Fordham Journal of Corporate & Financial Law

Volume 18 | Issue 3 Article 10

2013

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2013; B.A., Economics, University of Pennsylvania, 2008. I am sincerely grateful for the unwavering love and support of my parents, Michael, Mya, and my friends. I would also like to thank our fearless Editor-in-Chief, Marc Zelina, for his steady leadership and encouragement throughout the past year.

VOLUME XVIII 2013 NUMBER 3

FORDHAM
JOURNAL OF
CORPORATE & FINANCIAL LAW

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ABSTRACT

Congress passed the Foreign Corrupt Practices Act in 1977 as a component of the 1934 Securities Exchange Act. The purpose of the FCPA was to hold U.S. corporations and individuals criminally responsible for bribing foreign officials. The Act contains a series of requirements, prohibitions, terms and concepts with which companies are required to comply. Within one of these prohibitions, the business nexus provision states that U.S. companies and their personnel are prohibited from corruptly paying or offering to pay anything of value to a foreign official "in order to obtain or retain business."

The Fifth Circuit decision in *United States v. Kay* addressed the business nexus provision in a case of first impression. The issue in *Kay* concerned whether payments to Haitian foreign officials in an effort to reduce customs and sales taxes owed to the Haitian government fell within the FCPA's scope. The issue presented was in contrast to a more common FCPA scenario in which a company allegedly makes improper payments to a "foreign official" to secure a foreign government contract. The *Kay* court held that bribing such officials to get lower tax payments could in fact be considered obtaining or retaining business. Thus, the court concluded that obtaining or retaining business by way of a bribe improves the business opportunities of the payor, irrespective of whether that assistance is direct or indirect, whether it is related to administering the law, awarding, extending, or renewing a contract, or whether the purpose is the execution or preservation an agreement. This

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expansion of the business nexus element resulted in an increased number of enforcement actions brought under the Act.

This Note argues that the Fifth Circuit court in *Kay* incorrectly interpreted the business nexus provision of the Foreign Corrupt Practices Act by holding that any bribe that results in an increased profit margin will then satisfy the business nexus element, so long as it can be shown that the increased profits helped the company obtain or retain business in some specific manner. It contends that because every bribe that a company makes is assumedly going to increase profits for a company by reducing costs in some manner or another, increased profits lead to increased business, unavoidably helping the company obtain or retain business. Therefore, the holding in *Kay* mandated that increased profit margins satisfy the business nexus requirement so long as it can be shown that the increased profits helped the company obtain or retain business; this Note, however, ultimately concludes that the precedent set by the Fifth Circuit in *Kay* should no longer be followed as the circuit's interpretation allows for the provision to become a self-fulfilling requirement. The correct interpretation for the business nexus requirement should be restricted to obtaining or retaining contracts with any entity deemed to be a foreign official. The requirement should be read to restrict bribes made to assist the issuer or domestic concern in obtaining or retaining contracts with any entity deemed to be a foreign official.

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INTRODUCTION

While today's public distrust of politicians and business institutions seems to be at an all-time high, the aftermath of the Watergate scandal left the public in a comparable state of suspicion of those who were expected to be leading the country at the time.[1] Watergate revealed that many large multinational corporations maintained "slush funds"—or funds for financing political or commercial corruption—for illicit payments made both domestically and abroad.[2] Following the Watergate crisis and subsequent political turmoil, the Securities Exchange Commission ("SEC") conducted an investigation to discover the extent to which corporations were making illegal contributions to political campaigns.[3] The SEC uncovered widespread abuse of these "slush funds."[4] In an effort to illuminate and eliminate corporate corruption, the SEC indicated it would refrain from bringing enforcement actions against corporations who voluntarily disclosed making similar illicit payments; over 400 companies, including over twenty percent of Fortune 500 companies, admitted to making improper or illegal payments overseas to foreign officials in order to receive favorable treatment.[5] The aggregate amount of money admitted to being used for bribery was estimated at over $300 million.[6] It was in this environment, combined with the ensuing public outcry, that Congress

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1. *See Watergate and the Legacy of Distrust*, CHI. TRIB., June 17, 1992, *available at* http://articles.chicagotribune.com/1992-06-17/news/9202230536_1_watergate-hotel-senate-select-committee-hearings-distrust.

2. *See* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1988 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 (2001).

3. *See* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 359 (2010).

4. *See* Brown, *supra* note 2.

5. H.R. REP. NO. 95-640, at 4 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

6. *Id.*

signed the FCPA into law on December 19, 1977, as an amendment to the Securities Exchange Act of 1934.[7]

The aftermath of Watergate led to an unprecedented number of disclosures of bribes in the domestic and international spheres, kickback commissions, political payoffs, and other controversial financial transactions involving both U.S. and foreign corporations.[8] These seedy transactions were concealed using elaborate methods of deception, including the falsification of records and the structuring of fictitious transactions, a practice generally referred to as management fraud.[9]

Stories of improper payments first began to emerge in the investigations after the Watergate scandal, when the Special Prosecutor's Office discovered that a considerable number of American corporations had made illegal political campaign contributions during the 1972 presidential election.[10] To determine whether this nondisclosure violated federal securities laws, the SEC launched investigations into the matter.[11] The Watergate scandal, however, only attracted public scrutiny surrounding domestic issues; international matters were only unveiled after the revelation of an unrelated event known as "Bananagate."[12] Bananagate was first brought to attention when Eli Black, the President and Chief Executive Officer of the fruit company United Brands, now Chiquita, jumped to his death from the forty-fourth floor of the Pan Am Building in Manhattan.[13] Black's death was followed by an SEC investigation that uncovered a $1.25 million bribe that had been authorized by Black payable to the President of Honduras in order to avoid the imposition of a confiscatory export duty

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7. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (amending section 13(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(b)).

8. *See id.*; *see also* H.R. REP. NO. 95-640, at 4.

9. *See* H.R. REP. NO. 95-640, at 4.

10. *See* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1115–16 (1977).

11. *Id.*

12. *Id.*

13. *See* David Pauly & Rich Thomas, *The Great Banana Bribe*, NEWSWEEK, Apr. 21 1975, at 76; *see also Chiquita Brands, International, Inc. History*, FUNDINGUNIVERSE, http://www.fundinguniverse.com/company-histories/chiquita-brands-international-inc-history/ (last visited Sept. 28, 2012).

on bananas.[14] Thus, Bananagate shifted the focus from illegal domestic political contributions to international commercial corruption.[15] Following the Bananagate scandal, various other misdeeds were uncovered such as Lockheed Corporation's worldwide bribery of senior ministers and questionable payments made by Gulf in South Korea, Exxon in Italy, and the Northrop and Grumman corporations in the Middle East.[16]

Although Congress signed the Foreign Corrupt Practices Act ("FCPA" or "the Act") into law in 1977 (as a result of the slew of federal investigations following Watergate), the SEC and Department of Justice have only recently began seriously utilizing the Act as an enforcement mechanism.[17] Because of the drastic increase, many questions have arisen surrounding the Act's requirements and prohibitions.[18]

This Note examines a specific area of confusion in the FCPA: the "business nexus" requirement. Part I explains the background of the FCPA, including its legislative history, enactment, and amendments. Specifically, this Part outlines the provisions of the legislation, the exceptions, the affirmative defenses that have been included in the Act, and the policy rationale and intent of Congress in enacting the FCPA. Part II describes the legal problem surrounding the "obtain or retain business" requirement, also known as the "business nexus" requirement. In particular, this Part discusses the Fifth Circuit's interpretation of the "obtaining or retaining business" requirement as discussed in *United States v. Kay*. Part III advocates that the current interpretation of the

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14. *Chiquita Brands, International, Inc. History*, *supra* note 13. In a later investigation, the SEC also accused United Brands of bribing European officials with $750,000. *Id.*

15. *See* Coffee, *supra* note 10.

16. *See id.*

17. To provide a clearer view of the expansion in litigation that has been brought under the Act, it may be useful to examine some figures that highlight the current era of invigorated enforcement: In the 1980s and 1990s, the government consistently brought a couple of FCPA actions per year. Between 2007 and 2009, the Department of Justice brought sixty-four FCPA enforcement actions, and the S.E.C., forty-seven – nearly double the total number of FCPA cases brought in the first twenty-eight years that the statute was in effect. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522 (2011).

18. *See id.* at 560–61.

"obtain or retain business" requirement should be discarded in favor of a narrower alternative that would limit the application of the FCPA to obtaining or retaining *contracts* with any entity deemed to be a foreign official, thereby reestablishing and clarifying the "obtaining or retaining business" requirement as a necessary provision under the FCPA. Using this interpretation would allow corporations to have comfort knowing that not every payment made to a foreign official would be classified as a bribe. This would also allow for the establishment of more effective corporate compliance programs.

I. THE ENACTMENT, SCOPE, AND FEATURES OF THE FOREIGN CORRUPT PRACTICES ACT

This Part provides a detailed background of the Foreign Corrupt Practices Act. Section A provides some background pertaining to the scope of the Act, namely, who qualifies as a "foreign official" as defined by Congress. Section B outlines the exception to the "foreign official" rule and the affirmative defenses against bribery of foreign officials as outlined by and included in the Act.

A. THE BEGINNINGS AND PURPOSE OF THE FOREIGN CORRUPT PRACTICES ACT

The FCPA prohibits corporations from bribing foreign officials in an attempt to persuade the official to assist the corporation in obtaining or retaining business in foreign markets.[19] Under the Act, it is unlawful to offer or give anything of value to a foreign official to influence an official act, induce the foreign official to do, or omit to do, any act in violation of lawful duty, secure an improper advantage, influence the government to affect or influence any act or decision of the government; or to obtain, retain or direct business to any person.[20]

The Act developed directly from the federal probe into the Watergate scandal, a time period in which the political and economic climates were quite similar to those of today.[21] The United States

19. 15 U.S.C. §§ 78dd-2(a), 78dd-3(a) (2006).

20. *Id.*

21. *See* Sam Singer, Comment, *The Foreign Corrupt Practices Act in the Private Equity Era: Extracting a Hidden Element*, 23 EMORY INT'L L. REV. 273, 274–75 (2009).

enjoyed a period of large-scale global business expansion, while concurrently engaged in international wars.[22] Eventually, this led to the exposing of national corporate scandals, causing the market to contract and recoil.[23] The resulting overwhelming sentiment was one of distrust, with many believing that institutional structures, particularly those of big business, were corrupt and ill-founded.[24] The international bribery schemes of the 1970s brought to light fundamental issues in global corporate procedures, including inadequate supervisory procedures, insufficient risk calculations, and lack of proper internal communication systems.[25]

At this time, the United States had laws prohibiting corporate bribery.[26] With the passage of the FCPA, however, the United States became the first country to bar its citizens from bribing international officials.[27] It was not until more than two decades later that a significant number of other countries, led by the members of the Organization for Economic Cooperation and Development (OECD), began to enact similar legislation.[28]

The primary purpose of the FCPA was to prohibit bribery that allows officials to misuse their discretionary authority, impede the functioning of efficient markets, or have an adverse impact on U.S. foreign relations.[29] Despite these objectives, however, Congress made an exception and allowed for smaller payments to be made to expedite governmental actions, recognizing that such payments are at times necessary and within the realm of effective business.[30] The Act

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22. *See id.* at 274.

23. *See* Westbrook, *supra* note 17, at 500.

24. *See id.*

25. *Id.*

26. *See, e.g.*, Federal Meat Inspection Act (FMIA), ch. 2907, §§ 71–79, 34 Stat. 1260 (1906) (codified as amended at 21 U.S.C. § 622 (2006)); United States Grain Standards Act (USGSA), ch. 313 , § 9, 39 Stat. 482 (1916) (codified as amended at 7 U.S.C. § 85 (2006)), I.R.C. § 162(c) (2006); Federal Trade Commission Act (FTC Act), ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45 (2006)); Copeland "Anti-Kickback" Act, Pub. L. No. 73-324, § 1, 48 Stat. 948 (1934) (codified as amended at 18 U.S.C. § 874 (2006)).

27. *See* Westbrook, *supra* note 17, at 501.

28. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 1.1, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, 6 (1998), *available at* www.oecd.org/dataoecd/4/18/38028044.pdf.

29. *See* United States v. Kay, 359 F.3d 738, 747 (5th Cir. 2004).

30. *Id.*

approaches the prohibitions in two ways.[31] The anti-bribery provisions outlaw payments to foreign officials made "corruptly" for the purpose of obtaining or retaining business and impose criminal sanctions on corporations and individuals for any violations.[32] Second, the Act provides that businesses must keep books and records according to the Act's provisions to ensure that these types of unlawful payments are discoverable.[33] This Note focuses on the anti-bribery element of the FCPA.

Legislative history strongly suggests that the anti-bribery provisions were not intended to apply to illicit payments made to procure "routine governmental action," (also known as "grease" or "facilitating" payments), though these types of payments were not specifically referred to in the 1977 Act.[34] Congress has since amended the anti-bribery provisions of the FCPA twice in an effort to clarify its original intent in enacting the statute and to expand the Act's scope, once in 1988 and again in 1998.[35]

B. THE SCOPE OF THE FOREIGN CORRUPT PRACTICES ACT AND WHO QUALIFIES AS A "FOREIGN OFFICIAL"

The extent of who should be included in the term "foreign official" is currently a widely debated issue.[36] The FCPA defines a foreign official as "any officer or employer of a foreign government," and "any department agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[37] It is clear that the FCPA categorizes elected foreign government officials, foreign heads of state, and employees of foreign

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31. *See* Stacy Williams, *Grey Areas of FCPA Compliance*, CURRENTS: INT'L TRADE L.J., Winter 2008, at 14.

32. *See id.*

33. *See id.*

34. *See* H.R. REP. NO. 95-640, at 8 (1977); S. REP. NO. 95-114, at 10 (1977).

35. *See* S. REP. NO. 100-85, at 83 (1987), *see also* 15 U.S.C. § 78dd-1(a)(1) (2006).

36. *See* Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China,* 7 J. INT'L BUS. & L. 13, 32 (2008) (discussing recent enforcement actions).

37. 15 U.S.C. § 78dd-1(f)(1)(A).

governmental agencies as "foreign officials."[38] It is the improper payments made to these types of foreign officials for purposes of obtaining or retaining business that Congress sought to prohibit by passing the FCPA in 1977.[39]

Although the FCPA does not define "agency or instrumentality," the Department of Justice and the SEC interpret "instrumentality" to include state-owned or controlled enterprises and businesses, thereby making the employees of foreign state-owned or controlled companies "foreign officials" for purposes of the FCPA.[40] Although these companies possess the attributes of private business (such as publicly-traded shares), they are considered an "instrumentality" of the government, and so their employees are included within the scope of the FCPA.[41] The Department of Justice has specified that it takes an expansive view of the words "agency or instrumentality" to include quasi-governmental bodies. It also looks beyond share ownership in

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38. *Id.* § 78dd-1(a).

39. *See* Brown, *supra* note 2.

40. *See* Information at 4, United States v. DePuy, Inc., No. 11-cr-00099-JDB (D.D.C. Apr. 8, 2011) ("Health care providers who work at publicly owned hospitals are . . . 'foreign officials' as . . . defined in the FCPA." (citation omitted)); Information at 5, United States v. Baker Hughes Servs. Int'l, Inc., No. H-07-129 (S.D. Tex. Apr. 11, 2007) ("Kazakhoil was controlled by officials of the Government of Kazakhstan and, as such, constituted an 'instrumentality' of a foreign government, and its officers and employees were 'foreign officials,' within the meaning of the FCPA." (citation omitted)); *see also* United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011) (holding that the jury could consider the state's degree of control of the company, and the state's own characterization of the entity as either independent or an arm of the government); Plea Agreement at Exhibit 1, United States v. DPC (Tianjin) Co., No. CR 05-482 (C.D. Cal. May 20, 2005) (noting that DPC was charged with making payments totaling approximately $1.6 million to physicians and laboratory personnel employed by government-owned hospitals in China to influence their decisions to purchase the company's products).

41. *See* Opinion Procedure Release, Dep't of Justice, Foreign Corrupt Practices Act Review, No. 94-01 (May 13, 1994) [hereinafter Opinion Procedure Release No. 94-01], *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf (opining that a general director of a state-owned enterprise being transformed into a joint stock company is a "foreign official" under the FCPA, despite a foreign law opinion that the individual would not be regarded as either a government employee or a public official in the foreign country).

companies to examine factors such as the role performed by the entity or the degree of the foreign government's influence.[42]

C. EXCEPTIONS AND AFFIRMATIVE DEFENSES INCLUDED IN THE FCPA

The FCPA provides an exception to the prohibition on bribery for "facilitating or expediting" the performance of regular governmental actions, including grease payments for mail delivery, electricity, and visas.[43] The exception for grease payments or facilitating payments was made explicit in the 1988 amendment.[44] The conference also clarified that the exception was to apply only to payments in connection with commonly performed actions, and not to payments for governmental approvals which require a government official's discretion, if the actions obtain or retain business.[45] This exception has been strictly interpreted in enforcement actions, and while the Act does not specify a monetary cap for facilitating payments, the allowed payments to date have been less than $ 1,000.[46]

Two affirmative defenses can be raised under the FCPA. The first was incorporated through the 1988 amendment and created an affirmative defense for payments that are legal in the country of the foreign official to whom they are offered.[47] Thus, if a corporation can successfully show that "the payment, gift, offer or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country," the corporation can avoid liability under the Act.[48] The 1988 House-Senate conference clarified, however, that even if a foreign country lacked a certain written law, this alone would not be

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42. *See* DONALD ZARIN, *Introduction*, *in* PRACTICE LAW INSTITUTE, COURSE HANDBOOK: THE FOREIGN CORRUPT PRACTICES ACT 2010, § 1-1, at 88 (2010) [hereinafter PLI COURSE HANDBOOK] (citing Opinion Procedure Release No. 94-1, *supra* note 41). *See also* Complaint, SEC v. Siemens AG, No. 1:08-CV-02167 (D.D.C. Dec. 12, 2008) (characterizing a consultant working for a governmental unit as a government official).

43. 15 U.S.C. § 78dd-1(b).

44. H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.).

45. *Id.*

46. *See* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 684 (2009).

47. 15 U.S.C. § 78dd-1(c).

48. *Id.*; 15 U.S.C. § 78dd-2(c)(1), 15 U.S.C. § 78dd-3(c)(1).

sufficient to satisfy the defense.[49] Rather, when interpreting what is lawfully written into the laws and regulations of a country, normal rules of legal construction would apply.[50]

To successfully argue this defense, the law must be affirmatively provided for by statute; "neither negative implication, custom, nor tacit approval will qualify."[51] Since no country has written laws that explicitly permit bribery, this defense has traditionally only been applied in cases where government officials are lawfully engaged in commercial activities and for political contributions.[52] In a recent example of an attempted application of this affirmative defense, the defendant in *United States v. Kozeny* argued on the basis of the "local law" during his trial for violating the FCPA by endeavoring to bribe Azeri officials regarding a state-owned oil company in Azerbaijan.[53] Defendant Bourke claimed the payments he made were lawful under Azeri law, and that since he reported them, they could not be considered criminal.[54] Therefore, Bourke argued that the local law made his bribe lawful; however, the court rejected his arguments, holding that though Azeri law excused the payor from criminal liability upon reporting the bribe, that was not the functional equivalent of the bribe being legal.[55]

The second affirmative defense under the FCPA concerns "reasonable and bona fide expenditures":

> It allows a payment, gift, offer, or promise of anything of value if: 1) the expense is a customary and reasonable expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official and 2) the payment must be directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof.[56]

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49. H.R. REP. NO. 100-576, at 921-22.

50. *Id.*

51. DAVID KRAKOFF ET AL., MAYER BROWN WHITE PAPER— FCPA: HANDLING INCREASED GLOBAL ANTI-CORRUPTION ENFORCEMENT (2009), *available at* http://www.mayerbrown.com/publications/article.asp?id=6386.

52. ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 235 (2010).

53. *See* United States v. Kozeny, 582 F. Supp. 2d 535, 535 (S.D.N.Y. 2008).

54. *Id.* at 536.

55. *Id.* at 540.

56. 15 U.S.C. § 78dd-1(c)(2) (2006).

In *United States v. Metcalf & Eddy, Inc.*,[57] a civil enforcement action, the Department of Justice took the position that payment for first-class airfare and other expenses (including food and lodging) for an Egyptian government official and his family to visit the United States would be prohibited under the FCPA because the purpose of the visit was to induce the Egyptian official to use his influence to award the United States Agency for International Development ("U.S.A.I.D.") contracts to Metcalf & Eddy.[58] Metcalf & Eddy subsequently consented to the entry of a final judgment of permanent injunction without admitting or denying the allegations.[59]

Congress also articulated in one of its subclauses that there may be a 'knowledge' element to an FCPA violation.[60] A decade later, Congress again updated the FCPA when it implemented the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions.[61] In doing so, Congress extended the jurisdiction of the FCPA to cover the actions of foreign nationals acting within the territory of the United States and conduct taking place outside the territorial boundaries of the United States, to prohibit payments for the purpose of obtaining any improper advantage and to further prohibit payments made to officials of international organizations or corporations, rather than simply government officials.[62]

The anti-bribery provision of the FCPA prohibits U.S. corporations and individuals acting on behalf of those corporations and issuers from using:

> Any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or

57. United States v. Metcalf & Eddy, Inc., No. 99 Civ. 12566 NG (D. Mass. 1999).

58. Consent and Undertaking of Metcalf & Eddy, Inc., United States v. Metcalf & Eddy, Inc., No. 99 Civ. 12566 NG (D. Mass. 1999).

59. *See id.*

60. 15 U.S.C. § 78dd-1(a)(3).

61. *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, art. 1.1, 37 I.L.M. at 6.

62. *See* 15 U.S.C. §§ 78dd-3(a).

> authorization of giving anything of value to (1) any foreign official . . . [to obtain, retain, or direct business to any person.][63]

II. THE BUSINESS NEXUS REQUIREMENT AND ITS INTERPRETATION IN THE FIFTH CIRCUIT DECISION *UNITED STATES V. KAY*

Part II of this Note discusses the legal question surrounding the "obtain or retain business" requirement, otherwise known as the "business nexus" requirement. In particular, this Part focuses on the Fifth Circuit's 2007 interpretation of the "obtaining or retaining business" provision as discussed in *United States v. Kay*.

The FCPA deems it unlawful for any U.S. citizen, national, resident, or corporation to bribe a foreign official for the purposes of "obtaining or retaining business for or with, or directing business to, any person."[64] The "obtaining or retaining business" clause, however, is currently at the heart of the debate in FCPA enforcement. The provision has been interpreted as the business nexus test, for which federal prosecutors must show that payments were made for the purpose of "obtaining or retaining business."[65] Historically, this element required that payments be made in connection with a bid for a new contract or the renewal of an existing one. Recently, the phrase "obtaining or retaining business" has become a source of disagreement between parties, as the interpretation varies depending on the scope each party would like to apply to the term.[66]

Defendants would argue that the payments must be instrumental to, or made for the purpose of, obtaining approval of a new government contract or renewal of one that is already in place.[67] Under this interpretation of the business nexus requirement, payments made merely to increase the profitability of the corporation under an existing contract would not be included within the provision.[68] The government, on the other hand, has taken a more expansive view, insisting that in addition to payments to officials for the purpose of acquiring or renewing contracts,

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63. *Id.* § 78dd-1(a).

64. *Id.* § 78dd-2(a).

65. *See id.* § 78dd-2(a)(1)(B); *see also* H.R. REP. NO. 100-576, at 921.

66. *See generally* Bruce E. Yannett, *The Foreign Corrupt Practices Act: An Overview*, *in* PLI COURSE HANDBOOK, *supra* note 42, at 720, 733 (discussing the difficulties that came with such a broad definition).

67. *See* United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004)

68. *See generally id.*

the provision encompasses any payments that "advance the goal of obtaining or retaining foreign business with or for some person."[69] Under this standard, the government claims the "obtaining or retaining business" requirement goes far beyond the awarding or renewal of a contract to including any foreign payments made to ensure a company's profitability, as generating profits are inherently the goal and fiduciary duty of companies in obtaining or retaining business.[70] Indeed, the Department of Justice has argued that business is a fluid, continuous activity which includes not merely bids and written contracts, but everyday wholesale and retail movement, the buying and selling of commodities or services between willing buyers and sellers.[71] Therefore, it concludes that when lower duties are able to be paid by companies, for example, they are able to turn around and sell their product for a lower price, which provides them with the ability to increase their business through higher profit margins and reinvestment.[72]

The Fifth Circuit Court of Appeals illustrates this point of contention in the case *United States v. Kay*.[73] *Kay* involved the bribing of Haitian import officials to under report the duties and taxes on rice shipped into Haiti.[74] Defendants David Kay and Douglas Murphy, respectively President and Vice President of American Rice Inc. ("ARI"), had allegedly bribed Haitian customs officials to accept forged bills of lading (receipts used to transport goods by sea) and other documentation that allowed ARI to understate the quantity of rice imported into Haiti by about 33%, thereby significantly reducing ARI's customs duties and sales taxes.[75] At trial, the District Court held that payments made to foreign government officials for the purpose of reducing customs duties and taxes did not fall under the scope of the "obtaining or retaining business" provision of the FCPA, based on the determination that Congress had previously considered and rejected

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69. *Id.*

70. *See* JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS §1:7, §1:1 (3d ed. 2011); *see also* Dodge v. Ford Motor Co., 170 N.W. 668, 678 (Mich. 1919).

71. Appellant's Reply Brief, United States v. Kay, 359 F.3d 738 (5th Cir. 2004) (No. 02-20588), 2002 WL 32507956, at *4.

72. *Id*.

73. *See* United States v. Kay, 513 F.3d 432, 441–42 (5th Cir. 2007).

74. *See Kay*, 359 F.3d at 740.

75. *Id.* at 741.

statutory language that would incorporate that particular type of conduct.[76]

On appeal, the Fifth Circuit court reversed the decision of the District Court and held that the business nexus element includes payments other than those specifically used to acquire or retain government contracts.[77] The court found that the FCPA can at times apply to payments to a foreign official to reduce customs and tax liabilities if such an action assists the payer, directly or indirectly, in obtaining or retaining business.[78] The court reached its conclusion, in part, by hypothesizing such scenarios in which the following may occur: for example, it is possible that evading duties and sales taxes might allow a company to underbid competitors, might help prevent a company from going out of business, or might enable a company to compete and obtain new contracts.[79] Thus, the court concluded that the use of a bribe to obtain or retain business improves the business of the beneficiary, regardless of whether the assistance gained from the bribe is direct or indirect, and whether it is related to creating or extending a contract, or effectively enforcing the law.[80] This expansion of the business nexus element has resulted in an "explosion" of FCPA enforcement actions utilizing a broadened reading of the provision to include any payments simply made to obtain an improper business advantage.[81] Further, in a subsequent decision in the *Kay* matter (in which the defendants appealed again on several grounds, including lack of fair warning) the Fifth Circuit seemed to view the "obtain or retain business" element even more broadly, stating that it was satisfied at the trial level by the showing of evidence proving that the reduced taxes and duties resulting from the bribes allowed the company to "compete . . . in other words, in order to retain business."[82]

Though believing that the bribes made to officials to understate defendants' duties and taxes on rice could fall within the business nexus requirement, the court cautioned against the notion that anytime profits are increased the beneficiary of the advantage was assisted in obtaining

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76. *See* United States v. Kay, 200 F. Supp. 2d 681, 686 (S.D. Tex. 2002).

77. *See Kay*, 359 F.3d at 744.

78. *See id.*

79. *See id.* at 761.

80. *Id.* at 750.

81. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 393–94 (2010).

82. *See* United States v. Kay, 513 F.3d 432, 441–42 (5th Cir. 2007).

or retaining business.[83] The Fifth Circuit clarified this claim by stating that if such an idea were true, the FCPA's language would be superfluous; furthermore, it would be required at trial to show that the increased profits helped the company obtain or retain business in some specific fashion.[84] This includes evidence that the defendant payor was aware or on notice of what business advantages were being requested and how the foreign official's illegal actions were of assistance to the defendant in obtaining these advantages.[85]

III. *KAY*'S INTERPRETATION OF "OBTAINING OR RETAINING BUSINESS" IS SELF-FULFILLING AND DEEMS THE REQUIREMENT SUPERFLUOUS

Part III of this Note argues that the current interpretation of the "obtain or retain business" requirement should be discarded in favor of an interpretation that limits the definition of obtaining or retaining business to obtaining or retaining business contracts. Such an interpretation would reestablish the "obtaining or retaining business" requirement as a necessary provision under the FCPA and would allow corporations to establish compliance programs without fearing that every payment made to a foreign official would be classified as a bribe punishable under the Act. Additionally, the interpretation of the "obtaining or retaining business" requirement as held by the Fifth Circuit court in *United States v. Kay* should no longer be followed as it is self-fulfilling and renders the FCPA provision unnecessary.

A. THE INTERPRETATION OF THE REQUIREMENT IN *KAY* SHOULD NO LONGER BE FOLLOWED

Based on the Fifth Circuit court's holding in *Kay*, the definition of the business nexus requirement goes well beyond the immediate award or renewal of contracts.[86] Under this interpretation, future cases could allow the government to infer that any bribe of foreign officials will satisfy the business nexus requirement—therefore rendering the

83. *See id.*

84. *See Kay*, 359 F.3d at 760–61.

85. *See id.*

86. *See Kay*, 513 F.3d at 443 ("The explicit terms of the FCPA do not include either language relating specifically to contracts or defining more general business practices that may fall under the business nexus test . . . .").

provision unnecessary for the government to take into consideration for evidentiary purposes.

It ought to be noted that the court did foresee the possibility that its decision could be interpreted in such a way that rendered the business nexus element unnecessary; however, it did not go far enough in remedying the issue.[87] The Fifth Circuit indicated that though it recognized that lowering tax and customs payments automatically increases a company's profit margin (by reducing the company's cost of doing business), it does not follow that such a result necessarily satisfies the statutory business nexus element.[88] The court acknowledged that if the government was correct in postulating that anytime operating costs are reduced (i.e., net income increases), the beneficiary would be "receiving or keeping business." In turn, the FCPA's language of assisting in obtaining or retaining business as a necessary component of an illegal bribe would be redundant and irrelevant.[89] Thus, the court attempted to remedy this conflict by holding that if the business nexus element is fundamental, then in addition to alleging and proving the minimally sufficient facts to show a violation of the FCPA, the government would also be required to show how the increased profits helped the company obtain or retain business in some specific fashion (for example, what business opportunities were sought to be obtained, or how the results were meant to assist in getting or keeping business).[90]

Even with the Fifth Circuit's requirement that it be proven that increased profits help a company obtain or retain business, the court's interpretation of the business nexus element is still self-fulfilling and cyclical in nature. The opinion posits that any bribe that results in an increased profit margin could satisfy the business nexus element,[91] so long as it can be shown that the increased profits helped the company obtain or retain business in some specific manner; however, according to free market theory, profits are a company's primary business goal, and in fact, the generation of profits is a fiduciary duty of the company

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87. *See Kay*, 359 F.3d at 760 ("Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.").

88. *Id.* at 759.

89. *Id.* at 760.

90. *Id.*

91. *See Kay*, 513 F.3d at 443.

to its shareholders.[92] Increased profits, therefore, unavoidably help fuel the company in obtaining or retaining business (for example, through increased shareholder demand, the ability to reinvest in capital and technology, or by making the company more appealing for other firms to conduct business with).[93] Every bribe that a company makes will presumably increase profits by reducing costs in some manner or another (for example, even if a company is able to traverse the bureaucratic red-tape faster, the time saved will result in cost savings, subsequently leading to an increased profit margin). Therefore, the holding in *Kay* allows for increased profit margins to satisfy the business nexus requirement so long as it can be shown that the increased profits helped the company obtain or retain business, which will be inherently true. The Fifth Circuit writes in *Kay* that "there are bound to be circumstances" in which a customs or tax reduction merely increases the profitability of an existing profitable company, but does not assist the payer in obtaining or retaining business.[94] This reasoning is unable to withstand the basic tenets of corporate theory, as a reduction in cost (leading to an increase in profits) is the very lifeblood of any profit-seeking company's business purpose.[95] A reduction in business costs, then, is included in the definition of helping a company to obtain or retain business. I would speculate, therefore, that the *Kay* interpretation has the ability to hold that every bribe satisfies business nexus requirement.

The Fifth Circuit first noted that the ambiguity in the statutory language is too vague to give a clear indication of the exact scope of the business nexus element.[96] Based on an analysis of the FCPA's legislative history that included comparing the language adopted by Congress and the language presented to the Senate in an SEC Report, the court held that the ultimate language of the statute's "obtain or retain business" element addresses more than just obtaining or retaining government contracts.[97] The court went on to write that because

92. *See, e.g.*, Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, *available at* http://www.umich.edu/~thecore/doc/Friedman.pdf.

93. *Id.*

94. *See Kay*, 359 F.3d at 760.

95. *See* Friedman, *supra* note 92.

96. *See Kay*, 359 F.3d at 743.

97. *See id.* at 748.

Congress changed the language of the SEC Report from "obtain or retain government contacts," to "obtain or retain business" (thereby using the word "business" rather than "government"), Congress intended for the statute to apply to bribes beyond the narrow category of payments sufficient only to "obtain or retain government contracts."[98] Thus, the government could now argue that according to the holding in *Kay*, Congress intended the statute to apply to payments made to increase the profitability of an enterprise.[99]

The government's interpretation of Congress' intent, while feasible, is too quick to conclude that Congress intended the Act to apply to all payments made to increase a corporation's profitability. Rather, what Congress may have intended by changing the wording of the statutory language from the SEC Report's was to merely expand the scope of contracts to be included. Instead of only including "government contracts," Congress may have meant to include other contracts that could be made with foreign officials. This interpretation is supported by the definition of the term "foreign officials" in the FCPA.[100] The FCPA defines "foreign official" as:

> Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[101]

Although "agency or instrumentality" is not defined in the FCPA, the Department of Justice and SEC interpret "instrumentality" to include state-owned or controlled enterprises,[102] thereby making such enterprises "foreign officials" for FCPA purposes. Additionally, the Department of Justice recently released an opinion letter stating that the legal opinion issued by a general director of an enterprise stating that someone is not a government employee nor a public official of that entity is not dispositive since the enterprise's and foreign government's

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98. *See id.*

99. *See* Appellant's Brief at 6, United States v. Kay, 359 F.3d 738 (5th Cir. 2004) (No. 02-20588), 2002 WL 32507953, at *6.

100. *See* Pedersen, *supra* note 36, at 34.

101. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

102. *See* sources cited *supra* note 40.

interpretations of "foreign official" may not be the same.[103] The term "foreign officials," as currently interpreted, extends beyond government employees to officers or employees of state-owned businesses.[104] The FCPA provides that an officer or employee of any "department, agency, or instrumentality" of the state may qualify as a foreign official, including, for example, state-owned hospitals or corporations.[105] Thus, it is possible that in changing the wording of the "obtain or retain business" element, Congress attempted to prevent confusion about whether the Act only applied to government contracts rather than all potential contracts with any foreign official.

The offered interpretation restricting the business nexus requirement to obtaining or retaining contracts with any entity deemed to be a foreign official seems both more plausible and logical. Read this way, the element remains useful within the provisions of the FCPA. This interpretation also seems more likely since the statutory language uses the phrase "obtaining or retaining," and business is ultimately obtained or retained *through* contracts.[106]

CONCLUSION

As FCPA enforcement has been on the rise in recent years with no sign of significant decline in the near future, Congress should provide guidance regarding its legislative intent on the meaning of the "obtaining or retaining" clause.[107] Unfortunately, Congress has not provided much of an explanation of what the FCPA requires on many of its hotly debated issues and the Judiciary and Executive Branch have not offered much guidance.[108] The greatest attempts at clarification come from the FCPA Opinion Procedure Releases issued by the Department of Justice, as well as litigated cases; the latter of which are rare with

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103. *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE 20–21 (2012), http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.

104. *See id.*

105. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

106. ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 2 (2d ed. 2009) ("Contract law also applies to mammoth deals between huge companies in the business world . . . .").

107. *See* Westbrook, *supra* note 17, at 499.

108. *See* Williams, *supra* note 31, at 16.

regards to the business nexus element.[109] The FCPA Opinion Procedure Releases clearly take the government's stance on the issue, arguing for a broad interpretation of the business nexus requirement to continue increasing enforcement actions.[110]

As previously noted, Congress last amended the FCPA in 1998.[111] Perhaps now, in an era of palpably increased enforcement actions (with companies willing to settle because they are unclear on, and weary of, the law[112]), it is high time for legislature to respond to the atmosphere of uncertainty.[113] The current interpretation of the provision, as understood by *Kay*, would allow for the government to expand the requirement in a manner that is unsound and in contradiction with the tenets of the area of law which it is attempting to regulate—an unfortunate irony that Congress (or the judiciary, through new precedent) can and should remedy.

To help render the provision once again workable for those attempting to abide by the FCPA, the precedent set by the Fifth Circuit in *Kay* should no longer be followed. The requirement should be read to restrict bribes made to assist the issuer or domestic concern in obtaining or retaining contracts with any entity deemed to be a foreign official.

"Foreign official," as defined by the government, extends beyond government employees to officers or employees of state-owned businesses and state-owned enterprises.[114] Since enforcement agencies deem these individuals to be "foreign officials" regardless of rank, title, or classification under local foreign law, this definition may have been the congressional intent employed in changing the statutory wording from "obtain or retain government contracts" to "obtain or retain business," rather than the analysis of the phrasing change drawn in *Kay*.[115] My proposed interpretation for the business nexus provision would allow the business nexus requirement to be workable, rather than a self-fulfilling requirement that has rendered itself obsolete.[116]

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109. *See* Opinion Procedure Release No. 94-1, *supra* note 41.

110. *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act*, supra* note 102.

111. *See* H.R. REP. NO. 95-640, at 8 (1977); S. REP. NO. 95-114, at 10 (1977).

112. *See* Koehler, *supra* note 81, at 406.

113. *See* Williams, *supra* note 31.

114. *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act*, supra* note 102.

115. *See* United States v. Kay, 359 F.3d 738, 748 (5th Cir. 2004).

116. *See* Williams, *supra* note 31, at 18.

Regardless, with the United States and other countries, most notably the United Kingdom, intent on creating and enforcing anti-corruption laws,[117] it is crucial that a clearly-defined interpretation of the business nexus provision be delineated and adopted so that United States companies can avoid committing unlawful acts during the course of business with international entities.

117. *See, e.g.*, Press Release, Serious Fraud Office (SFO), Mabey & Johnson Ltd. Prosecuted by the SFO (July 10, 2009), *available at* http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/mabey--johnson-ltd-prosecuted-by-the-sfo.aspx.