REGULATING CORRUPTION: ANALYZING UNCERTAINTY IN CURRENT FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT

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INTRODUCTION

In 1974, Nicolas Sanchez and Alan R. Waters wrote that "[c]orruption is like sex was in Victorian England: it absorbs intense activity and is the subject of much speculation, but it is seldom considered a suitable topic for serious economic analysis."[1] Thirty-five years later, Assistant Attorney General Lanny A. Breuer called 2009 "the most dynamic single year" in prosecuting foreign bribery and corruption since the Foreign Corrupt Practices Act was enacted in 1977.[2] Foreign corruption today is the subject of significant regulation through the Foreign Corrupt Practices Act (FCPA).[3] The Department of Justice (DOJ) has made clear that it "will not shy away from tough prosecutions and [it] will not shy away from trials" involving the FCPA.[4] Commentators suggest that significant trends in FCPA prosecution include increased financial penalties; more individual prosecutions; internationalized foreign anti-corruption enforcement; FCPA prosecutions coupled with other charges; and continued increase in FCPA litigation.[5] Since 2005, the DOJ has brought about sixty FCPA cases, which is more than the total number of cases brought in the thirty-two years between the Act's inception in 1977 and 2005.[6]

Fines have grown exponentially in recent years, as illustrated by the recent enforcement action involving Siemens AG Corporation.[7] Siemens pleaded guilty to the DOJ's charged violations of the FCPA's accounting provisions and consented to a civil complaint issued by the Securities and Exchange Commission (SEC) related to the same incident.[8] Siemens also settled charges with the Munich Public Prosecutor's corruption probe in 2007 by agreeing to pay €395 million – including €394.75 million of disgorged profits and about

[1] N. Sanchez & A.R. Waters, *Controlling Corruption in Africa and Latin America*, *in* THE ECONOMICS OF PROPERTY RIGHTS 279, 279 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974).

[2] Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Crim. Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, at 2 (Nov. 17, 2009) (transcript available at http://www.justice.gov/criminal/pr/speeches-testimony/documents /11-17-09aagbreuer-remarks-fcpa.pdf).

[3] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd (1)-(3), 78ff (2006)).

[4] Breuer, *supra* note 2.

[5] F. Joseph Warin, *2008 Year-End FCPA Update*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2009: COPING WITH HEIGHTENED ENFORCEMENT RISKS 503, 506-07 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1737, 2009).

[6] Breuer, *supra* note 2.

[7] *See* Robert C. Blume & J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 COLO. LAW. 91, 91 (2007).

[8] *See* Warin, *supra* note 5, at 507 (reporting that the SEC charged Siemens with violating anti-bribery, books-and-records, and internal controls laws).

€250,000 in fines and administrative penalties.[9] Adding to that sum the fines and penalties stemming from its communications business's settlement with the Munich Public Prosecutor and the company's settlement with German tax authorities, Siemens paid over $1.9 billion to both American and German authorities in connection with corruption investigations.[10] It is important to note that the settlement figures could have been significantly larger because the United States Sentencing Guidelines (Guidelines) recommend a criminal fine between $1.35 and $2.7 billion.[11] The size of the Siemens U.S. settlements "dwarf[ed] the prior record FCPA settlement," and the combined U.S. settlements exceeded the aggregate dollar amount collected by the U.S. government in every case preceding Siemens's in connection with the FCPA.[12]

A criminal law's legitimacy is often premised on certainty and predictability – also referred to as fair warning. Indeed, the Supreme Court has maintained that "[e]ngrained in our concept of due process is the requirement of notice."[13] Query, though, whether defendants' and commentators' surprise at the sheer size of the FCPA fines suggests a somewhat ironic disconnect between expectations and actual results.[14]

Recent legal scholarship argues that governmental authorities can manipulate uncertainties in the law to ensure greater deterrence.[15] Uncertainty may provide a better deterrent than a clearly quantifiable risk of punishment, for "an optimal level of uncertainty may generate an appropriate equilibrium of deterrence and personal liberty."[16] Take, for example, a hypothetical involving two different highways. One highway has a posted speed limit of sixty-five miles per hour. The other has a posted sign merely stating "Do Not Speed." Human behavior (and personal experience) indicates that on the former highway, many people will drive somewhere within the range of sixty-five to eighty miles-per-hour. It is clear what the legal limit is, and that clarity allows drivers to assess the risk of how closely he or she walks the line between legal and illegal activity. On the latter highway, however, drivers are unsure what "Do Not Speed" means. That uncertainty tends to convince people to drive on the slower side, because it is unclear at what point he or she violates the law. The only sure thing is that the slower one drives, the lower the risk of a violation.

[9] *Id.*

[10] *Id*.

[11] *Id.* at 508; *see also* Breuer, *supra* note 2, at 4.

[12] Warin, *supra* note 5, at 508.

[13] Lambert v. California, 355 U.S. 225, 228 (1957).

[14] *See* Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 MICH. L. REV. 467, 491 (2008).

[15] *See, e.g.*, *id.* at 496.

[16] Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1546-47 (2005); *see also id.* at 1539 ("Uncertainty breeds caution and restraint.").

Scholars have made such arguments in the contexts of criminal and civil laws and administrative regulations.[17] Not all scholars find uncertainty optimal, however; some question the system's fairness and the relative value of that fairness.[18] This Note reviews these arguments and attempts to evaluate current FCPA enforcement within the context of the uncertainty debate.

FCPA enforcement has evolved over the years, and the DOJ and SEC have become increasingly active in pursuing FCPA violators. Today, very few FCPA cases go to trial, and most that do involve individual defendants rather than corporate entities. One of the most recent and most controversial trends in FCPA enforcement is the imposition of external compliance monitors as a term in a pre-trial diversion agreement between the government and the defending corporation. This Note details the history and reasons for this change and commentators' critiques of the corporate monitor's utility. A common criticism of using monitors in the FCPA context relates to the uncertainty of when a monitor will be imposed, what the terms of the monitorship agreement will be, and whether such an agreement will provide a reliable prediction of future FCPA enforcement. This Note brings to light concerns about situations in which uncertainty relates not to the underlying criminal statute, but to the discretion of prosecutors and application of relevant guidelines.

Part I of the Note reviews the history of the FCPA. Part II discusses the provisions of the FCPA and how the DOJ and SEC apply them in enforcement actions today. Part III outlines a brief history and the present use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Part IV discusses the use of monitorships and the circumstances warranting the imposition of an external compliance monitor. Part V argues that it is not clear that the uncertainty related to prosecutorial discretion induces greater compliance in the FCPA context. While violators may be uncertain of the actual consequences of violating the FCPA, this Note suggests that FCPA violators are no less certain than any other violators of laws whose consequences are a function of prosecutorial discretion. Manipulating the uncertainty, therefore, might very well have a minor additional effect, if any, on promoting deterrence.

[17] *See, e.g.*, Tom Baker, Alon Harel, & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 471 (2004); Guttel & Harel, *supra* note 14, at 497.

[18] *See, e.g.*, R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 431 (2005) ("Uncertainty in any legal regime is almost always undesirable.").

I. THE FCPA'S HISTORY

Congress enacted the FCPA in 1977 in the wake of the Watergate Special Prosecutor's investigation, which brought to light American corporate corruption within Nixon's reelection campaign, including bribery, money laundering in foreign countries, and illegal domestic campaign financing with overseas "slush funds."[19] These revelations prompted the SEC to establish a voluntary disclosure program, which revealed that at least four hundred companies collectively had made more than $300 million in questionable overseas payments.[20] One hundred seventy-seven of the multinationals that admitted to engaging in corrupt practices or bribery were Fortune 500 companies, including Exxon and Lockheed Martin.[21] Although the United States called for an international effort to fight bribery, neither corporations nor foreign governments took meaningful remedial action.[22] Therefore, Congress passed the FCPA to serve as the "first national legislation to criminalize foreign bribery."[23]

Despite its unprecedented nature, the FCPA was "a largely symbolic exercise at first," referred to by some commentators as a "legal sleeping dog."[24] Nevertheless, Congress and American corporations alike began to perceive a competitive disadvantage due to the lack of parallel anticorruption laws in other countries.[25] Congress therefore amended the statute in 1988,

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[19] H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 241-42 (2001); David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 476 (2009).

[20] Brown, *supra* note 19, at 244; Weiss, *supra* note 19, at 476.

[21] *See* H.R. REP. NO. 95-640, at 4 (1977).

[22] Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691, 697 (2007) ("[A]dverse publicity failed to produce serious remedial measures. Only three corporations forced the resignation of their chief executive officers, and moreover, no prosecutions ensued. Lockheed Martin, the largest government contractor at that time, reported increased profits that year.").

[23] *Id.* at 698; *see also* Weiss, *supra* note 19, at 476-77.

[24] Blume & McConkie, *supra* note 7, at 91 (citations omitted).

[25] Snider & Kidane, *supra* note 22, at 698 ("Because European multinationals had no parallel legal obligations to abstain from certain business practices in foreign countries, the U.S. business community perceived the FCPA as a disadvantage . . . ."); Dep't of Justice, *Foreign Corrupt Practices Act Antibribery Provisions*, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf [hereinafter *DOJ Lay-Person's Guide*] (last visited Dec. 1. 2010) ("Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their

establishing two affirmative defenses and instructing the President to negotiate with the Organization of Economic Cooperation and Development (OECD) to establish similar legislation in other countries.[26] Congress amended the FCPA again in 1998, effectuating the principles of the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention), which was adopted by the OECD.[27] These amendments considerably expanded the scope of the Act.[28] For example, the definition of "foreign official" now includes any officer of a public international organization.[29] Additionally, the amendments expanded the class of potential violators to "any person . . . or agent of such person" who makes use of an instrumentality of interstate commerce to bribe a foreign official, effectively extending jurisdiction to all foreign individuals and entities.[30] Finally, the amendments extended the prohibition to "any United States person," irrespective of whether the corrupt action makes use of interstate commerce or occurs within the territory of the United States.[31]

II. REGULATING CORRUPTION TODAY

The FCPA regulates corruption in two ways: by prohibiting bribery of foreign officials[32] and by requiring companies with stock registered pursuant to the Securities Exchange Act of 1934[33] (Exchange Act) to implement record keeping standards and internal controls.[34] The DOJ enforces the anti-bribery provisions with respect to domestic concerns, foreign nationals, and foreign companies.[35] The SEC enforces the accounting provisions and the anti-bribery provisions with respect to issuers.[36]

taxes.").

[26] *DOJ Lay-Person's Guide*, *supra* note 25, at 2, 5.

[27] Brown, *supra* note 19, at 239.

[28] *DOJ Lay-Person's Guide*, *supra* note 25, at 2.

[29] International Anti-Bribery & Fair Competition Act of 1998, Pub. L. No. 105-366, § 2(b), 112 Stat. 3302, 3302-03; *see also* Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 581 n.8 (2008).

[30] 15 U.S.C. § 78dd-3 (2006); *see also* Brown, *supra* note 19 at 291.

[31] 15 U.S.C. § 78dd-2(i)(1); *see also* Sebelius, *supra* note 29, at 590.

[32] 15 U.S.C. § 78dd-1(a), -2(a), -3(a).

[33] § 78a to -mm.

[34] § 78m.

[35] *DOJ Lay-Person's Guide*, *supra* note 25, at 2-3.

[36] *Id.* at 2; *see also* Ivonne Mena King, *Foreign Corrupt Practices Act Developments*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 215, 221 (PLI Corp. Law & Practice, Course Handbook Ser. No. 13908, 2008).

A. *Record Keeping and Internal Controls*

While one of the purposes of enacting the FCPA was "a desire to protect the investor,"[37] the FCPA goes beyond the Exchange Act's prohibition against false records because it also regulates the accuracy of that recorded information.[38] This requirement is a "significant expansion of the SEC's regulatory authority" because it is the first time the federal government imposed standards of corporate governance upon public companies.[39] The FCPA requires all such issuers of securities[40] to "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."[41] The legislative history of the FCPA provides that "the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes."[42] Notably, the accounting provisions have no materiality or scienter requirement. Congress highlighted the fact that since SEC enforcement actions are "designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, [Congress] intend[ed] that *scienter* is not an element of any Commission enforcement proceeding."[43] Also, given that there is no requirement that inaccurate records or insufficient controls be linked to a corrupt payment, it is possible to violate the accounting provisions without making a corrupt payment.[44]

Additionally, the FCPA requires all issuers to:

> 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; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with the 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

[37] SEC v. World-Wide Coin Invs., Ltd., 567 F. Supp. 724, 746 (N.D. Ga. 1983).

[38] H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 7-9 (1998).

[39] Brown, *supra* note 19, at 248 (citing *World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 747).

[40] 15 U.S.C. § 78c(a)(8) (2006).

[41] § 78m(b)(2)(A).

[42] H.R. REP. NO. 95-831, at 10 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4122.

[43] H.R. REP. NO. 95-640, at 10 (1977).

[44] Warin, *supra* note 5, at 505.

> assets at reasonable intervals and appropriate action is taken with respect to any differences.[45]

There is no criminal liability for the reporting and internal controls provisions unless the potential violator "knowingly circumvent[ed] or knowingly fail[ed] to implement a system of internal accounting controls or knowingly falsif[ied] any book, record, or account."[46] Factors the SEC considers when evaluating whether the corporation's accounting practices fulfill the FCPA's objectives include:

> (1) the overall control environment; (2) the translation of broad accounting control objectives into specific objectives which are applicable to the business, organizational, and other characteristics of the company; (3) the specific control procedures and environmental factors which should contribute to the achievement of the specific control objectives; (4) whether control procedures are functioning as intended; and (5) the benefits . . . and costs of additional or alternative controls.[47]

The internal controls provision also directly impacts the potential punishment because the United States Sentencing Guidelines provide that an effective compliance program may mitigate the offense level for sentencing.[48]

B. *Anti-Bribery Provisions*

The FCPA's anti-bribery provision applies (1) to "domestic concerns;"[49] (2) to issuers that either have securities registered pursuant to the Exchange Act[50] or are required to file reports under the Act;[51] and (3) to any person other than an issuer who makes use of "any means or instrumentality of interstate commerce" to bribe a foreign official.[52] The 1998 amendments added the "any person" provision to comply with the OECD Convention, which required member states to criminalize bribery by "any person."[53] While the FCPA

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[45] 15 U.S.C. § 78m(b)(2)(B).

[46] § 78m(b)(4)-(5).

[47] Brown, *supra* note 19, at 253 (citing Statement of Management on Internal Accounting Control, 44 Fed. Reg. 26,702, at 26,704 (proposed May 4, 1979)).

[48] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2009) [hereinafter SENTENCING GUIDELINES].

[49] 15 U.S.C. § 78dd-2(h)(1).

[50] § 78*l*.

[51] § 78dd-1(a) (referencing § 78o(d)).

[52] § 78dd-3(a).

[53] Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. I, ¶ 1, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) ("Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the

prohibits supplying the bribe,[54] the United States cannot prosecute foreign officials who either receive bribes or who conspire to violate the FCPA.[55]

Persons covered by the Act may not offer – either directly or indirectly – with a corrupt intent, anything of value to any foreign official for the purpose of "obtaining or retaining business for or with, or directing business to, any person."[56] The Act also prohibits offering, directly or indirectly, with corrupt intent, anything of value to another person knowing that any of that money or item of value will be offered either directly or indirectly to a foreign official to influence the official's decisions or to induce the official to influence governmental decisions.[57] In such a third-party context, the knowledge element is satisfied if the alleged violator is aware or has a firm belief that corrupt circumstances exist or that a corrupt result is substantially certain to occur.[58] Willful blindness is sufficient for a conviction because "knowledge is established if a person is aware of a high probability of the existence of [corrupt] circumstances."[59] The legislative history establishes that:

> [T]he "knowing" standard adopted covers both prohibited actions that are taken with "actual knowledge" of intended results as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.[60]

performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.").

[54] 15 U.S.C. § 78dd-1, -2, -3. Generally, Section 78dd-1 applies to issuers, Section 78dd-2 applies to domestic concerns, and Section 78dd-3 applies to "any person." These three sections often, but do not always, contain overlapping regulations.

[55] Sebelius, *supra* note 29, at 588.

[56] 15 U.S.C. § 78dd-1(a), -2(a), -3(a).

[57] *Id.*

[58] § 78dd-1(f)(2)(A), -2(h)(3)(A), -3(f)(3)(A).

[59] § 78dd-1(f)(2)(B), -2(h)(3)(B), -3(f)(3)(B).

[60] H.R. REP. NO. 100-576, at 920 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953, *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf. For a recent case discussing the willful blindness doctrine, see *United States v. Kozeny*, 664 F. Supp. 2d 369, 374-78 (S.D.N.Y. 2009). The *Kozeny* court held that the plaintiff need not show "actual knowledge" beyond a reasonable doubt, but that the defendant had "knowledge of the *object of the conspiracy*, which was to violate the FCPA, not that bribes, in fact, been paid." *Id.*; *see also 2009 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (Jan. 4, 2010), http://www.gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx (asserting that "[t]he ostrich instruction was essential to Bourke's conviction because the government lacked clear evidence that Bourke knew Kozeny was offering, facilitating or paying bribes"). The *Kozeny* Court, however, ruled that Bourke may remain free pending his appeal to the Second Circuit because his appeal raises a "substantial question of law or fact likely to result in reversal, a new trial," or a different sentence. *2009 Year-End FCPA Update*, *supra*.

Finally, because the statute focuses on the corrupt intent of the offeror, the offeror may violate the FCPA even without consummating a corrupt act.[61] The term "corruptly" refers to the offeror's unlawful intent "to induce the recipient to misuse his official position in order to wrongfully direct business [or anything of value] to the payor or his client."[62]

The FCPA does not prohibit all payments to foreign officials; the statute provides an exception for "routine governmental action."[63] The prohibition explicitly excepts payments to foreign officials "to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official," also known as "facilitating payments" or "grease payments."[64] The statute defines the term "routine governmental action" to include situations such as issuing permits and processing visas,[65] and the legislative history provides that the Act "would not include those governmental approvals involving an exercise of discretion by a government official."[66] For example, the term "routine governmental action" explicitly excludes:

> any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.[67]

It is important to note that the statute does not set a minimum or maximum monetary amount required in order to qualify as a facilitating payment.

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[61] *See* S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108, *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

[62] *Id.*

[63] 15 U.S.C. § 78dd-1(b), -2(b), -3(b).

[64] *Id.*; *see also* S. REP. NO. 95-114, at 10, *reprinted in* 1977 U.S.C.C.A.N. at 4108.

[65] 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A). Each relevant subsection defines "routine governmental action" as referring only to actions "ordinarily" and "commonly" taken an action which is ordinarily and commonly performed by a foreign official in:

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Id.

[66] H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. at 1954.

[67] 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B).

C. *Affirmative Defenses*

In 1988, Congress created two affirmative defenses to alleged FCPA violations.[68] First, an affirmative defense exists if the offer or promise of anything of value is lawful under the laws and regulations of the foreign official's country.[69] Absence of written laws in the official's country is insufficient, however, to trigger the defense.[70] Additionally, it is an affirmative defense if the offer or promise of anything of value was "a reasonable and bona fide expenditure . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[71] Examples of reasonable and bona fide expenditures include travel and lodging expenses.[72]

D. *Attorney General Opinion Procedure*

Issuers and domestic concerns may request that the Attorney General provide an opinion regarding whether certain prospective conduct would violate the FCPA (FCPA Opinion).[73] The DOJ publishes each FCPA Opinion the Attorney General provides, but each opinion only applies to parties who submit the request.[74] A compliant FCPA Opinion creates a rebuttable presumption for future actions against the issuer or domestic concern that the described conduct complies with the FCPA.[75] The FCPA Opinion only binds the DOJ and "will not affect the requesting issuer's or domestic concern's obligations to any other agency," including the SEC.[76] Consequently, the FCPA Opinion only applies to the anti-bribery provisions of the statute and will not affect the issuer's responsibility to comply with the accounting provisions.[77] The DOJ has issued a total of thirty-three FCPA Opinions.[78] The FCPA Opinion procedure further demonstrates that while there may be uncertainty in FCPA enforcement, it is not hard to determine what conduct actually constitutes a violation of the Act; the uncertainty relates instead to prosecutorial discretion in deciding the consequences of the violation.

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[68] *See* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1416-17 (codified as 15 U.S.C. §§ 78dd(1)-(3), 78ff (2006)).

[69] 15 U.S.C. § 78dd-1(c)(1), -2(c)(1), -3(c)(1).

[70] H.R. REP. NO. 100-576, at 922, *reprinted in* 1988 U.S.C.C.A.N. at 1955.

[71] § 78dd-1(c)(2), -2(c)(2), -3(c)(2).

[72] *Id.*

[73] § 78dd-1(e), -2(e). Note that there is no comparable provision in the "any person" section of the FCPA. *See* § 78dd-3.

[74] 28 C.F.R. § 80.5 (1992); *see also* Warin, *supra* note 5, at 521.

[75] *See* 15 U.S.C. § 78dd-1(e), -2(f); 28 C.F.R. § 80.10.

[76] 28 C.F.R. § 80.11.

[77] § 80.12.

[78] *See FCPA Opinion Procedure Releases*, U.S. DEP'T OF JUSTICE, FRAUD SECTION, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (last visited Oct. 11, 2010) (providing links to opinions since 1993).

E. *Enforcement and Penalties*

The DOJ and the SEC work together to enforce the FCPA and often bring parallel criminal and civil proceedings.[79] Both agencies enjoy discretion in deciding which enforcement actions to bring and in choosing the appropriate penalties to seek, including criminal penalties, fines, injunctions, or some combination thereof.[80] The SEC is limited to imposing civil fines and may only do so when securities are involved.[81] The DOJ has authority to issue guidelines[82] and opinions,[83] bring permanent or temporary injunctions,[84] subpoena witnesses,[85] gather evidence,[86] require production of documents,[87] and enforce criminal penalties.[88] After the fall of Arthur Andersen,[89] the SEC and DOJ have increasingly used deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) (collectively, pre-trial diversion agreements), under which the government either defers or omits formal charges but requires the corporation to comply with the terms of the agreement.[90] DPAs and NPAs subject corporations to significant penalties, and prosecutors look to the Sentencing Guidelines for direction in quantifying and qualifying these penalties by reference to the corporations' risk exposure if convicted. Because the Guidelines consider the use of an "effective compliance and ethics program" as a mitigating factor, the Guidelines also impact the decision to enter into a pre-trial diversion agreement.[91]

The United States Sentencing Commission (Commission) originally promulgated Sentencing Guidelines in 1987 to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[92] Although the Guidelines are only advisory, federal district courts must consult the Guidelines and calculate the suggested sentences, even if they do not ultimately follow the suggestions.[93]

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[79] *See* Weiss, *supra* note 19, at 478 (explaining that, typically, "the SEC [focuses] on civil violations related to issuers and the DOJ [concentrates] on criminal violations").

[80] *Id.*

[81] 15 U.S.C. § 78u-1(a) (2006).

[82] § 78dd-1(d), -2(e).

[83] § 78dd-1(e), -2(f).

[84] § 78dd-2(d), -3(d).

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *See* § 78dd-1, -2, -3.

[89] *See* discussion *infra* Part III.A.

[90] *See* Weiss, *supra* note 19, at 478-79; Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 166 (2008).

[91] *See* SENTENCING GUIDELINES, *supra* note 48, at § 8B2.1.

[92] *Id.* at ch.1, pt. A, 1.2.

[93] *Id.* at ch. 1, pt. A, 2 (citing 18 U.S.C. § 3553(a)(4)-(5) (2006); Gall v. United States,

Chapter Eight of the Guidelines governs sentencing of organizations.[94] The Guidelines list four factors that increase the punishment of an organization and two factors that mitigate the punishment, including having an effective compliance and ethics program and acceptance of responsibility.[95] The Guidelines serve as incentives for organizations to self-police and prevent criminal conduct.[96] The government can seek fines against entities that violate the anti-bribery provisions for up to $2 million and subject them to civil sanctions of up to $10,000.[97] Entities that willfully violate the accounting provisions may be fined up to $25 million.[98] The SEC and DOJ have vigorously enforced the FCPA and have collectively imposed fines of billions of dollars.[99] In light of the size of corporate fines, the Sentencing Commission is considering a proposal that would allow corporations to receive credit during sentencing if they have corporate compliance programs designed to combat white-collar crime with a compliance officer who has direct access to the board of directors.[100] The new proposal may provide sufficient incentives for more

552 U.S. 38, 49-50 (2007); Rita v. United States, 551 U.S. 338, 350-51 (2007); United States v. Booker, 543 U.S. 220, 264 (2005)).

[94] *See id.* at ch. 8. Because this Note focuses on the effect of uncertainty in pre-trial diversion agreements with corporations, this Note will deal primarily with guidelines and factors that affect punishment of corporations. For information about the Guidelines' treatment of individual FCPA violators, see *id.* at §§ 2B1.1, 2B4.1.

[95] *Id.* at ch. 8, introductory cmt. (stating that factors increasing an organization's punishment are: "(i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice," while mitigating factors include: "(i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility").

[96] *Id.*

[97] 15 U.S.C. § 78dd-2(g), -3(e) (2006).

[98] § 78ff(a).

[99] *See, e.g.*, SEC Charges Monster Worldwide Inc. for Options Backdating Scheme, SEC Litigation Release No. 21042 (May 18, 2009), *available at* http://sec.gov/litigation/litreleases/2009/lr21042.htm ("Without admitting or denying liability, Monster agreed to be permanently enjoined from violations . . . [and] agreed to pay a $2.5 million penalty."); SEC Charges KBR, Inc. with Foreign Bribery, Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations, SEC Litigation Release No. 20897A (Feb. 11, 2009), *available at* http://sec.gov/litigation/litreleases/2009/lr20897a.htm (asserting that the settlements with the SEC are subject to the court's approval, and that, under the plea agreement with the DOJ, Kellogg Brown & Root LLC is required to pay a criminal fine of $402 million and to retain a monitor); SEC Files Settled FCPA Action Against Willbros Group, Inc. and Several Former Employees, SEC Litigation Release No. 20571 (May 14, 2008), *available at* http://sec.gov/litigation/litreleases/2008/lr20571.htm (consenting to a deferred prosecution agreement where the corporations will pay a criminal penalty of $22 million and adopt an independent monitor).

[100] Gary Fields, *Plan Would Soften White-Collar Fines*, WALL. ST. J., Jan. 29, 2010, at A3.

corporations to self-report, decreasing the number of indictments while increasing the use of pre-trial diversion agreements.

III. PRE-TRIAL DIVERSION AGREEMENTS

The DOJ and the SEC have used pre-trial diversion agreements at a substantially higher rate in recent years.[101] In a DPA or NPA, the prosecutor may file formal charges,[102] but he or she agrees to defer or forgo criminal prosecution if the company complies with the terms of the agreement.[103] The DOJ explained that the objectives of pre-trial diversion agreements include preventing recidivism, promoting judicial efficiency, and providing a vehicle for restitution.[104] Such agreements also help companies avoid the severe consequences of an indictment, which, in the FCPA context, can include debarment and suspension from government contracts or subcontracts.[105] Many people point to the demise of the accounting firm Arthur Andersen to demonstrate how criminally prosecuting a corporation can cause permanent harm to the corporation and innocent third parties.[106] As a result, the DOJ allows prosecutors to negotiate pre-trial diversion agreements and demand reformation of the corporation, restitution, and other conditions in exchange for agreeing to forgo or defer prosecution.[107]

Commentators suggest that the shift from formal prosecution to pre-trial diversion agreements reflects a shift in DOJ policy.[108] In fact, one commentator remarked that the increased use of these pre-trial diversion agreements in recent years "is arguably the most profound recent development

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[101] *See, e.g.*, Spivack & Raman, *supra* note 90, at 159 ("In the four years between 2002 and 2005, prosecutors and major corporations entered into twice as many of these agreements . . . as the previous ten years combined. The trend appears to be accelerating."); *2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, GIBSON, DUNN & CRUTCHER LLP (July 8, 2009), http://www.gibsondunn.com/Publications/Pages/2009Mid-YearUpdate-CorpDeferredProsecutionAgreements.aspx; Breuer, *supra* note 2.

[102] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, TITLE 9 CRIMINAL DIVISION § 9-22.010 [hereinafter U.S. ATTORNEYS' MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (last visited Oct.16, 2010).

[103] Spivack & Raman, s*upra* note 90, at 160.

[104] U.S. ATTORNEYS' MANUAL, *supra* note 102, § 9-22.010.

[105] *See* 48 C.F.R. § 9.406-2 (2010); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278-82 (2008).

[106] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 1 (2009) [hereinafter GAO REPORT: DPAS & NPAS].

[107] *Id.*

[108] *See e.g.*, Leonard Orland, *The Transformation of Corporate Criminal Law*, *in* THE NEW JUSTICE DEPARTMENT GUIDELINES FOR CORPORATE PROSECUTIONS: WHAT THE MCNULTY MEMO MEANS TO YOU 197, 199 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1592, 2007); Spivack & Raman, *supra* note 90, at 161.

in corporate white collar criminal practice."[109] Mary Jo White, a former U.S. Attorney for the Southern District of New York, believes that "[t]hey are becoming a rather routine way of resolving investigations of corporate crime as to companies."[110] In fact, *Forbes Magazine* describes the group of large corporations that have been accused of wrongdoing but have had their prosecution deferred as those who have been "inducted into Club Fed Deferred."[111]

White describes deferred prosecution agreements as potentially including:

> (a) [T]he payment of large fines or restitution to victims; (b) filing of a criminal charge against the company; (c) some sort of acknowledgement of responsibility or stipulation of facts as the government sees them; (d) an agreement not to publicly dispute the acknowledgment or stipulation, including in civil litigation; (e) remediation measures; (f) often some kind of corporate monitor; and (g) a variety of other corporate governances changes, such as adding outside directors to the board . . . .[112]

The main difference between a DPA and an NPA is that DPAs are "typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court."[113] NPAs are typically a contract between the corporation and the government and do not require court submission or approval.[114] DPAs and NPAs are distinct from plea agreements, which involve a court proceeding and the formal conviction of the corporation.[115]

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[109] Spivack & Raman, *supra* note 90, at 159.

[110] Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, *in* 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 824 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1517, 2005).

[111] Janet Novack, *Club Fed, Deferred*, FORBES (Aug. 29, 2005, 1:50 PM), http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html.

[112] White, *supra* note 110, at 824.

[113] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to the Heads of Dep't Components & U.S. Att'ys, on Selection & Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, at 1 n.2 (Mar. 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf [hereinafter Morford Memo].

[114] *Id.*

[115] *Id.*

A. *Brief History of DPAs and NPAs*

Prosecutors used to defer prosecution only for juveniles to facilitate docket management and to allow juveniles to avoid the stigma of a criminal conviction.[116] This changed in 1992 with the informal non-prosecution agreement executed with Salomon Brothers, prompted by the corporation's "unprecedented" cooperation while under investigation for fraud.[117] Although the U.S. Attorney's Office did not formally accede to a deferred prosecution agreement as we know of them today, companies began to realize that cooperation and "cleaning house" could lead to better results should they face criminal charges.[118]

In 1994, then-U.S. Attorney for the Southern District of New York, Mary Jo White, entered into the first formal deferred prosecution agreement with a major company, Prudential Securities, Inc.[119] While this DPA opened the possibility for prosecutors to negotiate pre-trial diversion agreements, prosecutors had little guidance from the DOJ. As a result, then-Deputy Attorney General Eric Holder issued the first formal DOJ guidance for proceeding against a corporation in 1999, entitled "Federal Prosecution of Corporations" (Holder Memo).[120] The Holder Memo "provide[d] guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."[121] The Holder Memo, however, did not explicitly discuss deferral agreements, so prosecutors remained reluctant to use them.[122]

A series of corporate fraud scandals in the early 2000s convinced prosecutors and the public that holding individuals liable for the unlawful actions of corporations was not sufficient, and that the government should therefore bring charges against both individuals and corporations.[123] The DOJ

[116] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 905-06 (2007); Spivack & Raman, *supra* note 90, at 163.

[117] *See* Press Release, U.S. Dep't of Justice, Dep't of Justice & SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), *available at* http://www.justice.gov/atr/public/press_releases/1992/211182.htm (quoting Otto Obermaier, U.S. Attorney for the Southern District of New York: "While the alleged violations were serious, we believe that the combination of punishments are adequate, and there is no need for invoking the criminal process. Salomon's cooperation has been exemplary. Such actions were unprecedented in my experience.").

[118] *See* Spivack & Raman, *supra* note 90, at 163-64.

[119] White, *supra* note 110, at 819.

[120] *See* Spivack & Raman, *supra* note 90, at 164.

[121] Memorandum from Deputy Att'y Gen. Eric Holder to Component Heads & U.S. Att'ys, Bringing Criminal Charges Against Corporation 1 (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

[122] *See* Spivack & Raman, *supra* note 90, at 164.

[123] *Id.* at 165.

brought formal charges against one of the Big Five accounting firms, Arthur Andersen, for its involvement in the Enron scandal.[124] The DOJ considered a deferral agreement with the corporation to let it avoid indictment if it acknowledged that it had illegally destroyed documents and submitted to probation and other conditions, however such an agreement was never reached.[125] Andersen officials were unable to agree to all of the concessions the government sought.[126] The DOJ indicted Andersen in March of 2002 and a jury convicted the company of obstruction of justice three months later.[127] Although the Supreme Court eventually overturned Andersen's conviction in 2005,[128] the indictment effectively put the company out of business, affecting many jobs, shareholders, and the accounting industry in general.[129] The Andersen story taught the DOJ to be extremely cautious of the harmful consequences to innocent third parties if it indicts a corporation.[130] The DOJ faced a lot of criticism for its decision to indict Andersen, especially in light of the fact that pre-trial diversion agreements are used specifically to avoid such results.[131] Consequently, the DOJ now must balance the need to hold corporations responsible for their unlawful actions against the risk of harming innocent third parties, shifting the focus to the pre-indictment stage of corporate criminal proceedings.[132]

Despite the criticism the DOJ faced for indicting Andersen, corporate fraud was still a significant concern. Congress enacted the Sarbanes-Oxley Act in 2002 to address many public corporations' failure to adequately detect and prevent corporate fraud.[133] President Bush established the DOJ Corporate

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[124] *See* Kurt Eichenwald, *Enron's Many Strands – The Investigation: Andersen Charged With Obstruction in Enron Inquiry*, N.Y. TIMES, Mar. 15, 2002, at A1. For background information about the Andersen case, see Kurt Eichenwald & Jonathan D. Glater, *U.S. is Called Ready to Indict Audit Firm Over Enron Papers*, N.Y. TIMES, Mar. 9, 2002, at A1.

[125] *See* Jonathan D. Glater, *Government Rejects Andersen Proposal*, N.Y. TIMES, Apr. 26, 2002, at C6 (explaining that although Andersen was finally willing to admit to wrongdoing, the government required further concessions before entering into a pretrial diversion agreement).

[126] Kurt Eichenwald & Jonathan D. Glater, *Some Concerns of an Impasse in U.S. Talks with Andersen*, N.Y. TIMES, Apr. 18, 2002, at C1.

[127] Spivack & Raman, *supra* note 90, at 165.

[128] Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005).

[129] Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

[130] Spivack & Raman, *supra* note 90, at 166; *see also* GAO REPORT: DPAS & NPAS, *supra* note 106, at 1.

[131] *See, e.g.* White, *supra* note 110, at 824-25.

[132] *See* GAO REPORT: DPAS & NPAS, *supra* note 106, at 1; Garrett, *supra* note 116, at 854.

[133] Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. 312, 313-14 (Supp. 2007) (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002)

Fraud Task Force in the same year.[134] The following year, then-Deputy Attorney General Larry D. Thompson issued a DOJ memorandum, entitled "Principles of Federal Prosecution of Business Organizations" (Thompson Memo), to provide more guidance.[135] The Thompson Memo was updated by an internal DOJ memorandum by then-Deputy Attorney General Paul J. McNulty,[136] and again by then-Deputy Attorney General Mark R. Filip.[137] Both of these updates have, in relevant part, been incorporated into the U.S. Attorneys' Manual (DOJ Manual).[138] In 2004 the U.S. Sentencing Commission provided more guidance by issuing new sentencing guidelines which allow courts to reduce the suggested fine if the corporation has an "effective" compliance program.[139]

(codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.)).

[134] *See e.g.*, Garrett, *supra* note 116, at 888 (explaining the Task Force's purpose was "to coordinate investigation and prosecution of companies"); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 314 (2007) (discussing the Task Force's role in responding to political pressure and to mitigate corporate scandals' effects on an already strained, post-September 11th investment market).

[135] *See* Memorandum from Deputy Att'y Gen. Larry D. Thompson to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.justice.gov/dag/cftf/business_organizations.pdf.

[136] Memorandum from Deputy Att'y Gen. Paul J. McNulty to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations, at 2 (2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_ memo.pdf.

[137] Press Release, Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), *available at* http://www.justice.gov/opa/pr/2008/August/08-odag-757.html [hereinafter DOJ Press Release].

[138] *See* U.S. ATTORNEYS' MANUAL, *supra* note 102, § 9-28.000, *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf; *see also* Rachel Delaney, Comment, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 898 (2009). The main differences between the current guidelines and previous guidelines relate to waiver of attorney-client privilege and corporate advancement of attorneys' fees to employees when evaluating the corporation's cooperation. DOJ Press Release, *supra* note 137. The changes were made in reaction to expressed legislative concern over requiring waiver of attorney client privilege and Sixth Amendment right to counsel. *See id.* Although significant, these changes do not affect the considerations posed in the Thompson Memo relevant to this Note. Further, while the DOJ Manual has been updated since the publication of the McNulty Memo, the changes are unrelated to the content of this Note.

The changes do emphasize, however, that "the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct." U.S. ATTORNEYS' MANUAL, *supra* note 102, § 9-28.720. Most importantly, the Guidelines remind prosecutors that "[c]ooperation is a relevant potential mitigating factor, but it alone is not dispositive" on whether a corporation should be indicted. *Id.*

[139] *See* Garrett, *supra* note 116, at 908-09.

The fifth factor in the DOJ Manual directs prosecutors to evaluate the existence and adequacy of the corporate compliance program.[140] One commentator suggests that this effectively creates an affirmative defense of "due diligence" for corporations.[141] Corporations, however, cannot rely entirely on a compliance program as a defense – even though several commentators have advocated for such an affirmative defense.[142] The existence and scope of a compliance program is only one of many factors that the DOJ considers in deciding how to move forward against a corporation. While an effort to implement or improve an existing compliance program is one factor to consider, the DOJ Manual does not assert that a compliance program, or any factor, is determinative in all cases.[143] Because an effective compliance program is not a sure bet to secure DOJ leniency, a corporation could be certain about whether its actions violated the FCPA, while remaining uncertain about the consequences of that violation. This uncertainty makes the cost-benefit analysis more difficult for the corporate actor to calculate. Despite the expressed concerns related to uncertainty in risk analysis, commentators have listed several benefits and detriments in using pre-trial diversion agreements.

B. *Why Pre-Trial Diversion Agreements?*

In addition to avoiding the severe consequences suffered by Arthur Andersen, pre-trial diversion agreements may serve other important functions. Prosecuting complex corporations can be expensive and time-consuming, while DPAs and NPAs allow the DOJ to conserve resources and still achieve similar results.[144] A DPA with a corporation also allows the DOJ to prosecute individual employee-defendants with greater ease because corporations often must cooperate and disclose information about individual employees as part of the typical pre-trial diversion agreement.[145] Some commentators have expressed concerns that the trend toward DPAs and NPAs demonstrates prosecutors' over-involvement in corporate culture and their belief that prosecutors play an inappropriate role in reforming bad corporations.[146] For

[140] U.S. ATTORNEYS' MANUAL, *supra* note 102, § 9-28.300(A)(5).

[141] Garrett, *supra* note 116, at 889.

[142] For a discussion on adding an affirmative defense for corporate compliance programs, see Larry Thompson, *The Blameless Corporation*, 46 AM. CRIM. L. REV. 1323, 1326-28 (2009) (suggesting an "appropriate monitoring" defense for corporate compliance programs).

[143] U.S. ATTORNEYS' MANUAL, *supra* note 102, § 9-28.300.

[144] *See, e.g.*, Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 680-81 (2009); Garrett, *supra* note 116, at 901; Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1721 (2007).

[145] Garrett, *supra* note 116, at 883.

[146] *See id.* at 856; Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61

example, some critics have argued that prosecutors use the DOJ Manual's factors to "fashion[] themselves as the new corporate governance experts" rather than to make charging decisions.[147]

C. *DPAs and NPAs in the FCPA Context and Expressed Criticism*

Whatever the rationale for the use of diversion agreements, prosecutors seem to focus more on reforming corporations than on punishing them, as evidenced by the use of pre-trial diversion agreements and the imposition of compliance monitors with significant reformatory – and not punitive – power over the corporation.[148] The judge also retains less punitive power because prosecutors receive significant separation of powers deference for pre-indictment agreements.[149] Although courts have statutory power to review deferred prosecution agreements (but not *non-prosecution* agreements), the statute granting courts supervisory power in DPAs[150] does not provide courts with the same supervisory power that they have regarding probation.[151] Prosecutors therefore enjoy a significant amount of discretion when negotiating and creating pre-trial diversion agreements, which may make it difficult for corporations to know what to expect ex ante.

Further, there is no uniform policy for or against publishing DPAs and NPAs, and many corporations have no access to prior agreements.[152] In an effort to increase transparency, the Criminal Division's Fraud Section tends to issue a press release upon entering into DPAs and NPAs with corporations, although the press releases do not contain all of the terms of the agreements.[153] The district negotiating the agreement may affect both the terms and the public accessibility of an agreement. A select group of U.S. Attorneys' Offices negotiate most of the pre-trial diversion agreements beyond those negotiated at Main Justice.[154] In 2009, Main Justice negotiated about half of the pre-trial diversion agreements and the other half were negotiated by certain U.S. Attorney's Offices – led in number by the Southern District of New York.[155]

STAN. L. REV. 271, 277-78 (2008); Spivack & Raman, *supra* note 90, at 161.

[147] White, *supra* note 110, at 818.

[148] *See* Henning, *supra* note 133, at 314-15 ("The payment is the 'pound of flesh' for past wrongdoing, but that cost has little lasting impact on the company compared to the changes in its internal corporate governance required by the agreements."); *see also infra* Part IV.

[149] *See* Garrett, *supra* note 116, at 920.

[150] H.R. REP. NO. 93-1508, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7401.

[151] *See* Garrett, *supra* note 116, at 926.

[152] *See* Spivack & Raman, *supra* note 90, at 180-81.

[153] GAO REPORT: DPAS & NPAS, *supra* note 106, at 10.

[154] *See* Spivack & Raman, *supra* note 90, at 171-72 ("[W]hether a company is offered a DPA, and what the terms of that agreement are, could very likely turn on the luck of the draw regarding which office happens to handle the prosecution.").

[155] *2009 Year-End Update on Corporate Deferred Prosecution & Non-Prosecution Agreements*, GIBSON, DUNN & CRUTCHER LLP (Jan. 7, 2010),

At least one commentator suggested that "the fact that a handful of offices across the nation is driving DOJ policy in this area indicates a continued willingness on the part of the Department's leadership to abdicate its responsibility to provide uniform guidance – a state of affairs critics have described as a 'devolution of authority.'"[156] In any event, the fact that different districts apply different policies regarding whether and when it will negotiate a pre-trial diversion agreement necessarily affects corporate uncertainty about the consequences of a violation.

Responses to pre-trial diversion agreements run the gamut from approval to utter discontent. Some commentators have, in fact, described pre-trial diversion agreements as a "stroke of genius" because they allow the government to collect information through the corporation's cooperation and to prosecute individuals at a lower cost.[157] The corporation's cooperation is especially important in the FCPA context, because gathering evidence from other countries on corruption and bribery could require significant resources if the DOJ acts singlehandedly.[158]

Not all commentators, however, condone the use of such agreements. Moreover, critics express strikingly diverse reasons for their dissatisfaction. For example, some critics believe that these deferral agreements tend to hurt corporations and their employees by requiring the corporation to accept filed criminal charges (and therefore to waive its defenses), to implement expensive remedial measures, and to pay potentially enormous fines before the government even proves the elements of the alleged offense.[159] Fines may hurt innocent shareholders by forcing them to suffer for the company's wrongdoing.[160] One critic even expressed the somewhat extreme concern that, "[c]onsidering the scale of the reforms that diversion agreements impose on companies . . . there is a very real threat that civil regulators could in quiet concert with prosecutors (and free from the constraints of normal administrative law principles and procedures) use diversion agreements to reshape these industries."[161] Note that this critique focuses less on distaste for

http://www.gibsondunn.com/publications/Pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx.

[156] Spivack & Raman, *supra* note 90, at 171 (quoting Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 41 ST. LOUIS U. L.J. 1, 3 (2006)). The veracity of this charge is beyond the scope of this Note.

[157] *See, e.g.*, Ford & Hess, *supra* note 144, at 680-81.

[158] *See* GAO REPORT: DPAS & NPAS, *supra* note 106, at 9.

[159] Spivack & Raman, *supra* note 90, at 188-89; *see also* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1384 (2009) ("Practitioners at two recent conferences on corporate criminal liability agreed that, in negotiating with the government, corporate suspects have a knife at a gunfight.").

[160] *See* Spivack & Raman, *supra* note 90, at 182.

[161] *Id.* at 183 (citations omitted).

coercive action toward individual corporations and more on concern for bypassing administrative laws and regulations to achieve corporate reform.

On the other end of the spectrum, different critics argue that pre-trial diversion agreements are unduly lenient on corporations that deserve criminal indictment for their actions.[162] These opponents suggest that pre-trial diversion agreements may provide incentives for corporations to take greater risks and engage in more questionable practices if they believe that they can cut a deal with the government and defer prosecutions indefinitely.[163] The incredibly large fines that are often highly publicized have even been described as "'peanuts' compared with the damage posed by a criminal conviction."[164] These critics believe that corporations benefit from the uncertainty inherent in FCPA enforcement, because it will likely cost less than an actual prosecution.

Regardless of one's personal opinion on pre-trial diversion agreements, they are now common in FCPA enforcement against corporations. The overall movement from indictment to pre-trial diversion has moved corporate FCPA enforcement from the courthouse to the negotiation table. While absent in some agreements, many FCPA agreements include a provision requiring the company to hire an internal or external compliance monitor to observe the company's compliance with the agreement and relate relevant information back to the government.[165]

IV. MONITORSHIPS

Corporate monitors, while hotly debated, are not new. Although formalized for corporations in the 1991 Sentencing Guidelines, court-ordered probation after a criminal conviction or guilty plea was used well before 1991.[166] The 1991 Guidelines required court-ordered probation if the corporation had more than fifty employees and lacked an effective compliance program.[167] Courts were allowed to impose probation officers to monitor the corporation's developing compliance program.[168] Today the Guidelines add, among other provisions, that the court "shall" order probation "if such sentence is necessary

[162] *See* Ford & Hess, *supra* note 144, at 681.

[163] Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A1.

[164] *Id.*

[165] U.S GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS 2 (2009) [hereinafter GAO SELECTING MONITORS].

[166] Ford & Hess, *supra* note 144, at 686.

[167] *Id.* at 686-87. The current Guidelines retain substantially similar language. *See* SENTENCING GUIDELINES § 8D1.1(a)(3).

[168] *See* Ford & Hess, *supra* note 144 at 686-87.

to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."[169]

The practice of installing corporate monitors can be traced to English Chancery use of special masters.[170] Corporate monitorship as it exists today, however, derives from public law litigation and labor union corruption cases brought under the Racketeer Influenced and Corrupt Organizations[171] (RICO) statute.[172] The "monitor" approach to corporate wrongdoing was also used by the SEC to impose cease-and-desist orders as part of a negotiated consent decree.[173] Today's corporate monitor represents a conjunction between ongoing supervision used in RICO cases and government regulator supervision in SEC-negotiated cease-and-desist orders.[174] The monitor's purpose is to ensure that the corporation has policies and procedures in place to prevent recidivism and future misconduct.[175]

Concerns about the efficacy of monitorships and whether it is the government's (or the court's) job to direct corporate management also are not new.[176] For example, with respect to probation, one commentator even teased that when judges are confirmed by the Senate, the confirmation hearings should also assess the judge's ability to run a major corporation.[177] Courts have already entered the realm of corporate governance to a limited extent by establishing that a corporate board's fiduciary duties include implementing an effective compliance and monitoring system.[178] Such involvement in corporate governance is very common in FCPA enforcement actions and is commonly achieved through the use of either external or internal monitors.

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[169] SENTENCING GUIDELINES § 8D1.1(a)(6).

[170] *See* Khanna & Dickinson, *supra* note 144, at 1715.

[171] 18 U.S.C. §§ 1961-1968 (2006).

[172] Ford & Hess, *supra* note 144, at 683; Khanna & Dickinson, *supra* note 144, at 1716-17.

[173] Khanna & Dickinson, *supra* note 144, at 1717-18; *see also* Ford & Hess, *supra* note 144, at 685.

[174] Khanna & Dickinson, *supra* note 144, at 1717.

[175] Ford & Hess, *supra* note 144, at 689.

[176] *Id.* at 687.

[177] *Id.* (citing Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2018 (1992)).

[178] *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

A. *Monitorships in the FCPA Context*

Most FCPA pre-trial diversion agreements require corporations to purge themselves of wrongdoers and to implement compliance systems to prevent future misconduct.[179] The concept of a compliance program was largely influenced by the FCPA's accounting and internal controls requirements.[180] The U.S. Sentencing Commission's Guidelines provide for a mitigated sentence if the seven elements for an "effective compliance and ethics program" are in place, including, establishing standards to prevent criminal conduct, ensuring appropriate oversight by high-level personnel, communicating the procedures and requirements to employees, and monitoring and updating the compliance program when needed.[181] The SEC also acknowledged the Guidelines' mitigating factors in the 2001 Seaboard Report, suggesting that the SEC would be more lenient toward corporations with effective compliance programs.[182] To receive sentencing credit for having an "effective" corporate compliance program in place, the corporation must "exercise due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[183] When it decides to forgo or defer prosecution, the government often imposes a corporate monitor who will oversee the creation of and adherence to the ethics and compliance program.

A typical monitorship structure consists of a corporation retaining the monitor at its own expense to oversee its compliance with the pre-trial diversion agreement, such as implementing an ethics and compliance program.[184] Agreements typically last somewhere between one and three years, and often require the monitor to submit periodic reports to the government.[185]

Many commentators argue that the government exercises coercive power over the corporation during the negotiation process and throughout the agreement.[186] For example, although not in the FCPA context, the monitor

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[179] Spivack & Raman, *supra* note 90, at 184.

[180] Ford & Hess, *supra* note 144, at 689.

[181] *Id.* at 690; *see also* SENTENCING GUIDELINES § 8B2.1(b).

[182] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, 76 SEC Docket 220 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm [hereinafter Seaboard Report].

[183] SENTENCING GUIDELINES § 8B2.1(a).

[184] *See* Ford & Hess, *supra* note 144, at 683.

[185] *See id.*

[186] *Id.* at 701-03; *see also* Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 ("[Pre-trial diversion] agreements often read like the confessions of a Stalinist purge trial, as battered corporations recant their past sins and

imposed upon Bristol-Myers Squibb for alleged SEC violations recommended changing the corporation's leadership.[187] With support from the Assistant United States Attorney, both Bristol-Myers Squibb's General Counsel and CEO were removed.[188] Although prosecutors often include a change of management as part of the pre-trial diversion agreement, this removal was one of the highest-profile management changes stemming from a DPA and further occurred *after* the DPA had been negotiated.[189] While not all commentators criticize the use of monitors,[190] other critics are concerned about the scope of the monitor's increasing powers.[191]

Furthermore, commentators and the public alike have questioned whether monitorships and monitor-imposed corporate reform actually enhance shareholder value or society's general welfare.[192] Concerns over abuse in appointing monitors[193] led to three legislative attempts to regulate monitor selection.[194] In response to this criticism, Acting Deputy Attorney General Craig Morford issued an internal DOJ memorandum (Morford Memo) "to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements."[195]

submit to punishment widely in excess of any underlying offense.").

[187] Spivack & Raman, *supra* note 90, at 187.

[188] *Id.*

[189] Brooke A. Masters, *Bristol-Myers Ousts Its Chief at Monitor's Urging*, WASH. POST, Sept. 13, 2006, at D1.

[190] *See, e.g.*, S.E.C. v. Worldcom, Inc., 273 F. Supp. 2d 431, 432 (S.D.N.Y. 2003) (describing the monitor as "not only [a] financial watchdog (in which capacity he has saved the company tens of millions of dollars) but also as an overseer who has initiated vast improvements in the company's internal controls and corporate governance").

[191] Khanna & Dickinson, *supra* note 144, at 1720.

[192] *See, e.g.*, Spivack & Raman, *supra* note 90, at 185.

[193] David Kocieniewski, *In Testy Exchange in Congress, Christie Defends His Record as a Prosecutor*, N.Y. TIMES, June 26, 2009, at A19.

[194] *See* Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. §§ 1-8 (2009); Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. §§ 1-8 (2008); To Require the Attorney General to Issue Guidelines Delineating When to Enter into Deferred Prosecution Agreements, to Require Judicial Sanctions of Deferred Prosecution Agreements, and to Provide for Federal Monitors to Oversee Deferred Prosecution Agreements, H.R. 5086, 110th Cong. §§ 1-8 (2008); *see also 2009 Year-End Update on Corporate Deferred Prosecution & Non-Prosecution Agreements*, *supra* note 155 (providing an update on the state of pending legislation).

[195] Morford Memo, *supra* note 113, at 2.

B. *The Morford Memo*

The Morford Memo specifically asserts that a monitor's primary focus should be assessing compliance with the agreement's terms and reducing recidivism, rather than furthering punitive goals.[196] Morford intended for the monitor selection process to produce qualified monitors suitable for the assignment, to avoid potential conflicts of interest, and to instill public confidence in the corporate monitor system.[197] The Morford Memo requires the government office handling the case to establish an ad hoc committee to consider monitor candidates.[198] Thus, prosecutors cannot unilaterally select or reject a candidate, and the Office of the Attorney General must approve all monitors.[199] The monitor must be independent and cannot be an agent or employee of the government or the corporation.[200] The monitor's role is limited to only assuring compliance with "those terms of the [pre-trial diversion] agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including . . . evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs."[201] The responsibility of designing the compliance program should remain mainly with the corporation, subject to the monitor's recommendations.[202] Although the "monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct,"[203] "the monitor will have the discretion to report [evidence of previously undisclosed or new] misconduct to the Government or the corporation or both."[204] The Memo provides five factors that "militate in favor of reporting such misconduct directly to the Government and not to the corporation," such as misconduct involving senior management or criminal activity that the government could investigate proactively or covertly.[205]

In response to the Morford Memo and continued legislative attempts to regulate pre-trial diversion agreements and monitors, the United States Government Accountability Office (GAO) in November of 2009 provided Congress with research and observations on the DOJ's use of DPAs and NPAs and its adherence to guidance in selecting monitors in pre-trial diversion agreements.[206] The GAO ascertained that, after distribution of the Morford

196 *See id.*

197 *Id.* at 3.

198 *Id.*

199 *Id.*

200 *Id.* at 4.

201 *Id.* at 5.

202 *Id.*

203 *Id.*

204 *Id.* at 7.

205 *Id.*

206 *See* GAO REPORTS: DPAS & NPAS, *supra* note 106; GAO SELECTING MONITORS,

Memo in 2008, the DOJ entered into thirty-five DPAs and NPAs and required companies to hire a monitor in six of those agreements.[207] Of those thirty-five agreements, the three FCPA agreements (two NPAs, and one DPA) did not require an external compliance monitor.[208]

NPAs are gaining in popularity: in 2008, only thirty-two percent of the pre-trial diversion agreements were NPAs, while in 2009 that number increased to fifty percent.[209] One potential explanation is that more corporations are self-reporting alleged violations of the FCPA, because Assistant Attorney General Lanny A. Breuer indicated that the DOJ will give the company "meaningful credit for that disclosure and that cooperation."[210] However, Breuer also insisted upon imposing corporate monitors where a monitor is needed to "ensur[e] the proper implementation of effective compliance measures and in deterring and detecting future violations."[211] With little explicit guidance, it is unclear whether the DOJ will impose an external corporate monitor, allow the corporation to self-monitor, or forgo a monitor requirement completely.

supra note 165.

[207] GAO SELECTING MONITORS, *supra* note 165, at 7.

[208] The two NPAs were with UTStarcom, Inc. and Helmerich & Payne, Inc. UTStarcom, Inc. Non-Prosecution Agreement with Dep't of Justice (Dec. 31, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/utstarcom.pdf. [hereinafter UTStarcom, Inc.]; Helmerich & Payne, Inc. Non-Prosecution Agreement with Dep't of Justice (July 29, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/helmerich.pdf [hereinafter Helmerich & Payne, Inc.]. The DPA was with AGCO Corp. AGCO Corp., Deferred Prosecution Agreement with Dep't of Justice pincite (Sept. 29, 2009), *available at* http://www.justice.gov/opa/documents/agco-plea-agreement.pdf [hereinafter AGCO Corp.].

[209] *2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, *supra* note 155.

[210] Breuer, *supra* note 2, at 4; *2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, *supra* note 155.

[211] Breuer, *supra* note 2, at 4.

V. EVALUATING AND MANIPULATING THE UNCERTAINTY

A difficulty a corporation faces is weighing the consequences of committing or disclosing an FCPA violation against the benefit received from that potential violation or the likely result of not disclosing. Corporations find it difficult to know the benefits of disclosure ex ante because of disparities in the use and terms of pre-trial diversion agreements and external compliance monitors. Further, it is difficult for the government to place a monetary value on the FCPA violation itself because, in many cases, it is difficult to ascertain the actual benefit derived by the violators in influencing, or conspiring to influence, a foreign official.[212] This difficulty in governmental valuation causes uncertainty for corporations. It is very difficult for a corporation to predict how the Government will view the violation and therefore what penalty, if any, the Government will seek. Additionally, questions remain regarding what a corporation must do to show that prosecution should be deferred or forgone and that imposing an external compliance monitor is not necessary. The available guidance suggests that the corporation must demonstrate that it has a generally effective compliance program in place, or that it has overhauled its existing compliance program after discovering an FCPA violation to an extent satisfactory to the government.[213] In recent settlement agreements, the DOJ has cited the "extensive remedial efforts" to reform existing compliance programs – after becoming aware of the alleged violation – as a reason for entering into a settlement agreement and for not imposing an external monitor.[214] In contrast, when a corporation has merely taken a "'cookie cutter' approach to FCPA compliance, or [it] has a 'paper' program without any real substance to it," the DOJ will most likely impose an external compliance monitor.[215] Still, between the extremes of a "paper program" and a full overhaul of the corporation's compliance system, a substantial gray area exists.

Some scholars have argued that uncertainty may actually create optimal deterrence.[216] Dan Kahan, for example, insists that "[t]he more readily individuals can discover the law's content, the more readily they'll be able to

[212] *See* Weiss, *supra* note 19, at 474-75.

[213] *E.g.*, SENTENCING GUIDELINES, *supra* note 48, § 8B2.1(a); Morford Memo, *supra* note 113, at 1-2; Seaboard Report, *supra* note 182; Thompson Memo, *supra* note 135, at 8-11.

[214] UTStarcom, Inc., *supra* note 208, at 1; *see also* Margaret Ayres, John Davis, Nicole Healy & Alexandra Wrage, *Developments in U.S. and International Efforts to Prevent Corruption*, 41 INT'L LAW. 597, 599 (2007).

[215] Alice S. Fisher, Assistant Att'y Gen., Crim. Div., Prepared Remarks for the American Bar Association, National Institute on the Foreign Corrupt Practices Act 7 (Oct. 16, 2006) (transcript available at http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf).

[216] Guttel & Harel, *supra* note 14, at 496.

discern, and exploit, the gaps between what's immoral and what's illegal"[217] – as, for instance, in the highway hypothetical described above.[218] Thus, he advocates for some uncertainty in the law as a means to ensure better deterrence. But while the uncertainty in the highway hypothetical relates to lack of clarity in the underlying legal doctrine, the uncertainty involved in FCPA enforcement seems different in kind – more akin to prosecutorial discretion inherent in any criminal law.

It is possible to manipulate uncertainty resulting from prosecutorial discretion – or at least try to. When Rudolph Giuliani served as United States Attorney for the Southern District of New York, he actively exercised concurrent federal and state jurisdiction by choosing a random day each week to charge all drug offenders in federal court, subjecting them to greater sanctions.[219] The underlying rationale was that creating uncertainty through legal discretion may promote deterrence.[220] Nevertheless, it is unclear how and to what extent this kind of uncertainty will help deter violations in the FCPA context.

A. *Uncertainty Diminished to the Extent the Guidelines Articulate the Consequences?*

One might be tempted to argue that actually little uncertainty exists in FCPA enforcement because – though the consequences are not precisely identifiable in advance – the Government has never imposed penalties in an FCPA pre-trial diversion agreement equivalent to (or higher than) the maximum penalty enumerated by the Guidelines. In other words, there is little uncertainty because corporations know – roughly – what the fine will be, or at least they know it will not be above a certain level. The Siemens case illustrates that even the enormous and surprising fines seen recently have yet to reach the maximum possible under the Guidelines.[221] Deeming penalties "certain" because they are typically within or below the Guidelines' range for a convicted entity in pre-trial diversion agreements, however, may not be the proper way to assess uncertainty in FCPA sanctions. Arguably, it is not fair to compare fines imposed when the government has not proven the elements of the case – i.e. in settlement situations – with fines imposed on convicted corporations. In formal court proceedings, even though judges are not required to follow the guidelines, they are required to at least affirmatively consult the Guidelines.[222] In pre-trial diversion agreements, however, the guidelines need

[217] Dan M. Kahan, *Ignorance of Law Is an Excuse – but Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997).

[218] *See supra* INTRODUCTION.

[219] Baker, Harel & Kugler, *supra* note 17, at 471-72.

[220] *Id.*

[221] *See supra* notes 7-8 and accompanying text.

[222] *See* United States v. Booker, 543 U.S. 220, 264 (2005).

not ever be consulted and prosecutors have large amounts of discretion in imposing fines.

B. *Uncertainty as Prosecutorial Discretion*

Regardless of how "certain" corporations are that fines will not surpass the Guidelines' levels, uncertainty still exists. The uncertainty includes not only whether the corporation will be caught and whether a pre-trial diversion agreement will be negotiated, but also whether the negotiating government office will deem the corporate compliance program "effective," or the corporation's remedial efforts "extensive." Uncertainty also still exists in whether and to what extent the Government will exercise its prosecutorial discretion in punishing individuals (the corporate agents) who engaged in the corrupt acts. Regardless of how "certain" a corporation may be as to its likely fine, there are many layers of uncertainty that still remain.

In the end, the decision to self-report an FCPA violation, or commit one, turns on uncertainties in legal discretion on the part of the government on the one hand, and the probability of detection on the other. Uncertainty in the underlying *legal doctrine* is rarely a factor in a corporation's risk analysis – the legal elements are clear and there is little debate regarding what constitutes a violation.[223] Further, the creation and publication of the Attorney General's Opinion Procedure has attenuated any potential uncertainty that might exist in the statute.[224] Instead, corporations base their decisions to disclose potential violations on predictions of what the potential sanction might be and postdictions of whether the government has already noticed the illegal acts.[225]

While Baker, Harel, and their co-authors demonstrate that uncertainty can be carefully manipulated to exploit people's behavior while remaining clear enough to avoid abuse by officials,[226] this effect may not result when applied to uncertainties in FCPA prosecutorial discretion.

The value of this type of uncertainty – like the value of any type of uncertainty – turns on the extent of the uncertainty and how corporations will calculate that uncertainty in their risk analyses. The value of uncertainty is highly variable in different contexts. The decision to impose a corporate pre-trial diversion agreement and the terms of this agreement is discretionary and, further, varies among districts. Does the lack of a clear understanding of these differences provide a deterrent like the unclear speed limit in our highway

[223] *But see supra* note 60 and accompanying text for a discussion of a case against an individual in which the knowledge element was critical.

[224] *See FCPA Opinion Procedure Release*, *supra* note 78.

[225] The terminology "predictions" and "postdictions" is borrowed from Guttel & Harel, *supra* note 14, at 467.

[226] *See* Stevenson, *supra* note 16, at 1546 n.51 (characterizing the authors' view of uncertainty as one that allows for manipulation to "avoid room for abuses such as favoritism, conflicts of interests by officials, etc., and harnessed so as to exploit the aversion most people have to uncertainty, thereby deterring socially harmful conduct").

hypothetical? Or is this kind of uncertainty so ubiquitous – common to any potential illegal act by the corporation – and are there so many levels of uncertainty in the FCPA context that the risk analysis becomes too attenuated and rendered moot? Baker, Harel, and their co-authors describe this latter question as the "most powerful objection to the[ir] analysis" regarding the value of uncertainty to achieve law enforcement benefits.[227]

The typical prosecutor – regardless of the alleged offense – has discretion to negotiate plea agreements, reduce or increase charges within a discernable range, and request certain penalties.[228] Corporations, like individuals, must include such discretion in their risk analyses when they engage in *any* potentially illegal conduct. The argument that uncertainty in the FCPA context might promote greater deterrence may dissipate when we consider the number of uncertain variables which are left to prosecutorial discretion. It is an empirical question to what extent corporations take this type and level of discretion into account when analyzing the risk and considering whether to engage in or disclose prohibited conduct.

Despite the compelling arguments presented by some scholars regarding the value of uncertainty in the law, uncertainty in the FCPA context may very well not create any greater deterrent than the uncertainty germane to all prosecutorial discretion. It is unclear whether this type of uncertainty has a positive deterrent effect to begin with. Further, manipulating prosecutorial uncertainty by somehow increasing it may or may not have an additional deterrent effect. Little research exists. The concern this Note draws out is that because prosecutorial discretion in general is so ubiquitous, and because there are so many layers of uncertainty inherent in FCPA discretion in particular, the potential for uncertainty manipulation may be rendered moot.

CONCLUSION

The DOJ has expressed that it will continue to pursue aggressively FCPA violations and to impose corporate monitors in situations it deems appropriate.[229] Because many critics are concerned over the uncertainty arising from FCPA enforcement in individual cases, commentators, in addition to opening a conversation on whether and how pre-trial diversion agreements and compliance monitors weigh in the cost-benefit analyses of corporations, should address the use of uncertainty in the law to adjust individual or corporate behavior. While uncertainty does exist with respect to whether and on what terms the Government will negotiate a pre-trial diversion agreement,

[227] Baker, Harel & Kugler, *supra* note 17, at 483 ("[T]he ineffectiveness objection may be based on the conviction that the detection of criminal or tortious behavior is already so highly uncertain that the effects of manipulating certainty further for the sake of increasing deterrence can at most be marginal.").

[228] James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524-25 (1981).

[229] *2009 Year-End FCPA Update*, *supra* note 60.

the type of uncertainty in FCPA enforcement seemingly differs little from the uncertainty inherent in any prosecutorial discretion and the risk of detection a corporation may face every day. While uncertainty in underlying legal doctrine may create greater deterrence, it is unclear that manipulating the uncertainty in FCPA enforcement will have a great effect. More research is needed.