fair trial. [133] Ultimately, the indictments against Mr. Stein and the other KPMG employees were dismissed, a decision that was upheld by the United States Court of Appeals for the Second Circuit. [134]

3. The McNulty Memo

Immediately following the decision in Stein, then-Deputy Attorney General Paul McNulty issued a memorandum on December 12, 2006, establishing a new procedure regarding waivers of the attorney-client privilege and the work-product doctrine. [135] Thereafter, in order to demand that a company waive one or both potections, federal prosecutors had to first get approval from the Assistant Attorney General in charge of the DOJ's Criminal Division ***372** (and in limited cases from the Deputy Attorney General). [136] In addition, the McNulty Memo made it clear that a company's payment of legal fees for employees pursuant to a DOJ investigation may be used in calculating the authenticity of that company's cooperation only in extremely rare circumstances. [137]

4. The Filip Memo

The McNulty Memo lasted less than two years. Then-Deputy Attorney General Mark R. Filip issued the most recent guidance, which was codified in the United States Attorney's Manual on August 28, 2008 ("Filip Memo"). [138]

The Filip Memo instructs prosecutors to consider the following factors when determining whether or not to charge a corporation or business entity: (1) The corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents"; and (2) The corporation's "remedial actions, including any efforts to implement an effective corporate compliance program (or to improve an existing one), to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies." [139] In assessing cooperation, the Filip Memo goes on to explain that prosecutors may consider "the corporation's willingness to provide relevant information and evidence [as well as] identify relevant actors within and outside the corporation." [140] The Filip Memo explains that cooperation is a "potential mitigating factor" but the "failure to cooperate, in and of itself, does not support or require filing of charges." [141]

The new guidelines under the Filip Memo changed previous policies in two important ways: First, in assessing a corporation's willingness to cooperate, prosecutors were no longer permitted to consider whether that corporation paid legal fees for employees, or ***373** whether it entered into a joint defense agreement with employees. [142] Second, DOJ prosecutors were no longer permitted to ask a corporation to disclose information protected under the work-product doctrine and attorney-client privilege. Specifically, the Filip Memo stated that while 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." [143] The bottom line was this: Prosecutors were directed to evaluate a company's willingness to cooperate based on whether a company provided "relevant facts" rather than whether the company was willing to waive various protections. [144]

IV. TOWARDS UNDERSTANDING THE POWER IMBALANCE

A. Procedural Protections Weakened?

One of the goals of every successive memorandum issued by the DOJ, discussed supra Part III, from the Holder Memo issued in 1999 to the Filip Memo issued in 2008, was to increase procedural protections for corporate entities under investigation. However, it could be argued that the last memorandum actually took a step backward in terms of procedural protection. Indeed, two commentators argue that the Filip Memo "may actually lessen the procedural protections that the McNulty Memo offered . . . [because] no approvals are required for a prosecutor to seek factual material even where its provision may require a privilege waiver." [145]

The core of the Filip Memo directed prosecutors to focus on "relevant facts" of a given investigation. But what can or should a company do if certain "relevant facts" make good candidates for attorney-client privilege protection, or constitute central components of attorney work-product? Indeed, several practicing attorneys have argued that despite the directives within the Filip Memo, "it is likely that prosecutors will continue to look favorably on waivers. Thus, ***374** waiving privileges is likely to remain one way to demonstrate cooperation." [146]

Moreover, while the Filip Memo appears steadfast in its directive that privilege waivers not be required during the DOJ's investigative processes, the Filip Memo simultaneously (and perhaps inconsistently?) states that "a corporation that does not disclose the relevant facts about the alleged misconduct --for whatever reason--typically should not be entitled to receive credit for cooperation." [147]

The clear implication seems to be that, despite the issuance of the Filip Memo, companies seeking credit for cooperation might nonetheless be required (or at least feel pressured) to disclose privileged information in those instances when DOJ believes the information constitutes "relevant facts." In fact, former Deputy Attorney General Paul McNulty argues that under the Filip Memo guidelines, "there is still a pressure to waive attorney-client privilege if you have 'relevant factual information' covered by attorney-client privilege that the government wants to get." [148]

Moreover, McNulty contends that "quite a bit" of "relevant factual information" is subject to privilege claims: "Take notes from witness interviews, sure, you can tell the government what the person said, but the government is often interested in seeing the notes of the interview and other material memoranda that would be subject to privilege." [149] McNulty is suggesting that the Filip Memo failed in its effort to blunt certain federal prosecutor powers during investigations, because there can still be underlying pressure on companies to waive attorney-client privilege in certain instances. [150]

In practice, then, it appears the Filip Memo may have failed in achieving one of its primary goals: To rein in DOJ prosecutorial power through increased procedural protections for corporations under investigation. As one commentator soberly puts it: "[T]here is a real possibility that the new guidelines may create an underground system of waiver and coercion because these tactics have become so ***375** entrenched in white-collar practice." [151]

If that commentator is correct and an "underground system of waiver and coercion" leads to commonplace infringements on attorney-client or work product protections, that would be a dire state of affairs indeed. These privileges, with their ethical and constitutional underpinnings, are extremely important. They help bring about and protect "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." [152] Not only does the Model Rules of Professional Conduct mandate that attorneys have an ethical duty of loyalty--including a duty of confidentiality--to their clients, [153] but some commentators go so far as to suggest that confidentiality between attorney and client is protected by the U.S. Constitution because the Sixth Amendment right to counsel incorporates "meaningful" representation, which, it is argued, cannot be assured without protected communication between attorneys and their clients. [154]

Moreover, it appears that while the DOJ has been placing more restrictions on the ability of prosecutors to request waivers of attorney-client privilege and/or work-product protection, the descriptions of cooperation contained in DPAs and NPAs have become increasingly vague. For example, in the DOJ's 2013 NPA with the Ralph Lauren Corporation, the Agreement's discussion of cooperation includes the following:

the Company's extensive, thorough, and real-time cooperation with the Department, including conducting an internal investigation, voluntarily making employees available for interviews, making voluntary document disclosures, conducting a world-wide risk assessment, and making multiple presentations to the Department on the status and findings of the internal investigation and the risk assessment . . . . [155]

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[Ralph Lauren Corporation must] truthfully and completely disclose non-privileged information with respect to the activities of the Company, its officers, directors, employees, and others concerning all matters about which the Department inquires of it, which information can be used for any purpose, except as otherwise limited in this Agreement . . . . [156]

*** * ***

[Ralph Lauren Corporation must] provide the Department, upon request, all non-privileged information, documents, records, or other tangible evidence regarding matters arising out of the conduct covered by this Agreement about which the Department or any designated law enforcement agency inquires. . . . [157]

One commentator suggests that such vague language used by DOJ in their DPAs and NPAs results in decreased guidance for other corporations attempting to secure a favorable outcome through pretrial negotiations with DOJ. Specifically, the commentator argues that companies attempting to avoid indictment are left "in a precarious situation as they will be forced to speculate as to what conduct will be rewarded. As a result, companies likely will err on the side of disclosure and coercion to ensure that prosecutors perceive them as cooperative." [158] Another commentator makes the following, similar argument: "Prosecutors employ general terms that require broad corporate obedience in any and all matters related to the investigation. . . . These nonspecific terms that call for comprehensive cooperation give government investigators broad authority to compel disclosure of information and force internal changes, while leaving companies virtually defenseless . . . . These terms clearly favor the prosecutor and are only ***377** accepted by entities because they have no ammunition at the bargaining table." [159]

Moreover, this decrease in guidance (again, resulting from DOJ's vague descriptions of cooperation contained in DPAs and NPAs) could potentially make companies feel that it would be unwise to deny any of the DOJ's overtures or requests made during pretrial negotiations, regardless of how fair or unfair such requests might be. Mary Jo White, former United States Attorney and current Chairperson of the U.S. Securities and Exchange Commission, once hinted at the difficulty of saying "no" to federal prosecutors during pre-trial negotiations in the corporate context:

To ensure that a company does not become that "rare" case resulting in a corporate indictment with all of its attendant negative consequences . . . a company must not poke the government in the eye by declining any of its requests or suggestion of how a cooperative, good corporate citizen is to behave in the government's criminal investigation. This template, in my view, can give prosecutors too much power. [160]

U.S. District Court Judge John Gleeson of the Eastern District of New York expresses a similar sentiment when he states in a recent court opinion:

"In the deferred prosecution context, the defendant is presented with the opportunity for diversion from the criminal proceeding altogether. For obvious reasons, a defendant in these circumstances is less likely to raise a purported impropriety with the process, let alone seek the court's aid in redressing it, given the risk of derailing the deferral of prosecution." [161]

B. The Result: Negotiation Power Imbalance

Commentators have suggested that the DOJ has more power than corporations during the typical negotiation of a DPA or NPA; indeed, one commentator suggests the process is similar to "the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any ***378** underlying offense." [162]

Given its enormous leverage in the negotiation, the DOJ can oftentimes negotiate quite favorable prosecution agreements, whose terms can include large financial penalties, significant internal business reforms, and cooperation in pursuing the company's individually culpable directors, executives, managers, and/or employees. [163] This cooperation can include the company admitting liability, identifying wrongdoers within the organization, and sometimes even waiving work-product protection and attorney-client privilege pursuant to internal documents and internal investigations. [164]

Forbes magazine describes the group of corporations that have been accused of wrongdoing but have had their prosecutions deferred as those who have been "inducted into Club Fed Deferred." [165] The decision of whether or not a corporation will be invited to join this club appears to be at the complete discretion of the DOJ--something that amounts to a great deal of power during any negotiations with accused corporations. Indeed, Andrew Weissmann, the former director of the DOJ's Enron Task Force, testified before the United States Senate that "aggressive or misinformed" prosecutors can potentially "exploit the power imbalance inherent in the current FCPA statute" as they conduct pre-trial negotiations with accused parties. [166]

While the DOJ has complete discretion on whether or not to offer accused parties an NPA or a DPA, the consequences of not being offered one or the other can be devastating to a company. Due to negative collateral consequences surrounding corporate prosecutions, accused companies tend to yield to whatever demands are made by DOJ during the negotiation. The fate of accounting firm Arthur Andersen taught the business world the dangers of collateral consequences surrounding corporate prosecutions. Specifically, as part of the investigation into the failed business dealings of Enron, the DOJ became aware that Enron's accounting firm, Arthur Andersen, shredded millions of documents relating to audits of ***379** Enron's accounting practices. [167] In March of 2002, Arthur Andersen was indicted on charges of obstruction of justice. [168] Many commentators have suggested it was the mere indictment of Arthur Andersen that led to its closing--in the end, 28,000 people lost their jobs from one of the world's oldest and largest accounting firms. [169]

It quickly became clear that while regulators needed to take action in order to bring wrongdoers to justice, the regulators also needed to be aware of and consider the collateral consequences of such a corporate prosecution. As one commentator puts it:
[T]here is no question that criminal prosecution of a corporation has a tremendous impact on the corporation and its community, employees, customers and lenders. For starters, the tangible and intangible costs of responding to any corporate criminal investigation are significant. Company employees must gather thousands of documents in response to subpoenas. Prior to supplying subpoenaed documents, legal counsel must review each document to verify compliance and to ensure that privileged information is not being released. This process is time consuming and expensive. In addition, any company under investigation should undertake its own internal investigation. If outside counsel is hired to do this investigation, the legal fees are large. If in-house counsel undertakes the investigation, counsel is diverted from other corporate projects and tasks and this diversion

hurts a company in small and large ways. Also, once the existence of an investigation becomes public, stock prices of publicly traded companies often drop, sometimes precariously. . . .

Additionally, lenders may raise short term interest rates, terminate lines of credit, or call in loans. Moreover, business is often disrupted by an investigation. Deals and plans are put on hold because of the uncertainty surrounding the targeted company. ***380** Employee morale plummets. Competing businesses swoop in and lure away star employees who are reluctant to remain with a business under investigation. Customers leave for competitors. [170]

In short, that commentator concludes a company simply might not survive the costs and damage to both business and reputation that can result from a corporate criminal investigation. [171] Pretrial diversion agreements (such as DPAs and NPAs) can provide an alternative dispute resolution mechanism that punishes a company but avoids the collateral damage to those who played no role in the criminal conduct. For a corporate entity, then, receiving a DPA or NPA rather than an outright prosecution can literally mean the difference between life and death. As one commentator puts it: "A company does not just want to avoid prosecution--it may need to avoid prosecution in order to save itself." [172] Clearly, the DOJ's power in awarding DPAs and NPAs rather than prosecuting is very real.

For corporations, the impact of their vulnerability to mere indictment (as opposed to indictment plus conviction) [173] is that corporations usually cannot risk going to trial. [174] This helps explain why, in the last twenty years, only a handful of companies have decided to go to trial in an FCPA case. [175] While federal prosecutors ***381** enjoy wide, largely non-reviewable discretion regarding which corporate entities to target and what crimes to allege, [176] the most effective way for any criminal justice system to test such prosecutorial discretion and to rein in overly-aggressive prosecutors--namely, the trial by jury [177] --is not being utilized to resolve FCPA cases. One commentator puts it thusly: "Without the threat of trial . . . there is no assurance that the prosecutor is acting in a judicious manner." [178] Another commentator is even more blunt:
[B]ecause of the draconian consequences of indictment, which often include the downfall of an entire business, corporate entities have little practical choice when faced with either indictment or accepting a DPA. Hence, the government has enormous leverage in negotiating terms of DPAs, which has resulted in prosecutorial overreaching and deals which are unfair for corporate entities. [179]

Given that corporations cannot run the risk of going to trial, they essentially do not have a Best Alternative To a Negotiated Agreement ("BATNA") [180] in their negotiations with the DOJ; in other words, they have little choice but to accept whatever terms are offered through the form of a DPA or NPA. [181] Indeed, one commentator argues that the government's power in the negotiation process amounts to both economic duress and procedural unconscionability, stating:

> ***382** It is indeed a Hobson's choice between indictment, which amounts to corporate death, and an inequitable agreement that at least allows the business to subsist. Thus, the circumstances surrounding the negotiation and entrance into DPAs clearly seem to satisfy all of the elements of economic duress. *** The gross inequality in bargaining power combined with obviously one-sided terms also clearly evince unconscionability. This inequality in bargaining power, which is derived from the government's ability to indict and destroy a firm, is the impetus behind economic duress and also militates toward finding procedural unconscionability. [182]

That same commentator goes on to argue that specific terms typically included by the DOJ in DPAs and NPAs (such as mandating a corporation to exhibit broad cooperation in negotiating and carrying out the agreement, or allowing itself-- the DOJ--to unilaterally declare a breach in the agreement without judicial oversight) are "substantively unconscionable" because such terms "result in an imbalance in the obligations" imposed in the agreement. [183]

Professors Robert Mnookin and Lewis Kornhauser taught us nearly thirty-five years ago that parties do not bargain "in a vacuum" and that two essential ingredients of power within the context of legal negotiations include: (1) the option of going to trial should the negotiation fail to achieve agreement; and (2) knowledge of what the likely outcome would be, in accordance with legal precedent, should one ultimately choose to go to trial. As the professors write in their seminal work, Bargaining in the Shadow of the Law: The Case for Divorce:

> Divorcing parents do not bargain . . . in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips--an endowment of sorts. . . . In ***383** negotiations under this regime, neither spouse would ever consent to a division that left him or her worse off than if he or she insisted on going to court. [184]

And yet, corporations facing FCPA charges lack both of these essential ingredients of power: (1) as pointed out previously, going to trial would be so damaging to the company that it has little choice but to accept whatever terms are offered through the form of a DPA or NPA; and (2) because so few FCPA cases have gone to trial, it is very difficult for companies to accurately predict what the outcome at trial would likely be if they decide to pursue that avenue. The end result is that the balance of power in the context of FCPA pretrial negotiations is weighted significantly in favor of the government.

C. The Compliance Procedures Defense: A Possible Counterbalance?

A number of legal experts and commentators--including two former U.S. Attorney Generals and other high-ranking government officials who dealt directly with FCPA enforcement issues--have argued that one way to counterbalance the DOJ's seemingly all-encompassing power in this area is to enact a "compliance procedures defense" to the FCPA. [185]

Those who support a "compliance defense" in the context of the FCPA are simply saying this: A company's preexisting compliance policies and procedures (i.e., policies and procedures that are in place and in practice before a corporate entity is charged with an FCPA violation), as well as the company's good-faith efforts to comply with the FCPA, should be relevant as a matter of law when an employee or agent acts contrary to those policies and procedures and thereby ***384** violates the law. [186]

Moreover, it's not just the FCPA that corporate entities have to worry about as they conduct business throughout the world. Rather, there is a wide variety of criminal law exposure based on respondeat superior principles, despite whatever preexisting compliance policies and procedures the businesses might have in place, and despite whatever good-faith efforts the businesses might make to comply with the various laws. (Of course, while it's not provided for in the criminal context, corporations do have the benefit of a "good faith" affirmative defense when facing respondeat superior civil liability in tort.) [187]

Over the years, commentators have argued in favor of a general compliance defense to corporate liability in the criminal context. For example, Professors Richard Gruner and Louis Brown have argued that a "generally applicable due diligence defense" could be afforded to corporations in prosecutions based on offenses by their employees. Due diligence in this context would be shown if a corporation initiated and maintained an effective law compliance program under which the employee offense under prosecution was a rare and aberrant one. Firms would be rewarded with an immunity from liability for the good faith efforts of their managers to establish effective law compliance programs. [188]

Along these same lines, commentators have proposed a corporate due diligence defense if a firm can demonstrate: (1) "the illegal conduct had been clearly and convincingly forbidden," and (2) "reasonable safeguards designed to prevent corporate crimes had been developed and implemented, including regular procedures for ***385** evaluation, detection, and remedy." [189]

Professor Ellen Podgor argues it is important in a "post-Arthur Andersen world" to protect law abiding employees, shareholders, and corporate entities from the negative consequences of being held criminally liable "when good faith efforts have been made to constrain rogue employees." [190] Podgor concludes that providing a "'good faith' affirmative defense" to corporations that have adhered to the law in "structuring, overseeing, and maintaining" their compliance programs will offer an additional incentive to corporations to widely promote such programs. [191]

The Model Penal Code proposes to limit corporate liability to those instances in which "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment." [192]

A similar standard has been advocated by Andrew Weissmann, the former director of the DOJ's Enron Task Force, arguing corporate liability should be permitted only if a company "reasonably should have taken steps to detect and deter the criminal action of its employee." [193] Says Weissmann:

> A standard of corporate criminal liability that is tied to whether the company has taken all reasonable steps to prevent and detect crime by its employees would strongly incentivize meaningful and necessary self-regulation. A company that sought to avoid criminal prosecution would have strong reasons to implement an effective compliance program, both to deter criminal activity at the outset and to use as a shield in the event criminality nevertheless occurred. [194]

The notion of including some sort of compliance defense under the FCPA first appeared in 1983, just six years after the law first passed. While the bill being considered by Congress to reform the ***386** FCPA did not contain a compliance defense, one of the hearing witnesses suggested that such a reform might be worthwhile. Arthur Matthews, a former SEC enforcement official then in private practice, stated the following in his testimony:

> I would also support some type of affirmative due diligence defense that a corporation would be able to prove to avoid criminal responsibility on a reckless disregard theory. Since 1933, in the Securities Act of 1933, there has been a due diligence defense for issuers and their officers and directors with respect to whether or not a registration statement is false. I think comparable language could be placed in the bill so that corporations would have an affirmative due diligence defense. [195]

Matthews' testimony might have planted the seed for a compliance defense under the FCPA. Three years after he testified before Congress, an FCPA reform bill was introduced by Representative Don Bonker of Washington State that included such a provision. [196] Entitled the Export Enhancement Act of 1986, Title IV of the Act stated:

> Due Diligence.--An issuer [or domestic concern] may not be held vicariously liable, either civilly or criminally, for a violation [of the FCPA's anti-bribery provisions] by its employee, who is not an officer or director, if such issuer [or domestic concern] has established procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such employee, and the officer and employee of the issuer [[or domestic concern] with supervisory responsibility for the conduct of the employee used due diligence to prevent the commission of the offense by that employee. Such issuer [or domestic concern] shall have the burden of proving by a preponderance of the evidence that it meets the requirements set forth in paragraphs (1) and (2). The first sentence of this subsection shall be considered an affirmative defense to actions under ***387** [the anti-bribery provisions]. [197]

The House Report summarizing the bill stated that if a corporation "has set up internal controls to avoid illicit payments or has otherwise acted to keep within the law, its 'due diligence' can be used as a defense against both civil and criminal liability in cases where its employees have nonetheless engaged in bribery." [198]

However, while that legislative bill and similar ones contained provisions for a compliance defense, [199] the legislation that was ultimately agreed upon and signed into law after several years of political and legislative wrangling--the Omnibus Trade and Competitiveness Act of 1988--did not contain a compliance defense. [200]

Since that time, the business community has become increasingly energized to support the enactment of a compliance defense under the FCPA. Indeed, starting in 2010, a lobbying campaign spearheaded by the U. S. Chamber of Commerce Institute for Legal Reform has been strongly advocating such a change to the FCPA. [201] In Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act, [202] the first reform put forth by the Chamber is that of adding a compliance defense, or "a defense that would permit companies to fight the imposition of criminal liability for FCPA violations, if the individual employees or agents had circumvented compliance measures that were otherwise reasonable in identifying and preventing such violations." [203]

The Chamber argues that while certain benefits can accrue to a company that implements a strong FCPA compliance program, (such ***388** as a greater likelihood of being offered an NPA or DPA, [204] or a greater likelihood of receiving smaller penalties if the company is convicted of a criminal offense [205]), the problem is that such benefits are subject to prosecutorial discretion. [206] Indeed, Michael Mukasey, who was U.S. Attorney General from 2007 to 2009, testifies to the following at the June 2011 House hearing:

> It is true that the DOJ or SEC may look more favorably on a company with a strong FCPA compliance program when determining whether to charge the company or what settlement terms to offer, and such compliance programs may be taken into account by a court at the sentencing of a corporation convicted of an FCPA violation. However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a prosecution, or both. There is also no guarantee that a strong compliance program will be given the weight it deserves. [207]

By contrast, the U.K.'s Bribery Act of 2010 passed by the British Parliament provides a specific defense to liability if a corporation can show that it has "adequate procedures" in place to detect and deter improper conduct. [208] Under Section 7 of the Act, a "commercial organization [sic] will have a full defence [sic] if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing." [209]

The U.K. Ministry of Justice believes that "no policies or procedures are capable of detecting and preventing all bribery" [210] and that "no bribery prevention regime will be capable of preventing ***389** bribery at all times." [211] According to the Ministry of Justice, "the objective of the [[Bribery] Act is not to bring the full force of the criminal law to bear upon well run commercial organizations [sic] that experience an isolated incident of bribery on their behalf." [212] Moreover, there are numerous other OECD Convention signatory countries besides the U.K. that incorporate a compliance defense into their anti-bribery laws, including Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Sweden, and Switzerland. [213]

There are those who support the implementation of a similar defense under the FCPA, [214] as well as those who oppose it. [215] Whatever the political, economic, or other reasons preventing the U.S. Congress from incorporating an FCPA compliance defense heretofore, legislation for such a defense could easily be worded in a manner that avoids the core criticism cited by its strongest opponents [216] --namely, that a compliance defense would protect acts of FCPA wrongdoing by corporate officers and directors that are "knowing" [217] and "corruptly" [218] undertaken with intent, [219] thereby ***390** completely undermining the FCPA. [220] In order to avoid that outcome, any compliance defense passed by Congress should not allow the protection of corporate leadership from their own knowing and intentional wrongdoing under the FCPA, but, rather, should be designed in a narrow and targeted fashion to protect companies from rogue employees who commit FCPA crimes despite company efforts to prevent such crimes.

Indeed, even the Export Enhancement Act of 1986 (discussed supra), in defining "due diligence," stated that a company would be protected from civil and criminally liability only for FCPA violations made by employees who are not officers or directors of the company. [221] That legislation, although never signed into law, intentionally and specifically disallowed protection of a company from FCPA civil or criminal liability if the wrongdoers were either officers or directors within the company.

The drafters of that 1986 legislation were on the right track; any ***391** reasonable, modern-day compliance defense law should follow suit and work to insulate companies from FCPA civil and criminal liability only with respect to lower level, rogue employees who are not officers or directors within the business. Not only would such legislation increase FCPA compliance by providing the leadership of a business with strong incentives to implement policies and programs to identify current (and deter future) violations, [222] but it would also provide corporations with some protection against aggressive prosecutors who can otherwise exploit the power imbalance inherent in the current FCPA statute. [223]

D. Might the Courts Become More Involved?

1. Judicial review of proposed prosecution agreement terms

The federal government decides whether to prosecute a given corporate entity based upon a careful review and consideration of the Principles of Prosecution. The Principles are merely guidelines; they create no legal rights for corporate defendants, and there is little in the way of procedural protection available to companies subject to NPAs and DPAs, unless the company chooses to reject the agreement and instead submit to a criminal indictment. [224]

Furthermore, NPAs are not filed with a court and are therefore not subject to judicial approval or scrutiny. [225] Courts do not even ***392** review an NPA's statement of facts to determine if there is sufficient evidence to satisfy the elements of the crimes alleged by DOJ.[226] Because DPAs, on the other hand, are filed with a court, such agreements are subject to judicial scrutiny. However, as one commentator explains, not only has a U.S. Government Accountability Office report found that judges largely fail to provide any review or oversight of DPAs,[227] but the statement of facts put forth in such agreements are "often bare-bones and replete with legal conclusions."[228]

Ensuring judicial review of the terms of DPA and NPA agreements before the agreements are signed could mitigate or eliminate many of the concerns brought up in this article. Specifically, judicial oversight could help: (1) neutralize the unbalanced negotiating leverage that seems to favor the DOJ;[229] (2) look out for the employees whose attorney-client and/or work-product privileges can potentially be compromised during the negotiation process; and (3) look out for the investors who tend to bear the brunt of monetary penalties imposed on the corporation through DPAs and NPAs.

While application of judicial review could be accomplished by the passage of new legislation explicitly requiring judicial approval of NPAs and DPAs, it could also be accomplished by simply finding a textual mandate in the Speedy Trial Act, the legislation which enables the filing of DPAs.[230] The Act states there are exceptions for specified delays in filing information, including delays "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."[231] The language "with the approval of the court" ***393** could be interpreted broadly as a mandate for judicial approval. Indeed, in the matter of United States v. HSBC Bank USA, that very interpretation is made by U.S. District Court Judge John Gleeson of the Eastern District of New York (discussed more thoroughly, infra). Specifically, the judge rules that a "plain reading" of the provision would allow for the creation of a DPA, "but only upon approval of the agreement by the court."[232]

Interestingly, despite the fact that the Speedy Trial Act grants the judiciary approval rights for NPAs and DPAs,[233] nearly every NPA and DPA that the government has negotiated with a U.S. company has been approved without judicial modification.[234] According to one commentator, it is the absence of judicial scrutiny that "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."[235]

While this article is proposing increased judicial review, it is important that the judge's role in reviewing NPAs or DPAs not interfere with the prosecutor's role in making the initial charging decision and in drafting the text of the agreement. After all, the Constitution grants prosecutors wide discretion in assisting the President to "take Care that the Laws be faithfully executed."[236] This gives prosecutors the exclusive power to choose to indict or to enter into an agreement such as an NPA or DPA; furthermore, courts "presume that [the prosecutors] have properly discharged their official duties" in making those decisions.[237] Thus, effective judicial review does not require reviewing (or interfering with) a charging ***394** decision; nor does it require dictating the terms of an NPA or DPA. Rather, courts would play merely a reviewing role by approving or rejecting a completed agreement immediately after it has been drafted, but before it has been signed by the parties involved.[238]

With increased judicial review, not only would there be a more reasonable balance of power between prosecutors and corporations during the negotiation phase of NPA and DPA deal making, but companies would be provided with guidance on how some of the more vague FCPA provisions, (such as where the law stands regarding the definition of "foreign official"), will be construed by the courts.[239] Moreover, judicial review would ensure that the DOJ's claims and theories of corporate wrongdoing actually stand on firm legal ground.[240] Essentially, reviewing judges would help to locate and define that heretofore elusive line separating lawful from unlawful conduct, thereby providing more certainty in both FCPA compliance and enforcement.

Currently, most agreements fail to explain (1) whether (and how) the defendant's conduct satisfies the elements of the crime and (2) whether there is proper legal precedent to punish the defendant. Instead, NPAs and DPAs tend to recite legal conclusions. [241] If judicial review were incorporated into the process as this article proposes, then, after prosecutors and defendants finish negotiating the terms of an agreement, the court could review all the evidence, admitted facts, and legal analyses to ensure the conclusions and terms of the agreement are reasonable, [242] legally supportable, [243] and fair to ***395** both the parties and the general public. [244] Only after the court's review and approval would the NPA or DPA become an enforceable agreement. [245]

This idea is not a new one. In fact, in the United Kingdom, new legislation for Deferred Prosecution Agreements incorporates a final hearing into the DPA negotiation process wherein the court must give final approval to the DPA. Specifically, when a prosecutor and a person whom the prosecutor is considering prosecuting "have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that: (a) the DPA is in the interest of justice, and (b) ***396** the terms of the DPA are fair, reasonable and proportionate." [246]

Moreover, U.S. District Court Judge John Gleeson of the Eastern District of New York appears to concur fully that judges have a role to play in reviewing DPA agreements. In United States v. HSBC Bank USA, the Judge Gleeson wrote that "[b]y placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority." [247] Specifically, he ruled the court has authority to approve and oversee the implementation of the DPA pursuant to its "supervisory power." [248] Quoting extensively from Justice Louis Brandeis, the court noted the importance of the supervisory power in "preserv[ing] the judicial process from contamination." [249] Judge Gleeson reasoned that "the supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness and impropriety." [250]

Judge Gleeson went on to say that since the parties requested a ruling regarding the Speedy Trial Act,

the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant. By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority. [251]

While asserting this judicial role, however, the judge was careful to distinguish a DPA from an NPA, which he said falls within the government's "absolute discretion to decide not to prosecute" [252] and ***397** so "is not the business of the courts." [253] The critical feature of a DPA making it susceptible to judicial review, according to Judge Gleeson, is that it involves pending criminal charges, requiring oversight and review to protect "the integrity of the Court." [254]

In the end, Judge Gleeson approved the DPA "without hesitation," noting that "much of what might have been accomplished by a criminal conviction has been agreed to in the DPA." [255] He further ordered the government and HSBC to file quarterly reports keeping the court "apprised of all significant developments in the implementation of the DPA." [256]

An analysis of the particular settlement terms in this case goes beyond the scope of this article; the key development is that a sitting federal district court judge argued forcefully, and convincingly, through his ruling that courts do indeed have an important role to play in reviewing and overseeing DPA agreements. Several practicing white collar defense lawyers argue that Judge Gleeson's decision "introduces--seemingly for the first time-- a doctrinal framework for judicial scrutiny of the resolution of a criminal case under a DPA. By invoking the court's 'supervisory power' as a basis to approve and oversee the implementation of a DPA, he treads new ground." [257]

Furthermore, although Judge Gleeson concludes in his decision that NPAs are "not the business of the courts," [258] an argument could be made otherwise. Specifically, while courts do not have the right to interfere with a prosecutor's discretion on whether or not to prosecute, (i.e., whether or not to resolve the matter by using an ***398** NPA), [259] courts do have the right, it could be argued, to judicially review the terms of an NPA agreement after the prosecutor has decided to use one in resolving the matter at hand. After all, scrutinizing the terms of an agreement (in this case, an NPA) to ensure those terms are reasonable, legally supportable, and fair is far different from dictating to a prosecutor that he or she has no choice but to resolve a given matter by using an NPA.

2. Judicial review of NPA and DPA agreement breaches

Most DPAs and NPAs include a term giving the prosecutor the right to determine whether a breach of the agreement has occurred. If the corporation breaches, the agreement is thereby revoked and the corporation becomes subject to prosecution. [260] Moreover, there is very little recourse for a corporation to contest the DOJ's determination of breach, and it has no right to appeal the determination to an independent, impartial judicial authority. For example, DOJ's NPA with Ralph Lauren Corporation reads:

> In the event that the Department determines that the Company has breached this Agreement, the Department agrees to provide the Company with written notice of such breach prior to instituting any prosecution resulting from such breach. The Company shall, within thirty (30) days of receipt of such notice, have the opportunity to respond to the Department in writing to explain the nature and circumstances of such breach, as well as the actions the Company has taken to address and remediate the situation, which explanation the Department shall consider in determining whether to institute a prosecution. [261]

This threat of unilateral revocation of the agreement increases the leverage exercised by prosecutors. [262] Surely companies feel an ***399** increased sense of pressure to cooperate with the DOJ throughout the deferral period of the agreement, knowing that prosecutors have the power to decide whether or not the terms of the agreement have been met. In such a situation, prosecutors effectively become both judge and jury over a corporation's criminal conduct. [263] One commentator argues that the "unfairness and one-sidedness" of such an arrangement appears to be "blatantly unconscionable" and could only be the product of economic duress, stating, "There is no other reason for a corporate entity to subject itself to the final determination of an authority that opposes its interests." [264] It seems clear that judicial review of the determination on whether or not a prosecution agreement has been breached would offer some measure of security to companies that are signatories to such agreements.

V. POSSIBLE SOLUTIONS

In resolving FCPA cases, the DOJ currently relies heavily upon two ADR vehicles (NPAs and DPAs) that, although efficient and cost-effective, can present certain weaknesses and challenges. In particular, as was suggested throughout this article, the negotiation process by which these agreements are created, refined, and implemented can be unfair. In many instances, the government has too much power, too much leverage, and too much discretion over the accused parties in presenting, negotiating, and carrying out DPAs and NPAs. Moreover, there is not enough transparency or consistency within the negotiation processes involved, especially in the context of the FCPA. These negotiations could become more balanced and fair by implementing the six following recommendations:

A. The DOJ Should Release to the Public Carefully Redacted Information Regarding All FCPA Declination Decisions.

In the FCPA "Resource Guide" [265] published jointly by the DOJ and the SEC, there were six examples of actual matters in which the agencies declined to pursue prosecution or enforcement action, together with brief descriptions of the factors that influenced those ***400** declination decisions. Such disclosure should become a routine practice for all declination decisions. One might argue that since the agencies do not routinely provide information on declinations in other types of cases (e.g., financial fraud, antitrust, and money laundering), FCPA cases should not be treated any differently. However, (1) publishing the six examples in the Resource Guide shows how the information can be published in a manner that is not damaging to the companies, i.e., without using company names or any identifying information; and (2) while statutes targeting financial fraud, antitrust, and money laundering have been extensively construed by the courts, that is not the case for the FCPA. Thus, until such a body of case law is developed, it is the opportunity to study documents such as declination decisions that can provide the guidance businesses need to successfully comply with the FCPA.

B. FCPA Opinion Procedure Releases should have greater precedential value.

When the FCPA was enacted, the law directed the U.S. Attorney General to establish a procedure to provide responses to inquiries by those subject to the law regarding how a particular behavior or plan of action might (or might not) conform with DOJ's "present enforcement policy." [266] In other words, subjects of the law can write in and get a sense, in the form of a DOJ Opinion Procedure Release, of whether or not "specified, prospective--not hypothetical--conduct" would run afoul of the Act. [267] While the DOJ makes the opinions available through its web site, [268] the general public cannot rely upon those opinions, as a matter of law, to protect themselves from federal prosecution for engaging in similar conduct. Indeed, every opinion specifically states that it "has no binding application to any party which did not join in the request [of the opinion] . . . ." [269] DOJ should change this policy. Specifically, the new policy could mandate that if a particular Opinion Procedure Release states that conduct X, Y, or Z discussed therein conforms with the FCPA, that opinion is then entitled to a rebuttable presumption for any individual ***401** or company exhibiting the same conduct, whether they were a party to the Opinion Procedure Release or not, should an enforcement action later be brought as a result of the conduct discussed. If these opinions had precedential value in this manner, they would be far more helpful in giving guidance to other individuals and corporate entities trying to stay within legal bounds vis-á-vis the FCPA. One might criticize this idea by pointing out that neither IRS "private letter rulings" nor SEC "no-action letters" can currently be relied upon for legal precedent. However, it must be remembered that there are hundreds of judicial opinions covering every aspect of the work done by those two agencies, and those judicial opinions provide companies with extensive guidance on the intricacies of IRS and SEC policies, rules, and regulations--guidance that is currently in far shorter supply with respect to the FCPA.

C. The U.S. Congress Should Thoroughly Investigate, in As Nonpartisan a Manner As Possible, [270] the Advantages and Disadvantages of Passing an FCPA Compliance Defense.

Whatever the political, economic, or other reasons preventing the U.S. Congress from incorporating an FCPA compliance defense heretofore, legislation for such a defense could easily be worded in a manner that avoids the core criticism cited by its strongest opponents. [271] Namely, a compliance defense would protect acts of FCPA wrongdoing by corporate officers and directors that are "knowing" and "corruptly" undertaken with intent, [272] thereby completely undermining the FCPA. [273] In order to avoid that outcome, any compliance defense passed by Congress should not attempt to insulate corporate leadership from their own knowing and intentional wrongdoing under the FCPA, but, rather, should be designed in a narrow and targeted fashion to protect companies from rogue employees who commit FCPA crimes despite company efforts to prevent such crimes.

Indeed, even the Export Enhancement Act of ***402** 1986, (discussed at pp. 40-41, supra), in defining "due diligence," stated that a company would be protected from civil and criminally liability only for FCPA violations made by employees who are not officers or directors of the company.[274] That legislation, although never signed into law, intentionally and specifically disallowed protection of a company from FCPA civil or criminal liability if the wrongdoers were either officers or directors within the company. The drafters of that 1986 legislation were on the right track; any reasonable, modern-day compliance defense law should follow suit and work to insulate companies from FCPA civil and criminal liability only with respect to lower level, rogue employees who are not officers or directors within the business. Not only would such legislation increase FCPA compliance by providing the leadership of a business with strong incentives to implement policies and programs to identify current (and deter future) violations, but it would also provide corporations with some protection against aggressive prosecutors who can otherwise exploit the power imbalance inherent in the current FCPA statute.[275]

D. Judicial Supervision of the NPA and DPA Negotiation Processes Should Be Mandated.

This article suggests that the DOJ's Filip Memo failed in achieving one of its primary goals: to rein in DOJ prosecutorial power by increasing procedural protections for corporations under investigation. As one commentator soberly puts it: "[T]here is a real possibility that the new guidelines may create an underground system of waiver and coercion because these tactics have become so entrenched in white-collar practice."[276] If that commentator is correct and an "underground system of waiver and coercion" leads to commonplace infringements on attorney-client or work product protections, it would be a dire state of affairs indeed. These protections, with their ethical and constitutional underpinnings, are extremely important. The crux of the matter, of course, is that companies who are being investigated by the DOJ, and who are in the process of negotiating an NPA or DPA with the Department, do not feel like they are in a position to say "no" when the DOJ makes various suggestions during the course of the negotiation--even ***403** suggestions that might begin to infringe on attorney-client and/or work product protections. If courts could be involved to referee or play a "supervisory" role while the NPA or DPA is being negotiated, that would provide for a more fair and balanced negotiation between the DOJ and the accused party. Obviously, the details of such a policy would need to be resolved (e.g., does the Judge need to be present for all negotiation conversations, or can he or she simply be on standby, making himself or herself available should a difficult situation arise?). These details, however, could easily be fleshed out over time; moreover, different jurisdictions and courts might experiment with different ways of supervising such negotiations.

E. Judicial Review of NPAs and DPAs After They Are Drafted but Before They Are Signed Should Be Mandated.

Because prosecutors have the exclusive power to choose to indict or to enter into an agreement such as an NPA or DPA, effective judicial review does not require reviewing (or interfering with) a charging decision, nor does it require dictating the terms of an NPA or DPA. Rather, courts would play merely a reviewing or supervisory role by approving or rejecting a completed agreement immediately after it has been drafted, but before it has been signed by the parties involved. With increased judicial review, not only would there be a more reasonable balance of power between prosecutors and corporations during the negotiation phase of NPA and DPA deal making, but companies would be provided with guidance on how some of the more vague FCPA provisions (such as where the law stands regarding the definition of "foreign official") will be construed by the courts. Judicial review would also make it less likely that the DOJ's sometimes exuberant requests for cooperation do not mistakenly result in over-disclosure by companies who feel they simply cannot say "no" during the negotiation. Finally, judicial review would ensure that DOJ claims and theories of corporate wrongdoing actually stand on firm legal ground. Currently, most agreements fail to explain: (1) whether (and how) the defendant's conduct satisfies the elements of the FCPA violation and (2) whether there is proper legal precedent to punish the defendant. Instead, NPAs and DPAs currently tend to recite legal conclusions. If judicial review were incorporated into the process as this article proposes, then, after prosecutors and defendants finish negotiating the terms of an agreement, the court could review all the evidence, admitted facts, and legal analyses to ensure the conclusions and terms of ***404** the agreement are reasonable, legally supportable, and fair to both the parties and the general public. Only after the court's review and approval would the NPA or DPA become an enforceable agreement.

F. Judicial Review Regarding the Issue of NPA and DPA Breaches Should Be Mandated

Most DPAs and NPAs include a term giving the prosecutor the right to determine whether a breach of the agreement has occurred. If the corporation breaches, the agreement is thereby revoked and the corporation becomes subject to prosecution. Moreover, there is very little recourse for a corporation to contest the DOJ's determination of breach, and it has no right to appeal the determination to an independent, impartial judicial authority. This threat of unilateral revocation of the agreement increases the leverage exercised by prosecutors. Surely, companies feel an increased sense of pressure to cooperate with the DOJ throughout the deferral period of the agreement, knowing that prosecutors have the power to decide whether or not the terms of the agreement have been met. In such a situation, prosecutors effectively become both judge and jury over a corporation's criminal conduct. Judicial review of the determination on whether or not a prosecution agreement has been breached would clearly offer some measure of security to companies that sign agreements.

While it is "axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement," [277] a central criticism of the recommendations set forth above might be: What gives courts the authority to perform the judicial supervision and reviews that are recommended? To this I would respond thusly:

First, U.S. District Court Judge John Gleeson of the Eastern District of New York ruled, in United States v. HSBC Bank USA (see fn. 250-59, supra), that courts have an important role to play in reviewing and overseeing DPA agreements. While he stated that his opinion did not apply to NPA agreements, this article attempts to articulate why the ruling could and should extend to NPA agreements.

Moreover, in certain types of cases that present "special ***405** considerations not present in ordinary litigation," the law requires that judges formally approve proposed settlements. [278] Currently, settlements requiring court approval include the following: (1) bankruptcy claims; (2) class action and shareholder derivative suit settlements; (3) environmental clean-up consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); (4) settlements of actions in which receivers are appointed; (5) consent decrees in civil antitrust suits brought by the United States; (6) settlements of employment claims under the Fair Labor Standards Act ("FLSA"); and (7) settlements in cases involving incompetent persons or minors. [279]

In all these categories of cases, courts are charged by statute (or rule) to review proposed settlements to ensure that the settlement is "fair to the persons whose interests the court is to protect." [280] Of course, a court's power to approve or reject proposed settlements does not include the power to force parties to accept a judicially-amended agreement. [281]

It could be argued that FCPA cases also exhibit special considerations not present in ordinary litigation, and that the law should therefore require judges to review and approve FCPA "settlements" achieved via NPA and DPA agreements. The justification for such court review would be largely analogous to that which currently exists for:

(a) CERCLA environmental clean-up consent decrees, where courts are currently required to ensure the settlement is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve;" [282]

***406** (b) antitrust consent decrees in suits brought by the United States, where courts are currently required to "ensure that the Justice Department's use of consent decrees in antitrust cases would fully promote the goals of the antitrust laws and foster public confidence in their fair enforcement;" [283] and

(c) FLSA claim settlements, where courts are currently required to ensure that the settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." [284]

In all three situations, Congress has determined that a neutral judge should review settlements to ensure they are consistent with the applicable federal statute and the public interests and policies expressed therein. [285] Similarly, in Recommendation (E), supra, it is proposed that courts be empowered to review FCPA diversion agreements and ensure that "the conclusions and terms of the agreement are reasonable, legally supportable, and fair to both the parties and the general public."

VI. CONCLUSION

The six recommendations set forth above would help to level the FCPA negotiation playing field between the DOJ and accused parties as they work together toward a resolution. Even if one disagrees with the recommendations or sees legislative, judicial, or political roadblocks to their adoption or implementation, my hope is that the article points out to readers that real and significant power imbalances exist when the DOJ employs DPAs and NPAs to address FCPA enforcement matters. This is not fair or just to the party sitting on the "accused" side of the negotiation table, and something should be done to address that unfairness. [286]

Footnotes

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1 15 U.S.C. §§ 78dd-1 to 78ff (2012).

2 Janet Novack, Club Fed, Deferred, Forbes (Aug. 29, 2005), http:// www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html.

3 See U.S. Department of Justice, United States Attorneys' Manual § 9-28.200 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_ room/usam/title9/28mcrm.htm. See also Benjamin M. Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, 105 Colum. L. Rev. 1863, 1869 (2005) ("Deferred prosecution offers prosecutors an intermediate option between declination and plea bargaining, as deferrals exact sanctions while circumventing the collateral consequences of a conviction.") (internal citation omitted).

4 See 2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), Gibson Dunn (July 9, 2013), http://www.gibsondunn.com/publications/pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx [[hereinafter 2013 Mid-Year Update]

5 Id.

6 Of course, an Alford plea would involve a no-contest plea where the defendant does not admit guilt but nonetheless accepts a conviction. See generally Stephanos Bibas, Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 Cornell L. Rev. 1361 (2003).

7 See Greenblum, supra note 3, at 1869 ("A guilty plea (in a plea bargain) results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial.") (citations omitted).

8 See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 8, at 57-67.

9 See id. at 68-73.

10 See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 8, at 74-75.

11 Harry T. Edwards, Commentary, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 679 (1986) (emphasis in original).

12 Interview with David Pitofsky, 19 Corp. Crime Rep. 46 (8) (Nov. 28, 2005) (emphasis added).

13 Ernst & Young, 12th Global Fraud Survey (2012), available at http:// www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/Global-Fraud-Survey---a-place-for-integrity.

14 Id.

15 Id.

16 Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann, World Bank News & Broadcast (last visited Mar. 31, 2014), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,, contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~ theSitePK:4607,00.html.

17 Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann, supra note 16.

18 See generally id.

19 Id.

20 World Bank, A Guide to the World Bank 112 (2003), available at http:// www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/04/25/000090341_ 20060425085823/Rendered/ PDF/271450REVISED010WB0Revised01PUBLIC1.pdf.

21 Id.

22 Carolyn Lindsey, More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act, 35 Ohio N. U. L. Rev. 959, 961 (2009).

23 U.S. Dep't of Justice, Lay Person's Guide to the FCPA (2011), available at http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf.

24 15 U.S.C. §§ 78dd-1 to 78dd-3.

25 15 U.S.C. § 78m(b).

26 15 U.S.C. § 78dd-2(a)(1).

27 Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C. J. Int'l L. & Com. Reg. 83, 89 (2007).

28 This category includes "any issuer which has a class of securities registered pursuant to § 78***l*** ... or which is required to file reports under § 78o(d)." 15 U.S.C. § 78dd-1.

29 15 U.S.C. § 78m(b)(2)(A).

30 15 U.S.C. § 78(m)(b)(2)(B).

31 Amy Deen Westbrook, Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act, 45 Ga. L. Rev. 489, 495 (2011).

32 Krever, supra note 23, at 93-94.

33 Westbrook, supra note 31, at 495-96, 540.

34 Shearman & Sterling LLP, FCPA Digest: Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977 viii (2012), available at http:// www.shearman.com/~/ media/Files/NewsInsights/Publications/2012/01/Shearman2020Sterlings20Recent20Trends20a__/ Files/View20full20January20201220iFCPA20Digest/FileAttachment/FCPADigestJan2012.pdf.

35 Gregory M. Lipper, Foreign Corrupt Practices Act and the Elusive Question of Intent, 47 Am. Crim. L. Rev. 1463, 1465 (2010).

36 Shearman & Sterling, supra note 34, at ii.

37 Id. at iv.

38 Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at http:// www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

39 See generally, Michael B. Bixby, The Lion Awakens: The Foreign Corrupt Practices Act -1977 to 2010, 12 San Diego Int'l L.J. 89, 120 (2010).

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45 Press Release, United Nations Convention Against Corruption (Dec. 10, 2003), available at http:// www.un.org/webcast/merida/statements/pressrelease2-eng.htm.

46 Id.

47 Press Release, Signing of the United Nations Convention Against Corruption (Dec. 10, 2003).

48 See Pierre-Hugues Verdier, Transnational Regulatory Networks and Their Limits, 34 Yale J. Int'l L. 113 (2009).

49 FCPA investigations raise a number of issues that can only be addressed when there is international cooperation and coordination between and among enforcement agencies. See U.S. Dep't of Justice, United States Attorneys' Manual § 9-47.110 (2008), available at http://www.justice.gov/usao/eousa/foia_ reading_room/usam/title9/title9.htm.

50 Lanny A. Breuer, Ass't Att'y Gen., U.S. Dep't of Justice,Address at Columbia Law School: The Global Case for Justice: Protecting Human Rights and Promoting the Rule of Law (Oct. 7, 2009), available at http:// www.justice.gov/criminal/hrsp/pr/speeches/2009/10-07-09breuer-speech.pdf

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54 U.S. Dep't of Justice, Response of the United States: Questions Concerning Phase 3 OECD Working Group on Bribery § 10.2 (2010), available at http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf.

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56 Cooperative Agreements with Foreign Regulators, U.S. Sec. & Exchange Commission, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited July 19, 2013).

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60 Mary Kreiner Ramirez, Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002, 34 Loy. U. Chi. L.J. 359, 361 (2003).

61 See Robert Prentice, Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404, 29 Cardozo L. Rev. 703, 706 (2007).

62 15 U.S.C. § 7241(a)(5)(B) (2006).

63 See Laura E. Kress, How the Sarbanes-Oxley Act has Knocked the "SOX" Off the DOJ and SEC and Kept the FCPA on Its Feet, 10 U. Pitt. J. Tech. L. & Pol'y 2, 3-5 (2009).

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65 Richard A. Posner, Economic Analysis of Law 583 (Aspen, 6th ed. 2003).

66 Id. at 584.

67 See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong., 2011 (statement of Rep. Frank James Sensenbrenner, member, House Comm. on the Judiciary) (noting "the absence of case law interpreting the breadth and scope of the FCPA" and suggesting that such an absence can play a role in increased prosecutorial discretion in FCPA cases; also noting that "companies lack guidance" in how to conform to the FCPA). Although FCPA allegations very rarely go to trial, some that have been tried in recent years have resulted in courts rejecting the somewhat expansive theories put forward by the government. For example, in what are sometimes called the "SHOT Show" cases, the DOJ charged twenty-two defendants with FCPA violations. The charges arose from evidence that included hundreds of audio and video recordings, but after three defendants pled guilty, two trials resulted in two acquittals and the dismissal of the indictments against the remaining defendants. See Del Quentin Wilber, Charges Dismissed Against 16 Accused of Bribing Foreign Official

in Sting, Wash. Post, Feb. 21, 2012, http://www.washingtonpost.com/local/crime/charges-dismissed-against-16-accused-of-bribing-foreign-official-in-sting/2012/02/21/gIQAOhU5RR_story.html.

68 Carrie Menkel-Meadow, Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 500 (1985).

69 See Mike Koehler, The Façade of FCPA Enforcement, 41 Geo. J. Int'l L. 907, 998 (2010) (arguing that privately negotiated settlements serve as de facto case law even though they are subject to little or no judicial scrutiny).

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72 U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 70, at 86-87.

73 Id. at 75.

74 See U.S. Dep't of justice, www.justice.gov (last visited Apr. 4, 2014).

75 U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 70, at 75.

76 Id.

77 But see id. at 107 n.379 (noting that, while it is no longer DOJ's practice, historically the Department had, on occasion, agreed to DPAs with companies that were not filed with the court).

78 Id. at 74.

79 Id. at 74.

80 See U.S. Dep't of Justice, www.justice.gov (last visited Apr. 4, 2014).

81 U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 70 at 74 ("A company's successful completion of a DPA is not treated as a criminal conviction.").

82 Letter from Frank James Sensenbrenner & Sandy Adams, U.S. House of Representatives, to Greg Andres, Deputy Assistant Attorney Gen., U.S. Dep't of Justice (June 22, 2011), available at http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress.

83 The Principles of Prosecution of Business Organizations are available at http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

84 Letter from Ronald Welch, Assistant Attorney Gen., Office of Legislative Affairs, to Sandy Adams, U.S. House of Representatives, available at http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress.

85 Id.

86 Letter from Ronald Welch, supra note 84.

87 Id.

88 Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), available at http://www.justice.gov/opa/pr/2012/April/12-crm-534.html.

89 Press Release, U.S. Dep't of Justice, supra note 88.

90 See Larry Boyd, EVP, Sec'y & Gen. Counsel, 2012 Chief Legal Officer Leadership Forum (May 3, 2012), available at http://www.argylejournal.com/articles/session-transcript-larry-boyd-evp-secretary-general-counsel-ingram-micro-inc/.

91 28 C.F.R. § 80.1 (2011).

92 Id.

93 In one example, the Requestor proposed "to pay certain expenses for a trip to the United States by one official from each of two foreign government agencies to learn more about the services provided by the Requestor. The two officials will be selected by their agencies, without the involvement of the Requestor .... The Requestor has no non-routine business pending before the foreign government agencies that employ these officials. The sponsored program will last for approximately two days (not including travel time). The Requestor intends to pay for economy class air fare, domestic lodging, local transport, and meals." In response, the DOJ stated that the expenses contemplated were reasonable and, citing 15 U.S.C. § 78dd-2(c)(2)(A), in conformance with the FCPA provisions relating to "the promotion, demonstration, or explanation of products or services." Therefore, the DOJ stated that it "does not presently intend to take any enforcement action with respect to the planned program and proposed payments described in this request." The opinion is available at http://www.justice.gov/criminal/fraud/fcpa/opinion/.

94 28 C.F.R. § 80.10 (2011).

95 The Opinion Procedure Releases are available through the U.S. Department of Justice website at http:// www.justice.gov/criminal/fraud/fcpa/opinion/.

96 See U.S. Dep't of Justice, Opinion Procedure Release No. 11-01, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf.

97 See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 70.

98 Kevin J. Harnisch et al., The Disappearing Exception for Facilitating Payments, N.Y.L. J., Feb. 11, 2013, available at http://www.friedfrank.com/siteFiles/Publications/NYLJ20-20Harnisch-Witzel-Roth20Feb202013.pdf.

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100 Peter Spivack & Sujit Raman, Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements, 45 Am. Crim. L. Rev. 159, 163 (2008).

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103 Id.

104 Greenblum, supra note 3, at 1866.

105 U.S. Dep't of Justice, United States Attorneys' Manual § 9-22.010 (2008), available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm.

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110 See Mike Koehler, DOJ Prosecution of Individuals - Are Other Factors at Play?, FCPA Professor (Sept. 22, 2011), http:// www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play.

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112 Koehler, supra note 69, at 907 (2010) (arguing that FCPA violations are oftentimes settled using diversion agreements that are not subject to judicial scrutiny).

113 Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., on Bringing Criminal Charges Against Corporations, to All Component Heads and U.S. Attorneys (June 16, 1999), available at http:// www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

114 Id. at § II(A).

115 Id. at Introduction.

116 Memorandum from Eric H. Holder, Jr, supra, note 113 at § II(A)(4).

117 Id. at § VI(B).

118 Id. at § VI(B).

119 Id.

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121 Memorandum from Larry D. Thompson, Deputy Att'y Gen., on to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003), available at http:// www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

122 Id. at § VI(B).

123 See, e.g., Rebecca C.E. McFadyen, The Thompson Memo: Its Predecessors, Its Successor, and Its Effect on Corporate Attorney-Client Privilege, 8 J. Bus. & Sec. L. 23, 29 (2007) ("The Thompson Memo recognized the impropriety of a waiver request for communications regarding a corporation's ongoing defense in a criminal investigation, but the Memo's general lack of guidance created a 'wide area in the middle where the practices of federal prosecutors vary considerably'."); see also The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. On the Judiciary, 109th Cong. 147 (2006) (statement of Andrew Weissmann, Partner, Jenner & Block) (arguing there was a lack of uniform standards in the application of the Thompson Memo and, further, arguing for revisions to the Memo "so that it no longer encourages an environment where employees risk losing their jobs or legal defense").

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133 Id. at 368-69.

134 See United States v. Stein, 541 F.3d 130, 157-58 (2d Cir. 2008).

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148 Brian Baxter, With Thompson Trashed and McNulty Moot, Filip Memo's Time has Come, Am. L. Daily, Aug. 28, 2008, available at http:// amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html.

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153 Model Rules of Prof'l Conduct R. 1.6 (2008) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ....").

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170 Pamela H. Bucy, Trends in Corporate Criminal Prosecutions, 44 Am. Crim. L. Rev. 1287, 1288 (2007).

171 Id.

172 See Paulsen, supra note 163, at 1455 (emphasis added). But cf. Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Penn. J. Bus. L. 797 (2013) (determining through use of the database of organizational convictions made publicly available by Professor Brandon Garrett that no publicly traded company failed because of a conviction in the years 2001 to 2010).

173 Paulsen, supra note 163, at 1456 ("mere indictment can put a company in a tremendously vulnerable position: Stock prices plummet, lines of credit dry up, and clients are scared off.").

174 Weissmann & Newman, supra note 169, at 426. See also Joseph W. Yockey, Solicitation, Extortion, and the FCPA, 87 Notre Dame L. Rev. 781, 825 (2011) (stating that "firms feel they must accept" settlements); Joan McPhee, Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?, Inside Litig., Winter 2006, at 4 ("Given the breadth of the corporate criminal liability doctrine and the potentially devastating consequences of a criminal conviction or even indictment, it is the rare corporation today that has a meaningful right to a jury trial in the resolution of its corporate criminal disputes with the government"); Jon May, Feature: The New British Invasion: Will the UK Bribery Act of 2010 Eclipse the FCPA?, 63 Champion 28, 31 (2012) ("... the ugly truth is that while the existence of nonprosecution and deferred prosecution agreements can be welcome alternatives to an indictment, combined with a virtually strict liability regime, they can also permit the government to exact millions of dollars in fines from companies that are genuinely without fault but cannot afford to take the risk of an adverse outcome if they take on the government.").

175 See Mike Koehler, FCPA 101: How Are FCPA Enforcement Actions Typically Resolved? FCPA Professor, http://www.fcpaprofessor.com/fcpa-101#q16 (last visited Apr. 4, 2014) ("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')").

176 See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

177 See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.") (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).

178 Paulsen, supra note 163, at 1457.

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180 Roger Fisher, William Ury & Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In 100 (1991) (defining BATNA as "the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept"). See generally Charles B. Craver, Effective Legal Negotiation and Settlement (2009).

181 See Greenblum, supra note 3, at 1885 ("The corporate offender's unique vulnerability to adverse publicity and collateral consequences ... calls into question whether the choice to enter into deferral is really a choice at all.").

182 Senko, supra note 151, at 180.

183 Senko, supra note 151, at 180.

184 Robert H. Mnookin & Lewis Kornhauser, Barganing in the Shaddow of the Law: The Case of Divorse, 88 Yale L.J. 950, 968-69 (1979).

185 See Mike Koehler, Add Alberto Gonzalez To The List Of Former High-Ranking DOJ Officials Who Support An FCPA Compliance Defense, FCPA Professor (Sept. 11, 2012), http://www.fcpaprofessor.com/add-alberto-gonzalez-to-the-list-of-former-high-ranking-doj-officials-who-support-an-fcpa-compliance-defense (discussing the "growing chorus of former DOJ officials" who support a compliance defense, including two former U.S. Attorney Generals (Michael Mukasey and Alberto Gonzalez), a former Deputy Attorney General (Larry Thompson), a former Chief of the DOJ's FCPA Unit (Joseph Covington), and a former high-profile corporate crime prosecutor (Andrew Weissmann)) [hereinafter Koehler, Alberto Gonzalez]. For a more thorough discussion of why each of these individuals supports a compliance defense, see Mike Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012 Wis. L. Rev. 609, 651-54 (2012) [hereinafter Koehler, Revisiting].

186 See generally Koehler, Revisiting, supra note 185, at 611.

187 Consider, for example, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), in which the Supreme Court examined vicarious employer liability for alleged sexual harassment by a supervisor. In deciding whether employers could offer an affirmative defense, the Court stated that the defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. at 765. See also Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (applying the same standard set forth in Burlington Industries, Inc. v. Ellerth).

188 Richard S. Gruner and Louis M. Brown, Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation, 21 Iowa J. Corp. L. 731, 764 (1996) (citation omitted).

189 See Charles R. Nesson, Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1257-58 (1979).

190 Ellen S. Podgor, A New Corporate World Mandates A "Good Faith" Affirmative Defense, 44 Am. Crim. L. Rev. 1537, 1543 (2007).

191 Id.

192 Model Penal Code § 2.07(1)(c) (Proposed Official Draft 1962).

193 Andrew Weissmann, A New Approach to Corporate Criminal Liability, 44 Am. Crim. L. Rev. 1319, 1335 (2007).

194 Id. at 1335.

195 The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on Int'l Econ. Policy & Trade of the H. Comm. On Foreign Affairs, 98th Cong. 226 (1983) (statement of Arthur F. Matthews, Partner, Wilmer, Cutler & Pickering LLP).

196 See H.R. Rep. No. 99-580, pt. 1 (1986).

197 See H.R. Rep. No. 99-580, at 66.

198 Id. at 9.

199 See, e.g., H.R. 4848, introduced by Representative Richard Gephardt of Missouri, entitled The Omnibus Trade and Competitiveness Act of 1988. The House Report summarizing H.R. 4848 stated the bill establishes "a new, 'due diligence' defense for civil and criminal liability of issuers and domestic concerns for violations of the FCPA by employees and agents. It provides that if the issuer or domestic concern has established procedures for detecting violations, and if the officers and employees with supervisory responsibility for the employees or agent violating the law have exercised due diligence to prevent the violation, then no vicarious liability will apply ...." H.R. Rep. No. 100-40, pt. 2, at 78 (1987).

200 See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1107, 1415-25.

201 See Boyd, supra note 90.

202 Andrew Weissmann & Alixandra Smith, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (2010), available at http:// openairblog.files.wordpress.com/2011/10/us-chamber-of-comm-amending-the-fcpa.pdf.

203 Weissmann, supra note 202, at 11.

204 See U.S. Dep't of Justice, United States Attorneys' Manual § 9-28.000 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_ room/usam/title9/28mcrm.htm.

205 See U.S. Sentencing Guidelines Manual § 8B2.1 (2012).

206 Weissmann & Smith, supra note 202, at 11.

207 See Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime, Terrorism and Homeland Security, H. Comm. On the Judiciary, 112th Cong. 19 (2011) (statement of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP), available at http://judiciary.house.gov/_ files/hearings/pdf/Mukasey06142011.pdf (emphasis added).

208 Weissmann & Smith, supra note 202, at 11. See also Bribery Act, 2010, c. 23, § 7(2) (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

209 U.K. Ministry of Justice, The Bribery Act 2010 15 (2011), available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

210 U.K. Ministry of Justice, supra note 209, at 7.

211 Id. at 8.

212 U.K. Ministry of Justice, supra note 209, at 8.

213 For a description of each country's compliance defense, see Koehler, Revisiting, supra note 185 at 638-45.

214 See Koehler, Alberto Gonzalez, supra note 185. The list of former DOJ officials who support a compliance defense includes two former Attorney Generals (Michael Mukasey and Alberto Gonzalez), a former Deputy Attorney General (Larry Thompson), a former Chief of the Justice Department's FCPA Unit (Joseph Covington), and a former high-profile corporate crime prosecutor (Andrew Weissmann). Scholars have also grappled with the issue, sometimes more directly (see, e.g, Podgor, supra note 190; Koehler, Revisiting, supra note 185) and sometimes in more tangential ways (see, e.g., Brent Fisse & John Braithwaite, The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability, 11 Sydney L. Rev. 468 (1988); Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?, 47 Rutgers L. Rev. 605, 689 (1995); V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477 (1996); William S. Laufer & Alan Strudler, Corporate Crime and Making Amends, 44 Am. Crim. L. Rev. 1307 (2007); Geraldine Szott Moohr, Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation, 44 Am. Crim. L. Rev. 1343 (2007)).

215 In January, 2012, more than thirty civil society and business groups sent a letter to every member of the U.S. Congress expressing their opposition to any legislative efforts to amend the FCPA. The signatories included, among others, Amnesty International, Calvert Investments, Citizens for Responsibility and Ethics in Washington, EarthRights International, Global Financial Integrity, Global Witness, Human Rights Watch, International Corporate Accountability Roundtable, Jubilee USA Network, Open Society Policy Center, Oxfam America, Revenue Watch Institute, and Transparency International USA. This letter is available at http://www.transparency-usa.org/documents/2012FCPACoalitionPressReleaseFINAL.pdf See also Open Soc'y Founds., Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act (2011) (arguing that the FCPA should not be amended).

216 See generally Open Soc'y Founds., supra note 215.

217 The FCPA defines "knowing" as follows:(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(f)(2)(a) and (b).

218 The FCPA does not explicitly define "corruptly," but in drafting the statute, Congress adopted the meaning ascribed to the same term in the domestic bribery statute, 18 U.S.C. § 201(b). See H.R. Rep. No. 95-640, at 7, which states in full:
The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly"

indicates an intent or desire wrongfully to influence the recipient. It does not require that the act (be) fully consummated or succeed in producing the desired outcome.

219 See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78ff. See also Foreign Corrupt Practices Act: Hearing Before the Subcomm. On Crime, Terrorism and Homeland Security, H. Comm. On the Judiciary, 112th Cong. 19 (2011) (statement of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP), available at http://judiciary.house.gov/_ files/hearings/pdf/Mukasey06142011.pdf (stating that the statutory language of the FCPA requires "evidence of knowledge and intent for liability").

220 See Open Soc'y Founds., supra note 215, at 31 ("Creating a 'compliance defense' to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a 'fig leaf' compliance program to insulate companies from knowing and intentional wrong-doing.").

221 See H.R. Rep. No. 99-580, pt. 1, at 66 (1986).

222 See Koehler, Revisiting, supra note 185, at 659 ("[I]t is reasonable to conclude that an FCPA compliance defense will cause more organizations with robust FCPA compliance policies and procedures to disclose rogue employee conduct to the enforcement agencies."). See also Mike Koehler, An Examination of Foreign Corrupt Practices Act Issues, 12 Rich. J. Global L. & Bus. 317, 372 (2013) ("An FCPA compliance defense is the best incentive for more robust corporate compliance as it can help reduce improper conduct and thus best advance the FCPA's objective of reducing bribery.").

223 See Weissmann & Smith, supra note 202, at 13.

224 See Ellen S. Podgor, Department of Justice Guidelines: Balancing "Discretionary Justice," 13 Cornell J.L. & Pub. Policy 167, 170 (2004). Given that the Principles of Prosecution are a part of the United States Attorneys' Manual, the following disclaimer found in the Manual's introduction underscores that the document serves to merely guide rather than to create substantive or procedural rights for the parties involved:

The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

U.S. Dep't of Justice, United States Attorney's Manual § 9-28.000 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_ room/usam/title9/28mcrm.htm.

225 Koehler, supra note 69, at 934, 937.

226 Id. at 935.

227 Id. (citing U.S. Gov't Accountability Office, Corporate Crime: DOJ has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness 25 (2009), available at http:// www.gao.gov/assets/300/299781.pdf).

228 Id. at 934.

229 See Daniel R. Wilson, Note, Administrative Procedure and Foreign Antibribery Enforcement: "Restoring Balance" Through Procedural Transparency, 36 Hastings Int'l & Comp. L. Rev. 289, 303 (2013) (arguing that the "primary flaw" of NPAs and DPAs is that there is "no binding procedure on the government to take into account valid contentions" put forth by defendants .... Judicial review could address this by "help[ing] to add transparency to the settlement process and enable corporate defendants to put forth these counterpoints without fear of DOJ retribution").

230 See 18 U.S.C. § 3161 (2010).

231 See 18 id. at § 3161(h)(2) (2010) (emphasis added).

232 United States v. HSBC Bank USA N.A., et al., No. 12 CR 763, slip op. at 5-6 (E.D.N.Y. July 1, 2013). The judge notes that his interpretation is supported by the legislative history of the provision. ("The Report of the Senate Judiciary Committee on the Speedy

Trial Act states that this provision 'assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits."') (quoting S. Rep. No. 93-1021, at 37 (1974)).

233 See 18 U.S.C. § 3161(h)(2) (2010) ("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.").

234 See Koehler, supra note 69, at 935-36.

235 Pete J. Georgis, Settling With Your Hands Tied: Why Judicial Intervention is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act, 42 Golden Gate U. L. Rev. 243, 275 (2012) (citation omitted).

236 U.S. Const. art. II, § 3.

237 United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926)).

238 See Greenblum, supra note 3, at 1898-99 (2005).

239 See Paul F. Enzinna, The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Businesses, Manhattan Institute for Policy Research, Issue Brief No. 17, Jan. 2013 (arguing that Congress should clarify the definition of "foreign official," specifically "the extent to which the FCPA applies to low-level employees of state-owned enterprises. The economic emergence of formerly Communist countries and of the still formally Communist China has led to a proliferation of state-owned enterprises with which American companies must do business in order to compete globally").

240 See Yockey, supra note 174, at 825 (noting that a lack of judicial scrutiny of FCPA agreements allows federal prosecutors to assert broad and vague theories of liability); see also 2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, Gibson Dunn (Jan. 4, 2011), http://gibsondunn.com/publications/pages/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.aspx (noting that because NPA and DPA agreements receive scant judicial scrutiny, the government tends to take expansive and untested legal positions).

241 See, e.g., Deferred Prosecution Agreement, United States v. Marubeni Corp., No. 12-CR-022 (S.D. Tex. Jan. 17, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf (DPA agreement providing only legal conclusions that the FCPA had been violated).

242 In determining whether an agreement is "reasonable," the court can assess whether DOJ's legal interpretations are consistent with congressional intent and statutory construction of the FCPA. See Julia Di Vito, Note, The New Meaning of New Process Steel, L.P. v. NLRB, 46 Wake Forest L. Rev. 307, 323 (2011). Although courts are bound to provide deference to the government's legal interpretations in FCPA matters, it is important for the judiciary to review the negotiated NPA and DPA agreements given that one of the parties, the prosecutor, clearly has a bargaining advantage. Such a review serves as a critical check on the power of the prosecutor, preventing him or her from unilaterally expanding the interpretation of any provision of the FCPA. See Richard A. Epstein, The Deferred Prosecution Racket, Wall St. J., Nov. 28, 2006, http://online.wsj.com/article/SB116468395737834160.html (suggesting that diversion agreements have the power to erode "the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers").

243 Other commentators have called for judicial review of FCPA diversion agreements; some have even begun to sketch out what such a review process would entail. See, e.g., Pete J. Georgis, Settling With Your Hands Tied: Why Judicial Intervention is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act, 42 Golden Gate U. L. Rev. 243, 277 (2012) ("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"). For additional thoughts on figuring out an applicable standard of review for FCPA agreement matters, see SEC v. Citigroup Global Markets Inc., where 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." SEC v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. Nov. 28, 2011).

244 Using its discretion, a court can evaluate whether the agreement is fair to both the parties and to the general public. See SEC v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. Nov. 28, 2011) ("Before the Court determines whether the settlement is fair, it must ask a preliminary question: fair to whom? ... The answer is, fair to the parties and to the public") (emphasis original).

245 The idea for judicial review of diversion agreements is not a new one. 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) (noting that the 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. Rather, the director suggests that judicial review and oversight within the UK's process is central, arguing that "only a judge can decide whether the terms are appropriate").

246 UK Crime and Courts Act 2013 (c. 22) Schedule 17, Part 1, paragraph 8 (1). (Emphasis added).

247 United States v. HSBC Bank USA N.A., et al., No. 12 CR 763, slip op. at 10 (E.D.N.Y. July 1, 2013).

248 Id. at 6, 10. Specifically, the Court states: This Court has authority to approve or reject the DPA pursuant to its supervisory power. "The supervisory power ... permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." United States v. Payner, 447 U.S. 727, 735 n.7 (1980) (quoting McNabb v. United States, 318 U.S. 332, 340 (1943)); Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("[E]very United States court has an inherent supervisory authority over the proceedings conducted before it ...."). HSBC Bank, No. 12 CR 763, slip op. at 6-7.

249 HSBC Bank, No. 12 CR 763, slip op. at 8 (quoting Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting)).

250 Id. at 10.

251 Id. at 10 (internal citation omitted).

252 HSBC Bank, No. 12 CR 763, slip op. at 9 (citing ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 283 (1987)) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.").

253 Id. (citing Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations to Heads of Department Components and U.S. Att'ys (Mar. 7, 2008), available at http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf) ("In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.").

254 Id. at 11. The Court cites to United States v. Hasting, 461 U.S. 499, 526 ("[Our] cases have acknowledged the duty of reviewing courts to preserve the integrity of the judicial process."); United States v. Payner, 447 U.S. 727, 735 n.8 ("[T]he supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity."); and Elkins v. United States, 364 U.S. 206, 216, 222-23 (discussing "the imperative of judicial integrity" in invoking the supervisory power). See HSBC Bank, No. 12 CR 763, slip op. at 7-8.

255 See HSBC Bank, No. 12 CR 763, slip op. at 7-8.

256 Senko, supra note 151, at 178.

257 Steven E. Fagell, James M. Garland and David M. Zionts, The HSBC DPA--Approved, But At What Cost?, Law360 (July 8, 2013), available at http:// www.cov.com/files/Publication/a5ced455-cc43-40f1-80ff52485645fabb/Presentation/PublicationAttachment/dcd98c07-67f7-4fbc-9201-58e51da1c475/The_HSBC_DPA_Approved_But_At_What_Cost.pdf.

258 HSBC Bank, No. 12 CR 763, slip op. at 9.

259 Judge Gleeson stated in his opinion that "a prosecutor's 'broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."' Id. at 14 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

260 Candace Zierdt & Ellen S. Podgor, Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing, 96 Ky. L.J. 1, 16 (2007).

261 Letter from Loretta E. Lynch, U.S. Attorney, & Jeffrey H. Knox, Chief of the Fraud Section of the Criminal Div. of the U.S. Dep't of Justice, on the Non-Prosecution Agreement between DOJ and of the Ralph Lauren Corporation, (April Apr. 22, 2013), available at http:// www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf (emphasis added).

262 See Paulsen, supra note 163 at 1464.

263 See Greenblum, supra note 3, at 1864 ("Deferral is a powerful prosecutorial tool because it is negotiated and implemented exclusively by the prosecutor.").

264 See Senko, supra note 151, at 178.

265 See U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, supra note 70.

266 28 C.F.R. § 80.1 (2011).

267 Id.

268 The Opinion Procedure Releases are available through the U.S. Department of Justice website, at http:// www.justice.gov/criminal/fraud/fcpa/opinion/.

269 See Dep't of Justice, Opinion Procedure Release No. 11-01, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/.

270 This could be done by assigning the issue to a joint Congressional committee such as the Joint Economic Committee, or to a research arm of Congress such as the Government Accountability Office.

271 See generally Open Soc'y Founds., supra note 215.

272 For definitions of "knowing," "corruptly," and "intent," see supra notes 220-222.

273 See Open Soc'y Founds., supra note 215, at 31 ("Creating a 'compliance defense' to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a 'fig leaf' compliance program to insulate companies from knowing and intentional wrong-doing.").

274 See H.R. Rep. No. 99-580, pt. 1, at 66 (1986).

275 See Weissmann & Smith, supra note 202, at 13.

276 See Heyman, supra note 158, at 179 .

277 Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 312 (7th Cir. 1980).

278 United States v. City of Miami, 614 F.2d 1322, 1330 & n.6 (5th Cir. 1980), modified on reh'g en banc, 664 F.2d 435 (5th Cir. 1981); see also Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits ... where settlement of the suit requires court approval.").

279 See Carrie Menkel-Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 Cornell L. Rev. 1159 (1995); Jeremy T. Grabill, Judicial Review of Private Mass Tort Settlements, 42 Seton Hall L. Rev. 123, 131-38 (2012).

280 Manual for Complex Litigation (Fourth) § 13.14 (2004); see also United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980), modified on reh'g en banc, 664 F.2d 435 (5th Cir. 1981) ("In these ... situations, the standard for approval has been stated ... that the trial court must find that the settlement is fair, adequate, and reasonable ....") (citations omitted).

281 See Manual for Complex Litigation (Fourth) § 13.14 (2004) ("The trial court may not rewrite a settlement agreement; if it is unacceptable the court must disapprove it, but it may suggest changes."); Principles of the Law of Aggregate Litigation § 3.05, cmt. d, at 212 ("Numerous courts have recognized that a court may accept or reject a settlement but may not impose terms on unwilling parties.").

282 United States v. Cannons Eng'g Corp., 899 F.2d 79, 85 (1st Cir. 1990) (quoting H.R. Rep. No. 253, pt. 3, at 19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042).

283 United States v. AT&T, 552 F.Supp. 131, 148 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

284 Lynn's Food Stores, Inc. v. United States ex rel. U.S. Dep't of Labor, 679 F.2d 1350, 1353 (11th Cir. 1982).

285 See Jeremy T. Grabill, Judicial Review of Private Mass Tort Settlements, 42 Seton Hall L. Rev. 123, 134-37 (2012).

286 As Federal Circuit Court Judge Harry T. Edwards warned nearly three decades ago: Settling matters through ADR is not always "fair and just." Edwards, supra note 11, at 679 (emphasis original).

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