"DECLINATIONS WITH DISGORGEMENT" IN FCPA ENFORCEMENT

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Abstract

This Article addresses the recent pretrial diversion scheme undertaken by the Department of Justice in conjunction with its Foreign Corrupt Practices Act Pilot Program; specifically, "declinations with disgorgement." In other words, the Department of Justice declined to prosecute or even continue investigation, provided the company disgorge its alleged ill-gotten gains. This Article dissects both the purpose of, and terminology used in, declinations with disgorgement, and argues that this novel and creative pretrial diversion is a dangerous conflation of legal remedial theories and terms. A criminal disposition cannot be a declination with attendant penalties because either illegal activity occurred or it did not; prosecutorial discretion does not allow an "in-between" option of declination while simultaneously requiring disgorgement. Calling these dispositions "declinations," and the penalties associated therewith "disgorgement," is a wild misuse of the terms, creating a crisis in the expressive function of the Foreign Corrupt Practices Act and in the legal lexicon itself.

INTRODUCTION

In April 2016, the Department of Justice ("DOJ") Criminal Division announced the Foreign Corrupt Practices Act ("FCPA") Pilot Program, a one-year program aimed at incentivizing voluntary disclosure and compliance.[1] At base, the Pilot Program requires voluntary self-disclosure and cooperation with the government in order to be eligible for a declination from the DOJ.[2] Since its inception, three public companies have disgorged profits to the Securities and Exchange Commission ("SEC") in return for a declination from the DOJ.[3] On September 29, 2016, the DOJ announced that it was providing two different private companies with declinations regarding potential FCPA liability, but required the two companies disgorge their profits to the Department of Treasury.[4] These two cases represent the first "declinations with disgorgement" that have ever

[1] U.S. Dep't of Justice, Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," [hereinafter Pilot Program Memo] at 2, *available at* https://www.justice.gov/opa/file/838386/download. The Pilot Program ended on April 5, 2107, but the Justice Department has stated that it will be keeping the Pilot Program in place going forward. *See* Remarks of Acting Assistant Attorney General Kenneth A. Blanco, American Bar Association National Institute on White Collar Crime, Mar. 10, 2017, *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

[2] *Id.*

[3] These companies are Nortek Inc., Akamai Technologies, and Johnson Controls. *See* U.S. Dep't of Justice, Declination Letter, In Re. Nortek, Inc. (June 3, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865406/download; U.S. Dep't of Justice, Declination Letter, In re. Akamai Technologies, Inc. (June 6, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865411/download; U.S. Dep't of Justice, Declination Letter, In re. Johnson Controls, Inc. (June 21, 2016), *available at* https://www.justice.gov/criminal-fraud/file/874566/download

[4] Letter to HMT LLC, U.S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899116/download; Letter to NCH Corp., U. S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899121/download.

been granted by the DOJ in FCPA enforcement. What makes these two dispositions so novel? After all, disgorgement extracted by the SEC is par for the course in FCPA enforcement. Disgorgement demanded by the DOJ, however, is not, and the implications of issuing "declinations" with the requirement of "disgorgement" are alarmingly far-reaching.

The stated goal of the Pilot Program is to promote greater accountability for individuals and companies involved in FCPA-related misconduct. While intending to incentivize other companies to self-disclose in order to get a coveted declination from the government, these "declination with disgorgement" cases instead distort the traditional understandings of critical legal terms. Specifically, these dispositions represent a bastardization of the term "declination," as well as the term "disgorgement." As such, a "declination with disgorgement" is an inherently oxymoronic statement. What is occurring in these dispositions involves neither a declination nor disgorgement. Yet the inappropriate use of these terms is not without significant repercussions. The misuse of the legal lexicon creates a crisis surrounding the expressive function of law and legal language,[5] creating a metaphorical Tower of Babel for lawmakers, regulators, companies and stakeholders.[6]

This Article's contribution to the literature is that it analyzes the very recent and novel creation of a new type of DOJ disposition: "declination with disgorgement." In this Article, I will analyze the terms at issue, "declination" and "disgorgement," and discuss why and how they are being misused in the Pilot Program dispositions described above. In Part I, this Article sets the backdrop of the Pilot Program by describing the statutory contours of the FCPA. In doing so, this Article will analyze the recent trends in FCPA enforcement, and the uptick in pretrial settlement agreements. This Article will take an historical look at the remedy of disgorgement and its rise to being omnipresent in FCPA enforcement, particularly when the true value of ill-gotten gains may be hard to define or calculate.

Part II addresses the creation of "declinations with disgorgement" under the Pilot Program and dissects the phrase into its critical terms, "declination" and "disgorgement." This Part analyzes the dangerous misuse of the terms. Put simply, a "declination" is a one-sided decision, made by the government, not to pursue charges against a defendant. It is not a contract or bilateral agreement. Yet the two "declinations with disgorgement" issued under the Pilot Program represent contractual arrangements between the government and the defendant, wherein the defendant will pay "disgorgement" in order for the government to agree to abandon its investigation. Moreover, the term "disgorgement" means dispossession of ill-gotten gains, and is historically a judicial remedy in equity. In the two dispositions settled by only the DOJ in the Pilot Program, disgorgement is wholly inappropriate, as it is not a remedy available to the DOJ in conjunction with a declination.

To the cynical observer, these two "declination with disgorgement" cases are the equivalent of a corporation "buying" a declination in a corruption case, with the disgorgement amount representing merely the cost of doing international business. Seen from another point of view, however, these dispositions could be viewed as examples of governmental extortion; meaning, if these "disgorgement" amounts are not paid, the government will threaten continued investigation and possible prosecution. The problems with either of these scenarios should be obvious – if illegal activity is occurring, the government should be enforcing the law and awarding appropriate punitive measures; if the government cannot prove that illegal activity is occurring, companies should not be required to pay in order to avoid the continued threat of fines and prosecution.

Finally, this Article will address the theoretical issue with the misuse of the terms "declination" and "disgorgement" in relation to the expressive function of law. In Part III, this Article describes

[5] *See, e.g.*, Cass Sunstein, On the Expressive Function of Law, 144 U. Penn. L. Rev. 2021 (1996).
[6] *See* Sections III and IV, *infra*, and accompanying footnotes.

the longstanding history of the expressive theory and applies the theory to declinations with disgorgement. This Part discusses the signals and messages sent when the government makes a seemingly schizophrenic choice to decline prosecution, and strict enforcement of the FCPA, while simultaneously demanding disgorgement of allegedly ill-gotten gains. Part IV takes a deeper dive into expressive theory and legal hermeneutics by arguing that the misuse of legal terms jumbles the legal lexicon and renders incomprehensible any communication among stakeholders. This Part concludes by offering proposals to reduce the risk of abuse inherent in declinations with disgorgement and other pretrial diversion measures.

I. THE FCPA

This section will address the scope of statutory authority under the FCPA, as is necessary for a foundational understanding of the expressive function of this particular law. Part A outlines the statutory jurisdictional and penalty scheme of the FCPA. Part B details the rise of FCPA enforcement actions and trends. Part C analyzes the recent settlement strategies in the form of DPAs, NPAs, and the DOJ Pilot Program.

A. Statutory Authority and Limits of the FCPA

In 1977, Congress passed the Foreign Corrupt Practices Act,[7] aimed at eradicating bribery occurring overseas for the purpose of obtaining business.[8] Specifically, the FCPA prohibits the corrupt use of the mail or any other instrumentality of interstate commerce in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or any other thing of value to any person, knowing that all or some of the payment will be offered, given or promised, directly or indirectly, to a foreign official to influence or induce the foreign official to either commit an act in violation of his or her lawful duty, or to secure an improper advantage in obtaining or retaining business.[9] In addition to the anti-bribery provision, the FCPA also includes accounting provisions. Among the FCPA accounting provisions, the books and records provision requires issuers to make and maintain accurate books, records and accounts.[10] Likewise, the internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.[11]

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[7] Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (2006)). The FCPA, or the Act, has been amended twice since its passage. *See* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988 (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at U.S.C. 15 §§ 78dd(1)-(3), 78ff (2000)).

[8] The legislative history of the FCPA makes clear that Congress, in the wake of the Watergate scandal, passed the measure intending to shore up corporate accountability by requiring transparency within corporate books and records. *See* Karen E. Woody, *Securities Laws as Foreign Policy*, 15 Nev. L. J. 398, 307-9 (2014). The measure was spearheaded by the SEC and initially focused only on corporate record-keeping, but was expanded by Congress to include anti-bribery as its focus. *See* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its 20th Birthday*, 18 N.W.J. Int'l. L. & Bus. 269, 271-2 (1998); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L. J. 929, 954 (2012).

[9] 15 U.S.C. §§ 78dd-1(a), -2(a) (Supp. V 2011).

[10] *Id.*

[11] *Id.*

The jurisdictional reach of the statute is global, meaning that it applies to activity occurring within the United States, as well to conduct that takes place exclusively in foreign countries.[12] Although only the DOJ has the authority to pursue criminal actions, both the DOJ and the SEC have civil enforcement authority under the FCPA.[13] The DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States,[14] while the SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.[15] The agencies often work in conjunction to bring criminal and civil proceedings simultaneously against an entity.[16]

The FCPA contains very specific guidelines and penalties for violations of both the anti-bribery and accounting provisions of the Act.[17] A criminal violation of the anti-bribery provision may result in a fine of up to $2 million per violation for an entity.[18] Likewise, an individual may face up to five years in prison and/or a fine of $250,000 per violation of the anti-bribery provision.[19] For criminal violations of the accounting provisions, entities can be assessed fines up to $25 million;[20] individuals may face up to 20 years in prison and/or fines up to $5 million.[21] In addition, under the Alternative Fines Act, courts may impose higher penalties than those statutorily provided by the FCPA.[22]

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[12] *Id.* §78dd-1(g)

[13] *Id.*

[14] U.S. DEP'T OF JUSTICE CRIM. DIV. & U.S. SEC. & EXCH. COMM'N ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) (hereinafter "FCPA Guidance"). According to the FCPA Guidance, *infra* n. XX, the DOJ has exercised this civil authority in limited circumstances in the last thirty years. *See, e.g.*, United States & SEC v. KPMG Siddharta Siddharta & Harsono, *et al*., No. 01-cv-3105 (S.D. Tex. 2001) (entry of injunction barring company from future FCPA violations based on allegations that company paid bribes to Indonesian tax official in order to reduce the company's tax assessment); United States v. Metcalf & Eddy, Inc., No. 99-cv-12566 (D. Mass. 1999) (entry of injunction barring company from future FCPA violations and requiring maintenance of compliance program based on allegations that it paid excessive marketing and promotional expenses such as airfare, travel expenses, and per diem to an Egyptian official and his family); United States v. American Totalisator Co. Inc., No. 93-cv-161 (D. Md. 1993) (entry of injunction barring company from future FCPA violations based on allegations that it paid money to its Greek agent with knowledge that all or some of the money paid would be offered, given, or promised to Greek foreign officials in connection with sale of company's system and spare parts); United States v. Eagle Bus Manufacturing, Inc., No. 91-cv-171 (S.D. Tex. 1991) (entry of injunction barring company from future FCPA violations based on allegations that employees of the company participated in bribery scheme to pay foreign officials of Saskatchewan's state-owned transportation company $50,000 CAD in connection with sale of buses); United States v. Carver, *et al.*, No. 79-cv-1768 (S.D. Fla. 1979) (entry of injunction barring company from future FCPA violations based on allegations that Carver and Holley, officers and shareholders of Holcar Oil Corp., paid $1.5 million to Qatar foreign official to secure an oil drilling concession agreement); United States v. Kenny, *et al*., No. 79-cv- 2038 (D.D.C. 1979) (in conjunction with criminal proceeding, entry of injunction barring company from future FCPA violations for providing illegal financial assistance to political party to secure renewal of stamp distribution agreement).

[15] FCPA Guidance at XX.

[16] *See* Stuart H. Deming, The Foreign Corrupt Practices Act and the New International Norms 6 (2005).

[17] 15 U.S.C. §§ 78dd-2(g); 78dd-3(e); 78ff (2000).

[18] 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A)

[19] 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. §3571 (b)(3), (e) (criminal fining authority that supersedes FCPA-specific fine provisions).

[20] 15 U.S.C. §§ 78ff(a)

[21] *Id.*

[22] 18 U.S.C. §3571(d). The fine can be as much as twice the benefit that the defendant obtained by making the corrupt payment, provided the government can prove its case beyond a reasonable doubt.

Penalties assessed under the SEC civil enforcement authority are typically much smaller than those of its criminal counterpart. As discussed below, this penalty limitation may be part of the reason the SEC has opted to demand disgorgement, often in addition to a fine, in nearly every enforcement action it has pursued in the last decade.[23] The SEC has discretion to impose a fine or seek injunctive relief, or both.[24] For violations of the anti-bribery provisions, the SEC may fine both entities and individuals up to $16,000 per violation.[25] For violations of the accounting provisions, the SEC may demand a civil penalty not to exceed the greater of (a) the gross amount of pecuniary gain to the defendant or (b) a specified dollar limitation based on the egregiousness of the violation, and ranging from $7,500 to $150,000 for an individual, and $75,000 to $725,000 for a company.[26]

The clearly delineated penalty scheme set forth in the FCPA is of importance when analyzing cases in which the SEC and DOJ strayed from the statutorily authorized penalties and required disgorgement. This concept is addressed below.

B. FCPA Enforcement Trends

Although enacted in 1977, the FCPA was an oft-overlooked statute, in terms of enforcement, until the 2000s.[27] From its enactment in 1977 until 2001, the SEC brought only nine enforcement actions under the FCPA.[28] The DOJ brought, on average, three cases per year during that same time period.[29] Since those original cases, the FCPA industry, which includes both regulators and defense counsel, has enjoyed a boom that to date has not yet waned. In 2001 alone, the SEC brought five enforcement actions, including one administrative proceeding.[30] Correspondingly, the DOJ brought seven cases in 2001.[31] In 2007, as an example, the SEC's enforcement actions under the FCPA rose to 18.[32] In 2010, the SEC created a specialized unit in its Enforcement Division, devoted solely to FCPA matters.[33] Likewise, in 2010, the SEC brought twenty-six enforcement actions, and the DOJ brought forty-eight.[34] The number of enforcement actions per year brought by the SEC has remained at least eight every year, and skyrocketed to 32

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[23] *See* Section II.B., *infra.*

[24] *See* Deming, *supra* n. XX at 44.

[25] 15 U.S.C. §§ 78dd-2(g)(1)-(2)(B), 78dd-3(e)(1)-(2)(B), 78ff(c)(1)-(2)(B).

[26] Section 21(B) of the Exchange Act; 15 U.S.C. § 78u(d)(3).

[27] *See, e.g.,* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUBL. CONT. L. J. 393 (2011).

[28] *See* U.S. Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, *available at* http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Jan. 12, 2016). Note that this list includes only the SEC enforcement actions and not the parallel DOJ proceedings that occurred in many of these cases.

[29] *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008).

[30] *Id.* The administrative proceeding was brought against Chiquita Brands International. Two major cases in 2001 included KPMG Siddharta Siddharts & Harson, and Baker Hughes. The SEC brought follow-on actions against individuals in both of these matters.

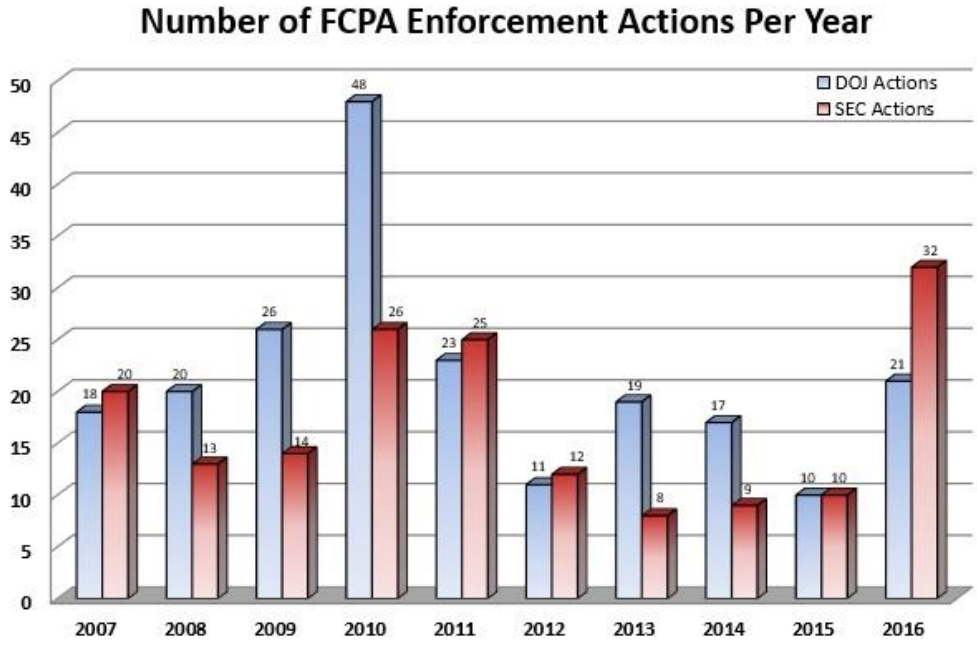
[31] U.S. Dep't of Justice, Fraud Section, Foreign Corrupt Practices Act, Related Enforcement Actions, Chronological List, 2001, *available at* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2001.

[32] *Id.* These cases included three administrative proceedings against Dow Chemical, Co., Delta & Pine Land Co. (and Turk Deltapine, Inc.), and Gioacchino De Cherico & Immucor, Inc.

[33] Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010).

[34] *See* Gibson Dunn, 2016 Year-End FCPA Update at 2 (Jan. 3, 2017) *available at* http://www.gibsondunn.com/publications/Pages/2016-Year-End-FCPA-Update.aspx.

in 2016.[35] The DOJ enforcement actions have not dipped below 10 since 2007, and included twenty-one in 2016.[36] The following table provides data on the enforcement actions taken since 2007.[37]



The fines associated with FCPA violations rose as quickly as the number of enforcement actions. The largest fine associated with an FCPA enforcement action remains $800 million, and was levied against Siemens Aktiengesellschaft in 2008.[38] The following five largest fines, three of which occurred in 2016, are as follows: $772 million against Alstom (2014);[39] $579 million against KBR/Halliburton (2009);[40] $519 million against Teva Pharmaceuticals Industries, Ltd. (2016);[41] $419 million against Braskem/Odebrecht (2016);[42] $412 million against Och-Ziff Capital

[35] *Id. See* U.S. Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, *available at* http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.
[36] *Id.*
[37] Gibson Dunn, 2016 Year-End FCPA Update, *supra* n. ___.
[38] Litigation Release No. 20829 (Dec. 15, 2008); Securities and Exchange Commission v. Siemens Aktiengesellschaft, Civil Action No. 08 CV 02167 (D.D.C.).
[39] Department of Justice, Press Release 14-1448, *Alstom Pleads Guilty and Agrees to Pay $772 Criminal Penalty to Resolve Foreign Bribery Charges* (Dec. 14, 2014).
[40] U.S. Securities and Exchange Commission, Litigation Release 20897A, *SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations — Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579* (Feb. 11, 2009), *available at* https://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.
[41] Press Release, U.S. Dep't of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More than $283 Million to Resolves Foreign Corrupt Practices Act Charges (Dec. 22, 2016), available at https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.
[42] Press Release, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), available at https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. This total amount listed in the press release includes payments to Brazilian and Swiss authorities.

Management Group LLC (2016).[43] In 2016, the corporate fines exceeded $2 billion for the first time in the history of the FCPA.[44] Importantly, these numbers include the disgorgement amounts required to the SEC.

C. Settlement Tools: DPAs, NPAs, and the DOJ Pilot Program

As enforcement actions and fines rose exponentially in the 2000s, companies and the defense bar began to push back on the government's broadening scope of the FCPA.[45] Corporate liability in general seemed to be expanding, thanks in part to the instruction of the DOJ's Holder Memorandum[46] and the SEC's Seaboard Report.[47] At that point, the prosecutorial decision was ultimately a binary one: prosecutors would either charge a company (or enter into a plea deal), or issue a declination. Pre-trial alternatives were not on the radar.[48] However, the collapse of Arthur Anderson following its criminal conviction forced a change in enforcement tactics due to a growing acknowledgment that corporate criminal convictions can be the death knell of companies.[49] In response, in 2003, Deputy Attorney General Thompson issued an official DOJ memorandum supplanting the Holder Memorandum, and referencing the option of pre-trial diversion as a consideration in prosecutorial decisions.[50] As a result, alternative pre-trial settlement

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[43] Press Release, U.S. Dep't of Justice, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016), available at https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.

[44] Gibson Dunn, 2016 Year-End FCPA Update at 10 (Jan. 3, 2017) *available at* http://www.gibsondunn.com/publications/Pages/2016-Year-End-FCPA-Update.aspx.

[45] Some of the pushback was due to the fact that FCPA cases never go to trial but instead are settled or negotiated behind closed doors in the DOJ or SEC. As a result, the contours or the law are not very clear. For instance, what constituted a "foreign official" was hotly debated as recently as this year, despite decades of intense enforcement of the statute.

[46] U.S. Dep't of Justice, Federal Prosecution of Corporations (June 16, 1999) The Holder Memorandum provided guidance to DOJ prosecutors regarding factors to consider when conducting investigations and either bringing charges or negotiating plea agreements. Notably, the Holder memorandum did not reference any other form of disposition, as DPAs and NPAs had not yet become a tool that the DOJ regularly used when investigating corporations. *See generally* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49. U.C. Davis L. Rev. 497, 501 (2015).

[47] Sec. & Ech. Comm'n, Commission Statement on the Relationship of Cooperation To Agency Enforcement Decisions; Release No. 44969 (Oct. 23, 2001). The Seaboard Report gives a framework for evaluating cooperation by companies, and details the factors the Commission will consider when granting leniency towards companies under investigation. The report identifies four broad areas for cooperation: (1) self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top; (2) self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations; (3) remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and (4) cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.

[48] *See* Koehler, *supra* n. ___ at 501.

[49] Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 65 FLA. L. REV. (2013).

[50] Memorandum from Larry D. Thompson, Deputy Att'y Gen., on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003). The Thompson Memorandum was superseded the Filip Memorandum, which explicitly referred to non-prosecution agreements and deferred prosecution agreements as "occupy[ing] an important middle ground between declining prosecution and obtaining the conviction of a corporation." Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice (Aug. 28, 2008), *available at* http://www.

arrangements such as Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) became some of the most oft-used negotiation and settlement tools for both corporations and prosecutors alike.[51]

At present, DPAs and NPAs represent the primary legal mechanism for concluding enforcement actions against corporate defendants.[52] DPAs and NPAs are just as pervasive in FCPA dispositions, with a growing acknowledgment of the strict liability nature of the statute,[53] and a sense from defendants and the defense bar that compliance programs may not catch every possible violation of the FCPA.[54] Importantly, DPAs and NPAs are not used solely by the DOJ; DPAs and NPAs became tools in the SEC's arsenal for FCPA enforcement in 2010, when the agency announced a cooperation initiative.[55] In addition to the use of DPAs and NPAs, the DOJ adopted a Pilot Program in 2016, discussed herein.

1. DPAs

A DPA is a formal agreement wherein the government files charging documents with the court, but thereby agrees to defer prosecution provided the defendant agrees and complies with the terms and conditions of the DPA.[56] The agreement itself is publicly filed, and typically requires the defendant to pay a monetary penalty, agree to waive the statute of limitations, admit to various facts included in the agreement describing the conduct at issue, and cooperate with the government.[57] At the end of the term of the agreement, which is typically between eighteen months and three years, the government moves to dismiss the charges, and the defendant company is able to settle the allegations without a criminal conviction or guilty plea on its record.[58] Although DPAs are filed in court, the judicial review of the agreement is minimal, and often amounts to "rubber-stamp" approval.[59]

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justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf. In contrast, DPAs for individual prosecutions have existed for a number of decades. *See* Peter Spivack & Sujit Raman, Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements, 45 Am. CRIM. L. Rev. 159, 163 (2008).

[51] Companies greatly prefer DPAs and NPAs so as to not suffer the collateral consequences of a guilty plea, or risk going to trial. Collateral consequences can include debarment for companies involved in government contracts, reputational damage, shareholder litigation, among others. *See* Cunningham, *supra* n. ___

[52] *See generally* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008).

[53] *See, e.g.*, Irinia Sivachanko, Note, *Corporate Victims of 'Victimless Crime': How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C.L. Rev. 393 (2013).

[54] Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 65 FLA. L. REV. (2013);
Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 928 (2007) a

[55] Press Release, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-6.htm. The SEC entered into its first DPA with Tenaris in 2011, and Tenaris paid $5.4 million in disgorgement and pre-judgment interest. Yet outside of the three cases associated with the Pilot Program, discussed below, the SEC has required disgorgement pursuant to an NPA only once, in the case of Ralph Lauren. Press Release, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* https://www.sec.gov/news/press/2013/2013-65-npa.pdf.

[56] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 928 (2007).

[57] See FCPA Guidance, supra n. ___ (DPAs describe the company's conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant to the U.S. Sentencing Guidelines.)

[58] *Id.*

[59] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009) *available at* http://www.gao.gov/assets/300/299781.pdf. The "rubber

Prior to 2003, the DOJ used a DPA to settle enforcement actions fewer than 25 times.[60] Since 2003, however, the boom over the use of DPAs has not dissipated, with over 400 signed since 2003.[61] The first DPA for an FCPA allegation was agreed to in 2005.[62] For FCPA enforcement in particular, DPAs remain an oft-used settlement approach.[63] DPAs are attractive to both the government and companies. For companies, it is an avenue in which they can resolve potential FCPA violations without a finding of guilt. For the government, DPAs represent an easier way to reach a resolution, while still extracting a fine as well as keeping open the door for further prosecution if the company is unable to meet the terms of the DPA.

2. NPAs

Under an NPA, the DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties in the form of a letter agreement. The requirements of an NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty.[64] If the company complies with the agreement throughout its term, the DOJ does not file criminal charges. Because NPAs are not filed in court, there is no judicial scrutiny of the agreement, meaning there is no independent review of the government's findings or conclusions.[65]

Interestingly, the first pre-trial resolution in FCPA enforcement occurred in 2004, and came in the form of an NPA rather than a DPA.[66] Like DPAs, NPAs saw a sharp uptick in FCPA enforcement since that date.

In 2016 alone, for example, the government entered into twenty-one NPAs in total, with six of those related to FCPA allegations.[67] NPAs are a powerful tool in that both the government and the regulated companies see the merits of this pre-trial diversion. The DOJ is able to extract a fine

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stamp" approval became even more entrenched after a recent D.C. Circuit opinion slapping down Judge Leon of the District of Columbia District Court. U.S. v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016). Judge Leon had rejected the DPA, stating that it would "undermine the confidence in the administration of justice and promote disrespect for the law for [society] to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time. . . ." U.S. v. Fokker Servs. B.V., 79 F.Supp.3d 160, 167 (D.D.C. 2015). The D.C. Circuit reversed Judge Leon's, holding that the judiciary cannot second-guess the Executive Branch's charging authority and preferences.

[60] Cunningham, *supra* n. ___; Gibson Dunn, 2016 Year-End Update on Corporation Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) (Jan. 4, 2017).

[61] Brandon L. Garrett and Jon Ashley, Federal Organizational Prosecution Agreements, University of Virginia School of Law, available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

[62] Press Release, U.S. Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), *available at* https://www.justice.gov/archive/opa/pr/2005/January/05_crm_008.htm.

[63] Gibson Dunn, Year End DPAs and NPAs, *supra* n. ___

[64] U.S. DEP'T OF JUSTICE CRIM. DIV. & U.S. SEC. & EXCH. COMM'N ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) at 75.

[65] *See* Koehler, *Measuring the Impact*, *supra* n. ___

[66] *See* Press Release, U.S. Dep't of Justice, Invision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2004), available at http://www.justice.gov/archive/opa/pr/2004/December/04_crm_780.htm.

[67] Gibson Dunn, *supra* n. __. *See also* https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges; https://www.justice.gov/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges; http://www.fcpablog.com/blog/2016/10/7/tenet-healthcare-pays-513-million-for-fraud-and-kickbacks-wh.html

pursuant to the agreement with potentially fewer resources expended on investigation,[68] while companies are able to "walk away" without any finding of guilt, and also without a proverbial sword of Damocles hanging over their heads in the form of a DPA.[69]

3. DOJ Pilot Program

Entering into this current FCPA enforcement landscape of skyrocketing fines and disgorgement amounts, increased enforcement efforts, and an uptick in pre-trial settlement agreements, was the DOJ's Pilot Program, which was enacted in April 2016. As stated in the memorandum outlining the program, the "principal goal [] is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs."[70] In addition, the goals of the Pilot Program are to further deter individuals and companies from engaging in FCPA violations, encourage strong compliance programs, and "increase the Fraud Section's ability to prosecute individual wrongdoers. . . ."[71]

The Pilot Program memorandum sets out finite requirements companies must meet before being eligible for mitigation credit.[72] The first requirement is timely, voluntary self-disclosure. The disclosure must occur "prior to an imminent threat of disclosure or government investigation";[73] it must occur "within a reasonably prompt time after becoming aware of the offense; and the disclosure must be fulsome.[74] Second, the company must cooperate fully in all FCPA matters, meaning it must provide ongoing disclosure of the facts relevant to the wrongdoing at issue; preserve, collect and disclose all relevant documents; provide updates and disclose relevant facts discovered in the corporate internal investigation; make employees available for interviews by the government; facilitate third-party production of documents from foreign jurisdictions and provide

[68] "When companies self-reported and lay all their cards on the table, non-prosecution agreements are an effective way to get the money back and save the government substantial time and resources while crediting extensive cooperation." Andrew Ceresney, Director of SEC Enforcement Division. Press Release, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-109.html.

[69] Under a DPA, companies are closely watched by the government. In fact, companies under DPAs have reporting requirements, and some may even have corporate monitors in place. *See* FCPA Guidance, *supra* n. __ .

[70] U.S. Dep't of Justice, Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," [hereinafter Pilot Program Memo] at 2, *available at* https://www.justice.gov/opa/file/838386/download.

[71] *Id.* The emphasis on individual liability in addition to corporate liability comes on the heels of the 2015 Yates Memorandum, referenced in the Pilot Program Memo. *See* Department of Justice, Sally Quillian Yates, Memorandum Re. Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), *available at* http://www.justice.gov/dag/file/769036/download. The "Yates Memo," as it has come to be called, stresses six areas of focus for the DOJ and SEC in investigating individuals for corporate wrongdoing. They are as follows: (1) corporations will be eligible for cooperation credit only if they provide DOJ with "all relevant facts" relating to all individuals responsible for misconduct, regardless of seniority level; (2) both criminal and civil DOJ investigations will focus on investigating individuals "from the inception of the investigation"; (3) criminal and civil DOJ attorneys should be in routine communication with each other, notifying civil counterparts when conduct giving rise to potential individual liability is discovered; (4) the DOJ will not agree to a corporate resolution that provides immunity to potentially culpable individuals unless there are extraordinary circumstances present; (5) the DOJ will have a clear plan to resolve open investigations of individuals when the case against a corporation is resolved; and (6) civil attorneys, in addition to criminal attorneys, should focus on individuals and take into account issues such as accountability and deterrence, as well as ability to pay fines.

[72] *Id.* at 3-9.

[73] Pilot Program Memo at 4. This factor is in accordance to the U.S. Sentencing Guidelines § 8C2.5(g)(1).

[74] *Id.* This includes facts about individuals as well as the corporation.

translations as necessary.[75] Third, companies must perform timely and appropriate remediation, which includes implementation of an effective compliance and ethics program;[76] appropriate discipline of employees responsible for misconduct; and any additional measures the company believes would identify future risks and would demonstrate the recognition of the seriousness of misconduct.[77]

If the above requirements are met, companies are eligible for mitigation credit. According to the Pilot Program memorandum, mitigation credit can be in the form of a different type of disposition, a reduction in fine, or in a different determination regarding the need for a monitor.[78] The requirements of the Pilot Program are not "new" in the sense that the factors included are omnipresent in the 2012 FCPA Guidance issued by the DOJ and SEC.[79] However, the factors are not simply suggestions or "best practices," but are requirements for eligibility in the Pilot Program itself.

To date, five companies have received declinations from the DOJ in conjunction with the Pilot Program.[80] Three of these five companies have disgorged profits to the SEC under the parameters of the Program in return for a declination from the DOJ.[81] Of these three, two disgorged profits pursuant to NPAs with the SEC,[82] and the third disgorged profits pursuant to a cease-and-desist order.[83]

In other words, the first three dispositions undertaken with the Pilot Program involved a clear declination from the DOJ, but also included a corollary agreement with the SEC that involved disgorgement of profits. However, in September 2016, the DOJ granted two "declinations with disgorgement" under its Pilot Program.[84] These declinations were awarded to two private Texas-based companies, HMT LLC and NCH Corp., who are not issuers and therefore fall outside of the SEC's FCPA jurisdiction. Arguably because of this lack of SEC jurisdiction, the DOJ opted to conflate its role and that of the SEC's by issuing the novel "declination with disgorgement."

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[75] *Id.* at 5-7. Additional factors for cooperation include de-confliction of internal investigation, if necessary, and disclosure of any criminal activity. The Pilot Program Memo also states that cooperation may be different depending on the size of the company and related expenses for cooperation.

[76] *Id.* at 7. The compliance program criteria may vary among companies but must include: (1) a culture of compliance and awareness among employees that criminal conduct will not be tolerated; (2) dedication of sufficient resources to compliance; (3) high-quality and experienced personnel in compliance who can identify risks; (4) independence among compliance personnel and corporate managers; (5) auditing of compliance program; (6) valid reporting structure from compliance to the management.

[77] *Id.* at 8.

[78] *Id.*

[79] FCPA Guidance, *supra* n. __ .

[80] U.S. Dep't of Justice, Foreign Corrupt Practices Act Pilot Program, Declinations available at https://www.justice.gov/criminal-fraud/pilot-program/declinations.

[81] These companies are Nortek Inc., Akamai Technologies, and Johnson Controls. *See* U.S. Dep't of Justice, Declination Letter, In Re. Nortek, Inc. (June 3, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865406/download; U.S. Dep't of Justice, Declination Letter, In re. Akamai Technologies, Inc. (June 6, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865411/download; U.S. Dep't of Justice, Declination Letter, In re. Johnson Controls, Inc. (June 21, 2016), *available at* https://www.justice.gov/criminal-fraud/file/874566/download.

[82] Press Release, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-109.html. The press release details the agreements that required Akamai Technologies and Nortek Inc. to disgorge profits related to bribes paid to Chinese officials by foreign subsidiaries.

[83] In re. Johnson Controls, Inc. File No. 3-17337 (July 11, 2016).

[84] Letter to HMT LLC, U.S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899116/download; Letter to NCH Corp., U. S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899121/download.

In its letter to counsel for HMT LLC, the DOJ stated that its investigation found that the company, through its employees and agents, had paid bribes to government officials in both Venezuela and China in order to influence those officials' purchasing decisions.[85] Specifically, the DOJ alleged that HMT sales agents illegally paid $500,000 in bribes disguised as commissions or subcontracting fees to government officials in Venezuela.[86] In China, an HMT subsidiary engaged a distributor who paid bribes on "almost all transactions in China."[87] The letter to HMT's counsel detailing the declination states that the DOJ would be closing its investigation into HMT because of HMT's voluntary self-disclosure, its full cooperation, its comprehensive global investigation, the remedial steps HMT had taken, including its robust compliance program, and its agreement to disgorge to the Department all profits it made from the illegal conduct, totaling $2,719,412.[88]

Likewise, in the case of NCH Corporation, the DOJ's letter to counsel states the exact same language regarding why the DOJ would cease its investigation into NCH's subsidiary in China, that "illegally provided things of value. . . to Chinese government officials."[89] The DOJ alleged that NCH's subsidiary in China provided "things of value," including gifts, meals, and entertainment, worth $44,545 to Chinese government officials.[90] These bribes were recorded in NCH's books as "customer maintenance fees," "customer cooperation fees," and "cash to customer."[91] In addition, NCH paid expenses for several employees of an NCH China customer during a ten-day trip to the U.S. and Canada, when only one-half day involved business-related activities. For NCH, the DOJ required $335,342 in disgorgement.[92]

Obviously, one major distinction between these latter two declinations and the other three from the Pilot Program is the fact that the DOJ demanded disgorgement. In addition, unlike the declinations afforded to the other three companies under the Pilot Program, the declination letters for NCH and HMT required a signature of the defendant companies' counsel.[93] The signature of counsel indicates that counsel agrees to the brief statement of facts provided in the letter. Indeed, many have suggested that these "declinations with disgorgement" are in fact NPAs,[94] a point that will be discussed below. The DOJ's declinations with disgorgement were a novel concept, but create a legal and theoretical morass with the oxymoronic phrase "declination with disgorgement."

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[85] Letter to HMT LLC, U.S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899116/download.

[86] *Id.*

[87] *Id.*

[88] *Id.* (emphasis added).

[89] Letter to NCH Corp., U.S. Department of Justice, Sept. 29, 2016, *available at* https://www.justice.gov/criminal-fraud/file/899121/download.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Letter to HMT, *supra* n. ___; Letter to NCH, *supra* n. ___

[94] *See, i.e.*, Gibson Dunn, *supra* n. __ ("We have determined to count these declination letter agreements, where they are countersigned by the company with agreements to the alleged facts and to disgorge illicit gains, as enforcement actions for statistical purposes. Although we understand there could be a different view taken toward counting a so-called declination of prosecution as an enforcement action, these letter agreements bear significant similarities to other types of agreements (including DOJ and SEC non-prosecution agreements and SEC administrative proceedings) that we have been counting for statistical purposes for the 12 years we have been tracking FCPA enforcement. In our view, a company forced to pay hundreds of thousands or even millions of dollars to the U.S. Treasury as a result of publicized admissions to conduct that amounts to an FCPA violation has undergone a significant enforcement event that we believe warrants tracking.")

II. "DECLINATIONS WITH DISGORGEMENT"

In order to understand properly why the phrase "declination with disgorgement" is inherently oxymoronic, one must first dissect the phrase into its terms, "declination" and "disgorgement." This Section discusses the historical roots of the terms and their practical usage in FCPA enforcement. It concludes with an analysis regarding why a "declination with disgorgement" is both inappropriate and unavailable to the DOJ, and discusses the dangerous practical ramifications of the declinations with disgorgement.

A. "Declination"

A declination from the government is a decision to "conclude formal and informal investigations into potential violations of the FCPA without bringing enforcement actions."[95] In essence, it is the use of prosecutorial discretion to decline to pursue further action, a decision perhaps driven by certain factors including, perhaps, a realization that the charges could not be proven beyond a reasonable doubt.[96] As noted above, prior to the rapid rise of the use of DPAs and NPAs, the prosecutorial decision-making was essentially a binary exercise: charge a company (and/or enter into plea negotiations), or decline to prosecute further.[97]

1. Criteria for Declination in FCPA Enforcement

Declinations in FCPA enforcement, prior to the Pilot Program, were difficult to analyze given that they often were not publicized by either the DOJ or SEC. Nevertheless, the DOJ has outlined in its FCPA Guidance the factors involved for considering a declination. These decisions are to be

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[95] James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, BLOOMBERG L. REPS.: CORPORATE COUNSEL (2011), *available at* http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSwOZDm83!/document.name=/miller_chevalier_tillen_bohn_article.pdf.

[96] All criminal charges require proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970) ("The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.").

[97] *See* Koehler, *Measuring Impact*, *supra* n. __ at 502-3. Koehler looks to the Filip Memorandum of 2008, in which one finds the first discussion of DPAs and NPAs as pre-trial options. The Filip Memorandum states:

> […] it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

Filip Memorandum, *supra* n. __ at 18.

made pursuant to the *Principles of Federal Prosecution of Business Organizations*.[98] According to the *Principles*, prosecutors are to consider ten factors when deciding whether to prosecute:

- the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's willingness to cooperate in the investigation of its agents;
- the existence and effectiveness of the corporation's pre-existing compliance program;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution,[99] and to cooperate with the relevant government agencies;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of remedies such as civil or regulatory enforcement actions; and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[100]

Importantly, the decision whether or not to award a declination does not, and should not, turn on whether the company pays back any or all of its allegedly ill-gotten gains. That is, there is not any *quid pro quo* in order to obtain a declination, for reasons set out in Part II.C.[101]

The list of factors to be used in deciding whether to prosecute provides an abstract rubric for stakeholders to understand what corporate conduct will be evaluated. However, prior to the Pilot Program's five declinations, neither the DOJ nor the SEC typically publicized declinations. In addition, nearly every corporate FCPA enforcement matter to date has been settled outside of court, so there is little public record for companies to reference when considering what conduct may elicit investigation or not.[102] The most transparency the DOJ and SEC provided into declinations prior to the Pilot Program was a list of six examples of companies to which the agencies had provided declinations, published in the 2012 FCPA Guidance.[103] For each of the six companies, the FCPA Guidance lays out in bullet-point form the factors that were taken into

[98] U.S. Att'y Manual 9-28.000 *et seq.* For individuals, prosecutors are to reference the *Principles of Federal Prosecution.*

[99] As will be discussed in Part II.B., "restitution" in this context refers to compensating the victims of the crime. This is separate and distinct from disgorgement. In FCPA enforcement, restitution is not demanded often because the victims of the

[100] U.S. Att'y Manual 9-28.300.

[101] *See, e.g.*, Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 B.Y.U. L. Rev. 307, 312 (2015) (noting that a declination is "walking away and doing nothing").

[102] *See generally*, Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement*, 38 Cardozo L. Rev. __ (2017).

[103] FCPA Guidance, *supra* n. __ at 77-80

consideration for that particular company to obtain a declination.[104] Out of the six examples illustrated in the Guidance, however, not a single one included any mention of the company's payment of disgorgement or restitution.[105]

2. "Declinations" in Conjunction with the Pilot Program

Importantly, unlike a DPA or NPA, a declination is *not* an agreement between two parties, but instead is a unilateral decision. In other words, a declination is entirely under the control of the government, and does not demand any simultaneous action by the company under investigation in order to secure it. To be sure, certain pre-existing factors may *influence* whether a company secures a declination. However, those pre-existing conditions are antecedents to the decision not to prosecute, and do not occur as consideration in an agreement with the government for a declination. The Pilot Program disastrously conflates declinations with the principles of an NPA by requiring disgorgement in order to secure the declination. This is a bastardization of the term "declination." As noted above, these "declinations" instead are actually NPAs in disguise, which begs the question of why the DOJ referred to these as declinations at all.[106] The declination letters in the two cases themselves make clear that the government was treating the declination more as an NPA. Unlike the declination letters for the first three companies in the Pilot Program, the letters for NCH and HMT included a longer summary of "facts" that the government alleged.[107] These two declinations with disgorgement also required signatures from defendants' counsel, meaning there is an implied admission to the facts as laid out in the declination letter. If these dispositions are actually NPAs in practicality, then the DOJ has the authority to demand a criminal fine pursuant to the agreement, as it has done many times before when entering into NPAs and DPAs.[108] Unfortunately, a criminal fine cannot be exacted when the government decides to decline to either continue investigation or proceed with prosecution, as the DOJ claimed it would in the HMT and NCH letters. A declination with strings attached, however, is not a declination. The practical and theoretical implications of this misuse of the term "declination" are vast, and are discussed below.

B. "Disgorgement"

Of all the FCPA enforcement actions to date, the DOJ has not sought disgorgement from a corporation or individual until its creation of the Pilot Program.[109] Just as the term "declination" was analyzed above, this Part takes the same approach toward the term "declination." Specifically,

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[104] *Id.*

[105] FCPA Guidance, *supra* n. ___

[106] This question is addressed in Section III.

[107] Letter to HMT, *supra* n. ; Letter to NCT, *supra* n. ___

[108] In such a situation, a criminal fine would be entirely distinct from disgorgement as the term has historically been used. *See* Section II.B, *infra.*

[109] The DOJ required restitution from Albert Jackson Stanley, a former officer of Kellogg, Brown & Root, Inc., a subsidiary of Halliburton Inc. during the Halliburton/Snamprogetti/Technip enforcement action related to the Bonny Island, Nigeria, liquefied natural gas contracts. *See* Press Release, Dep't of Justice, Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes, *available at* https://www.justice.gov/opa/pr/former-chairman-and-ceo-kellogg-brown-root-inc-sentenced-30-months-prison-foreign-bribery-and. Stanley entered a guilty plea for his role in the joint venture and authorizing agents to pay bribes to Nigerian officials. U.S. v. Stanley, No. 08-cr-597 (S.D. Tex. 2008). Importantly, restitution is quite different from disgorgement, and is often demanded in a criminal matter. *See* SEC v. Huffman, 996 F.2d 800, 802 ("[Disgorgement] is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. . . Disgorgement is not restitution.")

this Part will address the history of disgorgement as a remedy, the unavailability of disgorgement in a criminal context, and the use of disgorgement in government proceedings.

1. History of Disgorgement and its Modern Use in Government Actions

Disgorgement is an historical remedy, with roots dating back to Emperor Justinian.[110] At its base, disgorgement means to "strip of ill-gotten gains."[111] Disgorgement in today's jurisprudence is a remedy in equity,[112] and lies within the core judicial power of a court.[113] It is not intended as a punitive measure, nor is it available outside of an equitable resolution.[114] Despite a reference to disgorgement in the U.S. Sentencing Guidelines,[115] criminal disgorgement is rarer than its use in civil matters.[116] For this reason, this discussion focuses heavily on the use of disgorgement in matters of securities law wherein the SEC is a party to the suit in a civil disposition.

Disgorgement now seen as a commonplace remedy in SEC enforcement, but it was not used in conjunction with regulatory actions until the latter half of the twentieth century.[117] The agency first obtained disgorgement in the insider trading case of *SEC v. Texas Gulf Sulphur*[118] despite the fact that Congress had never explicitly authorized the SEC by statute to seek disgorgement in a federal court.[119] In 1990, the Securities Enforcement Remedies and Penny Stock Reform Act

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[110] J.P. Dawson, Unjust Enrichment: A Comparative Study (1951); *see also* Caprice L. Roberts, *Supreme Disgorgement*, 68 Fla. L. Rev. 1 (2016).

[111] Black's Law Dictionary 214.

[112] Disgorgement historically is understood as a remedy in equity, but some scholars have argued that it is practically being applied as a remedy at law. Ryan, *supra* n. __. This distinction has wide implications in that the SEC (and the DOJ) does not have the authority to request a legal remedy that is not provided for in the statute. Ryan points out that disgorgement cannot be a remedy in equity in cases where a defendant does not possess or control any of the tainted profits (either because he has squandered them or profits were redeployed elsewhere), because the defendant is not in a position to "disgorge" anything. In these cases, Ryan argues, disgorgement is a remedy at law because it is an obligation to pay a sum of money to a plaintiff. *Id.*

[113] *See, e.g.*, SEC v. First City Fin. Corp, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Disgorgement is an equitable remedy . . . ."); SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991) ("The disgorgement remedy [the district court judge] approved in this case is, by its very nature, an equitable remedy . . . ."); SEC v. Certain Unknown Purchasers of Common Stock of and Call Options for Common Stock of Santa Fe Int'l Corp., 817 F.2d 1018, 1020 (2d Cir. 1987) ("The disgorgement remedy approved by the district court in this case is, by its nature, an equitable remedy.")

[114] *See, e.g.*, Russell Ryan, The Equity Façade of SEC Disgorgement, FCPA Professor (Nov. 21, 2013), *available at* http://fcpaprofessor.com/the-equity-facade-of-sec-disgorgement/ ("The only two sources of legal authority for disgorgement are that (1) it is included among the ancillary equitable remedies inherently available to the court once its equitable powers are invoked by the SEC's request for an injunction and (2) it is authorized by a provision in the Sarbanes-Oxley Act – codified at Exchange Act section 21(d)(5) – saying the SEC can obtain any 'equitable relief.' In either case, however, so-called 'disgorgement' is authorized only if it is truly a form of equitable relief rather than legal relief").

[115] USSG § 8C2.9 "Disgorgement: The court shall add to the fine determined under [the Guideline range] any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures."

[116] *See* James T. O'Reilly, *supra* n. __ at 191-2. O'Reilly points out that it is a congressional priority to have victims paid first (in restitution) before requiring disgorgement of any additional gains beyond what restitution required.

[117] SEC v. Berlacher, 2010 WL 3566790 (E.D. Pa. Sept. 13, 2010) ("Disgorgement has become the routine remedy for a securities enforcement action. If a person is found in violation and has profited from the ensuing transaction, courts generally order the disgorgement of those profits.") *See* James Tyler Kirk, *Deranged Disgorgement*, 8 J. Bus. Entrepreneurship & L. 131 (2014).

[118] 312 F. Supp. 77 (S.D.N.Y. 1970).

[119] *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L. J. 641, 642 (1977) ("Nowhere within the statutory framework of the federal securities laws did Congress provide that the SEC would have the power to make a violator of the anti-fraud provisions disgorge tainted profits. Nor is there any direct reference in the legislative history surrounding the passage of the 1933 or 1934 Acts which would encourage the

allowed the SEC, in an *administrative* proceeding, to "enter an order requiring accounting and disgorgement, including reasonable interest."[120] This marked the first time the term "disgorgement" appeared as a remedial option in the securities laws. The availability of disgorgement as an equitable remedy was expanded again in 2002, with the passage of Sarbanes-Oxley.[121] The provision in Sarbanes-Oxley inserted a new amendment into Section 21(d) of the Exchange Act, allowing the SEC to "seek, and any Federal Court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."[122]

Despite being a commonly-sought remedy in modern civil enforcement, disgorgement remains a much-debated concept. The most recent issue regarding the SEC's ability to seek disgorgement is the upcoming Supreme Court review of a circuit split regarding whether the five-year statute of limitations applies to disgorgement.[123] The case centers on the application of the Supreme Court's decision in *Gabelli v. Securities and Exchange Commission*, in which the Court held that under 28 U.S.C. § 2462, enforcement actions seeking civil penalties, fines or forfeiture must be brought within five years from the date of when the allegedly fraudulent conduct occurred, not when the fraud was discovered.[124] The present Supreme Court case, *Kokesh*, addresses whether claims for disgorgement will be subject to the *Gabelli* holding. The Eleventh Circuit held that a disgorgement claim is the equivalent of an action or suit for *forfeiture*, meaning that it is subject to the statute of limitations under § 2462.[125] The Tenth Circuit, in *Kokesh*, held that disgorgement is not the equivalent of forfeiture.[126] The Tenth Circuit stated that disgorgement is an equitable remedy and should not be considered a *penalty;* therefore, disgorgement claims are not subject to the statute of limitations.[127] The Supreme Court will decide the circuit split in its 2017 term.[128]

Because disgorgement is defined as "ill-gotten gains," the government is only permitted to receive the profits if it can prove that the disgorgement amount is derived from the alleged illegal activities. Anything beyond that amount would be considered a punishment. In order to calculate disgorgement, the SEC must identify the causal link between the unlawful activity and the profit it seeks to disgorge.[129] In securities litigation, courts often afford a significant amount of deference to the SEC's calculation, given that profits from illegal activity may be hard to define with particularity.[130]As such, the threshold burden of the SEC is to give merely a "reasonable

utilization of such an enforcement tool by the SEC."); *see also* Russell Ryan, *The Equity Façade of SEC Disgorgement*, 4 Harvard Bus. L. Rev. Online 1 (2013), *available at* http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Fa%C3%A7ade-of-SEC-Disgorgement.pdf. Ryan points out that Congress has statutorily empowered the SEC only to issue injunctions, administrative cease-and-desist orders, monetary penalties, as well as a bars and suspensions.

[120] 15 U.S. § 78u-2(e). After the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 929, any individual or company can be sued in an SEC administrative proceeding, whereas before, the jurisdictional reach of the administrative proceedings extended only to broker-dealers and regulated entities. The question as to whether the authority to order disgorgement, in its original meaning, can be conferred upon administrative judges, meaning non-Article III courts, is one for debate, but is beyond the scope of this Article.

[121] Sarbanes-Oxley Act, §305(b), codified at U.S.C. § 78u(d)(5).

[122] *Id.*

[123] Kokesh v. Sec. & Exch. Comm'n, No. 16-529 (U.S. Jan. 13, 2017).

[124] *Gabelli v. Securities and Exchange Commission*, 133 S. Ct. 1216 (2013).

[125] *Securities and Exchange Commission v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

[126] Sec. & Exch. Comm'n v. Kokesh, 834 F.3d 11158 (10th Cir. 2016).

[127] *Id.*

[128] Kokesh v. Sec. & Exch. Comm'n, No. 16-529 (U.S. Jan. 13, 2017).

[129] SEC v. First City Fin. Corp, 890 F.2d 1215, 1230 (D.C. Cir. 1989)

[130] *Id.*

approximation of the profits which as causally connected to the violation."[131] Once the SEC meets this relatively low threshold, the defendant must rebut the SEC's calculation and demonstrate that the government's disgorgement figure is not, in fact, a reasonable approximation.[132]

Despite being only a fairly recently-demanded remedy, disgorgement is by far the largest category of money collected by the SEC. In fiscal year, 2014, the SEC collected $2.788 billion in disgorgement and half that in penalties, $1.38 billion.[133] Because disgorgement is a remedy rather than a penalty, companies disgorging ill-gotten gains in an SEC proceeding may be able to attain a tax deduction on the disgorged amount, along with pre-judgment interest.[134] For this reason, companies often negotiate to settle with a larger disgorgement amount, rather than a larger fine or penalty.

2. Disgorgement in FCPA Enforcement

The literature regarding the SEC's use of disgorgement focuses heavily on disgorgement of gains from insider trading,[135] with little ink spilled on disgorgement in FCPA matters. The same is true for disgorgement demanded by the DOJ, given that the DOJ only recently began using disgorgement in antitrust matters[136] and has never required disgorgement in FCPA matters until September 2016.[137]

As described in Section I, the FCPA lays out authorized statutory penalties. Disgorgement is not included in the statute, nor is it even mentioned in the original House or Senate reports of 1977,

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[131] *Id. See also* Elaine Buckberg & Frederich C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347, 352 (2008) ("[A]lthough few courts have discussed the concept of netting [finding the net but-for benefit] in the disgorgement context, the principle is routinely invoked to calculate damages for securities fraud and, logically, the same principle should apply to disgorgement."); Russell Ryan, *supra* n. __ (noting that the "reasonable approximation" standard is an advantage to the government that is afforded because disgorgement is considered a remedy in equity rather than a remedy at law).

[132] *Id.* This is typically done by proving intervening events or causes affected the calculation of profits.

[133] U.S. Sec. & Exch. Comm'n, Select SEC and Market Data: Fiscal Year 2014, *available at* http://www.sec.gov/about/secstats2014.pdf

[134] Sasha Kalb & Marc Alain Bohn, *Disgorgement: The Devil You Don't Know*, Corporate Compliance Insights (Apr. 10, 2010) available at http://www.corporatecomplianceinsights.com/disgorgement-fcpa-how-applied-calculated/. Because disgorgement is not intended to be a punishment, it does not fall under the exclusion set by the IRS for deductions. Meaning, absent a finding that disgorgement is the equivalent of civil forfeiture, or a factor of the punishment, it is a deductible expense.

[135] *See, e.g.*, Cheney & Sibears, *Disgorgement in SEC Insider Trading Cases*, 26 BB.J. No. 10 (1982); John K. Robinson, *A Reconsideration of the Disgorgement Remedy in Tipper-Tippee Insider Trading Cases*, 62 Geo. Wash. L. Rev. 432 (1994); Thomas C. Mira, *The Measure of Disgorgement in SEC Enforcement Actions Against Inside Traders Under Rule 10b-5*, 34 Catholic U. L. Rev. 445 (1985).

[136] *See, e.g.*, Einer Elhauge, *Disgorgement as Antitrust Remedy*, 76 Antitrust L.J. 79 (2009); DOJ Seeks Unprecedented Disgorgement Remedy in a Civil Antitrust Case, WilmerHale (Feb. 26, 2010), *available at* https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=88585.

[137] Disgorgement is often used interchangeably with "restitution," particularly in criminal dispositions but there is a significant difference between the two terms. *See* James T. O'Reilly, Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory Violations ("Disgorgement serves a different purpose than restitution. Restitution is victim specific and is designed to remediate their losses. The amount of restitution is limited by the amount of loss. The purpose of disgorgement is to prevent a wrongdoer from profiting by his or her illegal conduct.")

the discussion regarding its amendments,[138] or the 1981 U.S. General Accounting Office Report.[139] Yet the SEC has piggybacked on the expansion of remedies available under Sarbanes-Oxley, including equitable remedies, despite the explicitly-stated fining authority found in the FCPA itself. As noted above, the use of disgorgement as an equitable remedy available under Sarbanes-Oxley may be narrowed by the upcoming Supreme Court case determining whether a request for disgorgement will be subject to the statute of limitations or not.[140]

The first use of disgorgement in the settlement of an FCPA action by the SEC was in 2004, in the case of ABB Ltd.[141] Since that time, the SEC has sought disgorgement in "virtually every FCPA enforcement action it has brought."[142] The amount of disgorgement, like the number of FCPA enforcement actions, has increased over the past fifteen years.[143] In fact, four of the top ten highest amounts of disgorgement extracted by the SEC occurred in 2016.[144] As noted above, when faced with astronomical fines and disgorgement amounts, companies are often more willing to accept the disgorgement amounts because of the ability to write the amount off in taxes.

3. DOJ "Disgorgement" in the Pilot Program

The background regarding disgorgement as demanded by the SEC in FCPA enforcement actions is critical for understanding how much of a shift in practice it is to have the DOJ demand disgorgement in exchange for a declination. As discussed in Section II.A., the DOJ is not able to extract any *quid pro quo* in exchange for a criminal declination. There is no process by which the government can extract money without at least a settlement agreement. In the cases of NCH and HMT, the declination letters made clear that both companies were to pay the required disgorgement amount to the United States Treasury within ten days; in addition, both companies had to agree that they would not "seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the Disgorgement Amount."[145] Further, both

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[138] S.Rep. No. 95-114 (1977); H.R. Rep. No. 95-640 (1977); *see also* David 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, 474 (2009). Weiss writes that "the history surrounding the passage of the FCPA indicates that it is unclear whether Congress intended that the SEC pursue disgorgement in FCPA enforcement. This fact alone should at least give pause to question the normative function of disgorgement." *Id.*

[139] U.S. Gen. Acct. Office, Report to the Congress: Impact of Foreign Corrupt Practices Act on U.S. Business (1981).

[140] *See* fn. ___ and accompanying text.

[141] SEC v. ABB Ltd, Civil Action No. 10-1648 (D.D.C. Oct. 12, 2010). Interestingly, in that case, the settlement did not include anti-bribery violations. ABB disgorged $5.9 million to settle books and records and internal controls violations. *Id.*

[142] Mike Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int'l. L. 907, 981 (2010) (citations omitted). Koehler explains that there is an "intuitive appeal" to disgorgement in enforcement actions charging violations of the anti-bribery provisions of the Act. Yet the SEC's use of the disgorgement remedy is routine, regardless of whether the action involves only violations of the accounting provisions in the absence of anti-bribery violations.

[143] *See* Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement*, 38 CARDOZO L. REV. __ (2017).

[144] The four disgorgement amounts paid in 2016 that land in the top ten list of highest disgorgement amounts to date are: Teva Pharmaceuticals, $519 million; Och-Ziff, $199 million; VimpelCom, $167.5 million; and JPMorgan Chase, $130.5 million. The largest disgorgement amount to date remains that of Siemens, $350 million, which was settled in 2008. *See* Richard Cassin, *Teva pays second biggest FCPA Disgorgement*, The FCPA Blog, *available at* http://www.fcpablog.com/blog/2017/1/2/teva-pays-second-biggest-fcpa-disgorgement.html.

[145] Letter to HMT, *supra* n. ___; Letter to NCH, *supra* n. __

companies had to agree that "no tax deduction may be sought in connection with any part of [] payment of the Disgorgement amount."[146]

These factors diverge from the process in which disgorgement amounts that have been paid to the SEC to date in relation to an FCPA matter, and seem to suggest that the "disgorgement" amounts in these two DOJ dispositions are much more punitive than remedial in nature. The justification for the tax deduction of disgorgement is that it is a remedy that is calculated based on the company's reported pre-tax profits, which leaves open the possibility that an issuer or a subsidiary can seek refunds on taxes paid for historical profits that were ultimately disgorged.[147]

As noted above, the DOJ does have *civil* authority under the FCPA for domestic concerns that do not fall within the jurisdiction of the SEC.[148] This begs the question of whether, in these declinations with disgorgement, the DOJ merely conflated its two statutory jurisdictional authorities. Meaning, the DOJ put on its "civil authority" hat while demanding disgorgement where the SEC could not; at the same time, the DOJ, using its criminal authority, issued a declination. There are myriad problems with this academic attempt to justify a declination with disgorgement, and the evidence of the dispositions suggest that the DOJ was not undertaking this analysis when issuing its declinations, for the following reasons. First, the two declinations with disgorgement were issued pursuant to the Pilot Program, which is housed in DOJ Criminal Fraud.[149] Second, the letters themselves were issued on DOJ Criminal Fraud letterhead, and signed by [criminal fraud prosecutor.][150] Finally, the text of the declination letters themselves clearly link the "declination" with the "disgorgement" which is patently inappropriate and confounding to all stakeholders involved.

Even if one assumes, *arguendo*, that the DOJ was conflating its civil and criminal jurisdiction into one disposition, the DOJ would still need to bifurcate its declination and the disgorgement as two separate dispositions, for the reasons set out in this section: a declination is one-sided and does not have "strings attached." Even *if* the DOJ had jurisdictional authority for a criminal declination and a civil disgorgement agreement, the use of the terms should be more precise, for the reasons set out in Sections III and IV. In short, stakeholders cannot operate within a system wherein it is not clearly set out what the standards of proof, the jurisdictional authority, and the proper terms are, particularly if the government muddies the water in the manner it has with the declinations with disgorgement.

C. Practical Consequences of Disgorgement in DOJ FCPA Enforcement

The elephant in the room with regards to declinations with disgorgement strikes at the root definition of both of the terms, and is the following: if disgorgement is "ill-gotten gains," a declination, despite prosecutorial discretion, likely is not appropriate because illegal activity MUST have occurred in order for the company to have received "illegal" profits. Of course, the DOJ has prosecutorial discretion not to bring certain actions, but setting up an entire Pilot Program premised on a promise of lenient prosecutorial discretion starts to look as if prosecutors are shirking their prosecutorial duty to investigate and charge companies with violations of the law.[151] On the other hand, if the company rightly deserves prosecutorial discretion in the form of a

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[146] Letter to HMT, *supra* n. ___; Letter to NCH, *supra* n. __

[147] *See* Daniel Patrick Wendt, So how does the DOJ calculate disgorgement? FCPA Blog, Nov. 30, 2016.

[148] See Section I.A., *supra*.

[149] Letter to HMT, *supra* n. ___; Letter to NCH, *supra* n. __

[150] *Id.*

[151] This directly affects the expressive function of law, particularly in terms of what signals the government sends regarding what corporate behavior will be sanctioned and what will be excused. *See* Section III, *infra.*

declination, perhaps because the government would be flat-out unable to prove its case in a court of law, then "disgorgement" is inappropriate and instead becomes government extortion. In either case, there is at least a modicum of corruption in the exact institution charged with ferreting out and eradicating corruption. This Part explores both possibilities, addressing first the question of overextended prosecutorial discretion in granting declinations while demanding payment.

1. "Declinations with Disgorgement": Government Extortion?

Prior to the Pilot Program, the DOJ has never required disgorgement of profits in any of its FCPA enforcement actions. In the two cases of the Pilot Program involving DOJ disgorgement, the DOJ issued declinations, meaning the DOJ stated that it would cease all *investigation* and any subsequent prosecution of potential FCPA violations.[152] The extent of the investigation prior to the declination is anyone's guess, and it is possible that companies are compelled to enter into declinations with disgorgement even when they would otherwise contend the factual assertions made by the DOJ. The reason for this is that companies involved in potential FCPA malfeasance will jump at the notion of a declination, given the current rigorous enforcement regime of the statute and the corresponding penalties, and the sheer cost of defending an FCPA investigation whether frivolous or not. In other words, the DOJ may be making offers that companies simply "can't refuse." The only catch, of course, is that companies must pay "disgorgement."

The risk of government abuse in these situations is alarming. In practicality, what is happening is that the government does not continue its criminal investigation yet demands a sum in exchange for the declination. One can imagine a situation wherein a company that no longer wants to pay exorbitant legal fees for continued internal investigations and negotiations with the government will agree to a number of options in order to "make it go away." This is the FCPA equivalent of civil forfeiture.[153] Perhaps more aptly, declinations with disgorgement may meet the elements of extortion under the color of official right.[154]

Adding to the risk of abuse is the fact that nearly every FCPA matter ends in settlement rather than in a court of law. As such, there is little to no checks or balance by the judiciary.[155] This fact exacerbates the pressure that the government can exert in order to extract a settlement with terms favorable to itself.

2. The Irony of "Buying a Declination" for a Potential Corruption Charge

While risk of governmental abuse of not proving allegations of corruption before extracting disgorgement is valid, the other side of that coin is that corporations potentially can abuse the same loophole. For this reason, the bribery-extortion distinction proves relevant. If, on one hand, the

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[152] *See* Pilot Program Memorandum, *supra* n. __. Effectively, the DOJ could expend exactly nothing in terms of resources or investigation costs and reach the same resolution.

[153] The intersections between the Pilot Program's declinations with disgorgement and civil forfeiture are numerous, and will be explored in the author's future scholarship. *See generally*, Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L. J. 2446 (2016).

[154] The literature on extortion under color of office is highly relevant here. *See* James Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, U. Pa. L. Rev. 1695 (1993) ("Historically, extortion under color of office is the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action"). Of course, the irony that the DOJ official charged with rooting out corruption may be corrupt themselves should not be overlooked.

[155] *See* Turk, *supra* n. ___. Only one corporate defendant has ever taken FCPA-related charges to trial, and that was a 1983 case from the FCPA's "pre-modern" era. SEC v. World-Wide Coin Investments, 567 F. Supp. 724 (N.D. Ga. 1983). Since 2004, only two of the DOJ's FCPA actions have even progressed to criminal indictments, and both of those were dismissed. *See* Lindsey Manufacturing Co. (Dec. 1, 2011); Cinergy Telecomm'ns Inc. (Feb. 24, 2012).

government is extorting companies by requiring disgorgement, the same transaction can been seen as a company bribing the government to issue a declination.[156]

Another way to analyze the declinations with disgorgement is to ignore the term "declination" and treat the disposition as an NPA, given the many similar characteristics.[157] In other words, these declinations with disgorgement really are settled agreements, or contracts, between companies and the DOJ. Seen in this light, the contractual terms of the "contract" are the following: forbearance from further investigation and prosecution is the consideration provided by the government; "disgorgement" is the price of the contract for the company. Therefore, disgorgement is no longer merely disgorgement -- it is the price at which a company can buy the declination.

Compliance with the FCPA is always a cost-benefit analysis to companies;[158] the Pilot Program inserts into that analysis the potential ability to have the DOJ and SEC cease investigation and rely upon the corporation's internal investigation with the cost being only that of disgorgement. In other words, companies that are eligible for the Pilot Program ostensibly can "negotiate away" any continued government investigation and prosecution, provided they can agree on an acceptable disgorgement amount. In this case, "disgorgement" becomes a tax for doing global business, required like a toll by the DOJ and SEC. If this becomes the case, the deterrent effect of disgorgement is reduced to nearly nothing, and the Pilot Program is reduced to being simply a toll booth in FCPA enforcement. This outcome likely does not deter other similarly-situated companies, nor does it raise the ethical standard of business practices abroad, despite the Pilot Program's goals.

III. EXPRESSIVE FUNCTION OF "DECLINATIONS WITH DISGORGEMENT"

As discussed above, the DOJ Pilot Program's "declinations with disgorgement" are neither declinations nor true disgorgement. The use of the term "declinations with disgorgement," therefore, creates significant issues in both practice and theory. Section II.C discussed various practical ramifications of declinations with disgorgement. This Section addresses the theoretical implications. The primary danger with declinations with disgorgement is that the expressive purpose of the law is undermined.[159] The government sends out the mixed message that the

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[156] *See generally*, James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988) (noting that the two crimes often are not separated; "Extortion under the color of official right equals the knowing receipt of bribes; they need not be solicited," c*iting U.S. v. Holzer*, 816 F.2d 304 (7th Cir. 1987).

[157] *See* Section II.A, *supra*.

[158] *See, e.g.*, Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C.L.Rev. 949 (2009) (citing Laurie Brannen, *Price of Sarbanes-Oxley Declines,* 12.5 Bus. Fin. 15 (May 1, 2006) and noting that in 2006, eighty-five percent of financial executives who undertook a survey did not believe that the benefits of compliance outweighed the costs); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 William & Mary L. Rev. 2075, 2102 (2016) (discussing the average budgets for compliance efforts and variations among industries); Michael Kohler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense,* 2 Wisc. L. Rev. 609 (2012); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 488 (2003).

[159] This argument closely aligns with Lon Fuller's in *Morality of Law,* rev. ed. (New Haven: Yale University Press, 1969). Fuller identifies eight requirements of the rule of law. Laws must be general, specifying *rules* prohibiting or permitting behavior of certain kinds. Laws must also be widely promulgated, or publicly accessible. Publicity of laws ensures citizens know what the law requires. Laws should be prospective, specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past. Laws must be clear, meaning citizens should be able to identify what the laws prohibit, permit, or require. Laws must be non-contradictory. One law cannot prohibit what another law permits. Laws must be able to be obeyed. The demands laws make on citizens should remain

corporate conduct at issue is not conduct that is egregious enough to warrant prosecution; while at the same time, the government demands alleged "ill-gotten gains."

A. The Expressive Function of Statutory Enforcement

Expressive theorists have long argued that actions, including legal actions, make statements that have significant meaning in society. [160] These actions signal to society what type of social conduct is valued and what social conduct is sanctioned.[161] In other words, laws themselves, as well as the enforcement of laws (or lack thereof) sends certain messages to society. The expressive theory is of particular use when considering the deterrent effect of criminal sanctions and the importance of uniformity in enforcement of criminal laws.[162] Prof. Uhlmann, in particular, dissects the purpose of *corporate* criminal prosecution through the lens of expressive theory and expressive function.[163] He argues that expressive theory of criminal law can serve both a retributive and utilitarian purpose, but the critical factor for corporate criminal prosecution is the expressive function alone.[164] In other words, Uhlmann argues that the line-drawing and norm-setting functions of corporate criminal law set the parameters by which we expect corporations to act. As Uhlmann puts it, "[c]riminal prosecution of corporations [] reflects the societal imperative to respond to illegal behavior in a way that upholds the rule of law, reinforces core societal values, provides accountability, and ensures that justice has been done."[165] The *lack* of criminal prosecution also sends an important signal to society, and to corporations. Uhlmann makes this point clearly:

> [W]hen we do not impose criminal liability upon corporations that commit egregious violations of the law, we blur the lines that the criminal law establishes between conduct that is acceptable and conduct that will not be tolerated. We express to companies that break the law that their conduct is not so egregious that it warrants criminal prosecution.[166]

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relatively constant. Finally, there should be congruence between what written statutes declare and how officials enforce those statutes. *See* Colleen Murphy, Law and Philosophy (2005) 24: 239–262; *see also* Jeremy Waldron "Why Law- Efficacy, Freedom or Fidelity?" *Law and Philosophy* 13 (1994): 259–284, David Luban, "Natural Law as Professional Ethics: A Reading of Fuller," *Social Philosophy and Policy* (2001), and Gerald J. Postema, "Implicit Law," *Law and Philosophy* 13 (1994): 361–387.

[160] *See, e.g.*, Cass Sunstein, On the Expressive Function of Law, 144 U. Penn. L. Rev. 2021 (1996). Sunstein puts forward the proposition that law "makes statements" rather than merely controlling behavior. Sunstein analyzes these statements as means to effect social change and alter social norms. *See also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 519–20 (2001).

[161] *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 Monist 397 (1965); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999); *see also* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, U.C. Davis L. Rev. 1235, 1259 (2016) (citing Feinberg in stating that the expressive function of criminal law is to allow society to "express its disavowal of criminal conduct, make clear its non-acquiescence in impermissable behavior, vindicate the rule of law, and absolve the innocent").

[162] *See* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 Vand. L. Rev. 1191 (2015).

[163] David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, U.C. Davis L. Rev. 1235 (2016). Uhlmann argues that treatment of corporations and corporate criminal prosecution is critical to the expressive function of criminal law for a number of reasons; first, that corporations enjoy significant benefits with the expectation that corporations exist for legal purposes alone; second, corporations have "outsized power and influence"; and third, corporations cannot be jailed, so the function of criminal justice is patently different. *See* David M. Uhlmann, *Reconsidering Corporate Criminal Prosecution*, CLS Blue Sky Blog (Aug. 19, 2015).

[164] *Id.* at 1260-1.

[165] *Id.* at 1260.

[166] *Id.* at 1263-4.

The result of this, Uhlmann argues, is that companies that *do* comply with the law are "signaled" that their efforts are valued less; in other words, the rule of law in general is weakened because the message sent to society is that the law does not reflect adequately what is acceptable corporate behavior, as measured by what behavior was prosecuted and what behavior was not.[167] Prof. Stuntz arrived at a similar conclusion, stating:

> [O]nce legislators speak, once a crime is formally defined, police and prosecutors face the following choice – *reinforce* the message by enforcing the new law, *negate* the message by leaving the law unenforced, or *revise* the message by enforcing it only in certain kinds of cases or against certain kinds of defendants.[168]

The message sent by the law can be imbued with a particular message, but the enforcement methods and trends also send an equally poignant message to society about acceptance of various conduct.[169]

B. *Expressive Function of "Declinations with Disgorgement"*

Expressive theory is squarely applicable to the FCPA Pilot Program, in the following three areas: first, expressive theory sheds light on the goals of the Pilot Program and the message that the government wants to send to the regulated entities; second, expressive theory assists in the analysis of the ultimate dispositions undertaken by the Pilot Program; finally, expressive theory underscores the importance of clear jurisdictional split between civil and criminal authority, as relevant to the recent declinations with disgorgement.

First, the goals of the Program, as detailed by the DOJ in its memorandum, are increased transparency by the government, as well as deterrence for companies that may violate the FCPA. The government wants to send the message, or express, the importance of both rigorous enforcement of the law, as well as the reasonable leniency that the government will afford companies that make significant efforts to comply with both the FCPA and the Pilot Program. The DOJ wants to have companies continue to "buy-in" to the Program; in other words, the DOJ has an incentive to express that adequate cooperation will result in a better disposition for a company under investigation. This message seems to be well-received by companies, given their interest in obtaining declinations, and their interest in receiving disgorgement rather than a penalty. The Pilot Program really is a win-win for the DOJ. The Pilot Program allows the government to send the signal that it will be "tough" on FCPA violators; at the same time, the DOJ is able to reach a number of resolutions while (potentially) relying on the internal investigations done by the companies themselves.

Second, expressive theory applies in particular to the dispositions taken under the Pilot Program, particularly the declinations with disgorgement. In these cases, we see the ultimate "blurring of lines" as to what conduct is acceptable and what is condemned.[170] On the one hand, the DOJ issues a declination, a clear decision not to prosecute. The message inherent in a declination is that the conduct is not one that rises to the level of requiring criminal prosecution,

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[167] *Id.*

[168] Stuntz, *supra* n. ___ at 521-2.

[169] *Id.*

[170] *See* Joel Feinberg, *supra* n. __; *see also* Stuntz, *supra* n. ___ at 521 (noting that it is the legislators who are "speaking" through expressive laws, but it is the police and prosecutors who "control the volume").

meaning it is not egregious or threatening to the rule of law. In the same breath, however, the DOJ requires disgorgement, meaning that the government contends that ill-gotten gains were made by the company. The message, therefore, is schizophrenic, and demands some resolution in terms of the expressive function of the law.

Finally, the expressive theory assists with the supposed conflation of the DOJ civil and criminal authority. As discussed above, if one is to assume that the DOJ's declinations with disgorgement are done pursuant to the DOJ's civil authority (where the SEC lacks jurisdiction) *and* criminal authority to issue a declination, the practical issues regarding burdens of proof and other civil/criminal differences are only part of the problem. A larger theoretical problem looms when the agency conflates its civil and criminal authority. As Professor Hart stated:

> What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. . . . It is not simply anything which a legislature chooses to call a 'crime.' It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.[171]

In other words, there is significant expressive function in the distinction between a criminal act and one that is a civil infraction. Conflation of these two enforcement schemes and authority does a disservice to society because it reduces the significance of the critical distinction between criminal and civil law.

IV. A LEGAL TOWER OF BABEL: MISUSE OF THE LEGAL LEXICON

Uhlmann's article, and its progeny in expressive theory, plays a critical role in the argument put forth by this Article, yet I push the expressive theory even more broadly. Not only does the action of corporate criminal prosecution signal to both corporations and society at large what behavior is valued and what behavior is condemned; so too do the *words* and *terms* used in the prosecutorial process. This notion is rooted in textualist theory,[172] and can be seen as an outgrowth of the famous Derrida quote: "There is nothing outside the text."[173] The meanings commonly understood by the terms of the text bind all stakeholders in the word-meaning agreements.[174] This

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[171] Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401, 404-405 (1958) (quoted in Uhlmann, *supra* n. ___). Hart argues that this moral condemnation sets criminal law apart from civil wrongs. He notes that the difference is not simply that society has a greater interest in enforcing criminal laws; society indeed has an interest in upholding civil law (i.e., honoring contracts). In addition, he notes that the identity of the parties is not the sole distinction between civil and criminal law because the government often has civil enforcement authority. Rather, the thrust of his argument is that the moral condemnation of criminal law is what sets it apart from civil wrongs.

[172] Textualist theory, however, is limiting in this analysis as I am not analyzing "text" or a statute, per se, but the use of certain terms in a pretrial diversion negotiation. The analysis draws on both the conversational and legal meaning of the terms. *See* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015). Fallon addresses the numerous theories of legal interpretation in order to test whether the theories should be applied in a case-by-case basis.

[173] Jacques Derrida, Limited Inc at 144. (1988). "Il n'y a pas de hors-texte."

[174] Aharon Barak, Purposive Interpretation in Law (Princeton Univ. Press 2005).

simply is the "prime purpose of language"[175] and is of utmost importance when considering legal terms and definitions.[176]

A. The Importance of Correct Legal Terminology

The most critical ramification of the oxymoronic term "declination with disgorgement" is that it waters down the meanings of important terms in our legal lexicon.[177] Simply put, words matter. Words describing the criminal dispositions of corporations are the foundational building block to the expressive function of corporate criminal prosecution. When the government declines to prosecute a corporation for violations of the law, expressive theory, as Uhlmann aptly described, argues that the rule of law is weakened.[178] Similarly, when the government uses the incorrect terms to describe what sanctions it is giving corporations for potential corporate malfeasance, not only is the rule of law weakened but the entire legal lexicon that we use to communicate among stakeholders and society is rendered incoherent.[179]

In the case of the recent "declinations with disgorgement," a declination is no longer means "declination" in the sense that it has been used (and defined in legal dictionaries) for decades. Likewise, the use of the term "disgorgement" to describe a sum of money that is *allegedly* linked to illegal activity or ill-gotten gains is not disgorgement. Nor is it disgorgement as a remedy in *equity*, as it has historically been considered. Using these terms in such a fast and loose manner in order to show that the government will afford leniency in its prosecutorial discretion creates more confusion than it does transparency.

Further, this distortion of the terms is important because the language used to define certain remedies and penalties has vast implications in the law. This is particularly true when similar terms confer radically different outcomes. Consider, for example, the recent Supreme Court case of *Nelson v. Colorado*, in which the Court considered whether inmates whose convictions were overturned must be repaid for the substantial fees and penalties they paid to the state while incarcerated.[180] The term used for what the inmates paid is of critical importance to the central issue of whether he will be repaid. That is, if what he paid was "restitution" for a crime for which his conviction was ultimately overturned, he should be reimbursed the restitution amount, because it was wrongfully taken from him.[181] However, if what the defendant paid was termed

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[175] *See* Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 Cardozo L. Rev. 1109, 1123 (2008).

[176] It should be noted that I am not engaging in a hermeneutical assessment of objectivity versus subjectivity when considering the terms "declination" and "disgorgement." Rather, my point is that the commonly understood usage of the terms is the foundation for communication among regulators and regulated entities. *See* Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U.L.Rev. 523 (1988).

[177] One may consider this argument the equivalent of legal *term* taxonomy, which differs from general legal taxonomy. For an exposition of legal taxonomy, see Emily Sherwin, *Legal Taxonomy* (2009). Cornell Law Faculty Publications. Paper 47.

[178] Uhlmann, *supra* n. ____ at 1260.

[179] *See* Fish, *supra* n. ___ at 1125 (citing John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70, 88 (2006)*; see also* Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005).

[180] Nelson v. Colorado, No. 15-1256 (U.S. 2017). The fees included payment to the state crime victim compensation fund, a "docket fee," a "time payment fee," a drug-test fees, among others. *See* Garrett Epps, *Can States Make People Pay Even When Their Convictions Are Overturned?*, The Atlantic (Jan. 6, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/01/can-states-make-people-pay-even-when-their-convictions-are-overturned/512360/.

[181] In fact, Chief Justice Roberts seemed to have agreed with this theory. The State of Colorado argued that the inmates should not be compensated absent a clear finding of innocence. In other words, the Solicitor General of Colorado

"administration fees" or, as Colorado argued, "compensation," the case looks entirely different in terms of legal and equitable resolutions.[182] In other words, this case underscores the importance of the legal lexicon, and the importance of particular terms used in law, because these terms have significant consequences regarding how law is shaped and applied.

When declinations with disgorgement are issued, the misuse of the legal terms renders stakeholders, government regulators, and defendants incapable of communication and mutual understanding. The literal meaning of the term "declination" is simply the act of declining. In literal or layman's terms, a declination has a particular understanding; yet the term declination, when used in context of a governmental decision, carries significant meaning. It imports that the government does not find a reason to continue with investigation or prosecution. The reasons for the declination may be myriad. As for disgorgement, the literal meaning is one that seems somewhat far afield from the legal meaning. "Disgorge" means to discharge or emit. In legal terms, disgorgement is to "dispose" of ill-gotten gains. I point out the non-legal understandings of these two terms to underscore the importance of contextual understanding. To further muddy the water by using either "declination" or "disgorgement" to have yet another legal meaning is unnecessary at best, and, at worst, dangerous to those who trust and rely on the understood meaning.

In other words, the practical effects of this misuse are increased risks of either regulators or corporations exploiting the lack of clarity and understanding to the detriment of the enforcement scheme. One is stuck asking the questions, "what is a declination?" and "what is disgorgement?" given that the meanings have been distorted from their literal, conversational, and legal understandings.[183]

B. Proposals for More Effective and More Transparent Enforcement of the FCPA

The effects of the DOJ Pilot Program's declinations with disgorgement are wide-reaching and potentially catastrophic to our understanding of commonly-used legal terms, as well as to the expressive function of the FCPA. As a practical matter, these dispositions open the door to potential abuse by both government and companies. As the Pilot Program will be up for review in April 2017, it is worth considering how to make certain adjustments to effectuate the aim of the Program while acknowledging the importance of criminal prosecution in FCPA enforcement. This Part addresses potential proposals that the DOJ should consider when evaluating the merits of the Pilot Program.

1. Say What You Mean

The thrust of this Article is to point out that the terms used by the DOJ in its Pilot Program are distorted, rendering the expressive function of the law at risk. One potential "quick fix" to the instant issue is to call these dispositions what they actually are: NPAs with *penalties*, rather than declinations with disgorgement. As was pointed out in Section II, these dispositions are not declinations, nor is what they demand "disgorgement." Using the correct terminology for what

insisted that the inmates should be paid back only if their convictions were overturned due to findings of innocence. During the oral argument, however, the Chief Justice asked the Colorado Solicitor General why he used the term "compensation." Specifically, the Chief Justice stated, "you keep talking about compensation. The issue is restitution." *See* Steve Vladeck, Argument Analysis: Justices skeptical of Colorado's approach to returning payments by defendants whose convictions are reversed on appeal, SCOTUSblog (Jan. 10, 2017), *available at* http://www.scotusblog.com/2017/01/argument-analysis-justices-skeptical-colorados-approach-returning-payments-defendants-whose-convictions-reversed-appeal/.

[182] *See id.*

[183] *See* Fallon, *supra* n. ___.

the DOJ seeks to accomplish would help to clear up the already opaque body of law surrounding FCPA enforcement.

In addition, using the correct terminology and referring to these dispositions as NPAs with associated criminal penalties would help to buttress the expressive function that certain criminal corporate activity will not be tolerated in society without some amount of repercussion. Further, the legal lexicon is spared the distortion of terms commonly understood to mean something else. Meaning, a declination is a commonly understood term to prosecutors, as well as society in general. Referring to a bilateral agreement as a declination is a fundamental change in the definition of the term, and creates confusion and even mistrust between the government and regulated entities. The same is true for the use of the term disgorgement. Returning to the commonly understood usage of these terms is an easy and concrete step towards affording both transparency and understanding in FCPA enforcement.

2. Reduction of Pretrial Diversions

The larger issue of unclear FCPA enforcement standards is the lack of judicial oversight, and the lack of judicial precedent.[184] Because an FCPA case is rarely taken to court, the terms and conditions surrounding the settlement negotiations are often hard to pin down. As this Article has described, declinations with disgorgement are merely the most recent pretrial diversion scheme in FCPA enforcement. The stage was set with the noted increase in DPAs and NPAs. As a result, declinations with disgorgement did not seem like much of a logical or remedial leap. Yet the risk of overuse or abuse of declinations, or even DPAs and NPAs, creates an enforcement atmosphere wherein the government never proves its cases. Companies quick to avoid any legal ramifications are more than willing to pay the enforcement "toll" rather than get drawn into litigation.

Forcing the government to take more cases to court and prove the culpability of companies would reduce the risk of abuse of the pretrial diversion schemes. This solution is likely less practical, given the incentives for companies to settle cases rather than go to court; likewise, the DOJ and SEC are less likely to walk away from pretrial diversion schemes if the result is that these agencies must expend the resources to prove up their cases. Nevertheless, an increase in judicial precedent for FCPA matters would go a long way in clearing up the many ill-defined parameters of the law.

CONCLUSION

The use of disgorgement in the context of a declination from the DOJ is entirely novel, and poses a new frontier of available remedies for the government in the absence of extensive investigation or prosecution. What is problematic in these declinations is that illegal activity is alleged but not proven. This renders the disgorgement amounts untethered, in a legal sense, to the actions alleged. The result of this is a practical risk of abuse from both the government and corporations, and a theoretical risk of misuse of legal terms and remedies, creating havoc in the law, and opaqueness for the stakeholders who must comply with the law. Importantly, the expressive function of the law is sending two opposing messages: the government is shirking enforcement of the FCPA in favor of declinations, but at the same time requiring disgorgement of allegedly ill-gotten gains. This Article argues that the novel pretrial diversion scheme of declination with disgorgement creates more problems than it solves, both practically and theoretically, and should not be taken lightly despite the ease with which it creates resolutions for

[184] *See, e.g.,* Karen E. Woody, *No Smoke and No Fire, supra* n. ___.

companies and the government. The slippery slope is the deterioration of remedial options and legal terms themselves.