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"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." Pursuant to the Pilot Program, the Department of Justice declined to prosecute or even continue an investigation, provided the company disgorge its alleged ill-suprgotten 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, which creates a crisis in the expressive function of the Foreign Corrupt Practices Act and in the legal lexicon itself.

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INTRODUCTION

In April 2016, the Department of Justice ("DOJ") Criminal Division announced the Foreign Corrupt Practices Act ("FCPA") Pilot Program, a program aimed at incentivizing voluntary disclosure and compliance.[1] At base, the Pilot Program requires voluntary self-

1. ANDREW WEISSMANN, DOJ, CRIMINAL. DIV., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016) [hereinafter PILOT PROGRAM MEMO], https://www.justice.gov/opa/file/838386/download. The initial one-year Pilot Program ended on April 5, 2017, but the Justice Department has stated that it will be keeping the Pilot Program in place. *See* Kenneth A. Blanco, Acting Assistant Att'y Gen., DOJ, Remarks Before the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national. On November 29, 2017, the Department of Justice indicated the the Pilot Program was going to be inserted into the U.S. Attorney's Manual as definitive policy for sentencing in corporate criminal matters. *See* Department of

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 that these two companies disgorge their profits to the Department of Treasury.[4] These two cases represented the first "declinations with disgorgement" granted by the DOJ in FCPA enforcement. Since that date, the DOJ has awarded two more companies "declinations with disgorgement."[5] What makes these 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. The implications of issuing "declinations" with the requirement of "disgorgement" are alarmingly far-reaching.

The Pilot Program's stated goal is to promote greater accountability for individuals and companies involved in FCPA-related misconduct. Although 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 bastardize the term "declination," as well as the term "disgorgement." As such, a "declination with disgorgement" is

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Justice Corporate Enforcement Policy, https://www.justice.gov/criminal-fraud/file/838416/download.

2. PILOT PROGRAM MEMO, *supra* note 1, at 9.

3. These companies are Nortek Inc., Akamai Technologies, and Johnson Controls. *See* Letter from Daniel Kahn, Deputy Chief, Criminal Div., DOJ, to Luke Cardigan, K&L Gates LLP, Counsel for Nortek, Inc. (June 3, 2016), https://www.justice.gov/criminal-fraud/file/865406/download; Letter from Daniel Kahn, Deputy Chief, Criminal Div., DOJ, to Josh Levy, Ropes & Gray LLP, Counsel for Akamai Technologies, Inc. (June 6, 2016), https://www.justice.gov/criminal-fraud/file/865411/download; Letter from Daniel Kahn, Deputy Chief, Criminal Div., DOJ, to Jay Holtmeier & Erin G.H. Sloane, WilmerHale LLP, Counsel for Johnson Controls, Inc. (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download.

4. Letter from Lorinda Laryea, Trial Att'y, Criminal Div., DOJ, to Steven A. Tyrell, Weil, Gotshal & Manges LLP, Counsel for HMT, LLC (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download [hereinafter Letter to HMT, LLC]; Letter from Lauren N. Perkins, Assistant Chief, Criminal Div., DOJ, to Paul E. Coggins & Kiprian Mendrygal, Locke Lord LLP, Counsel for NCH, Corp. (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899121/download [hereinafter Letter to NCH, Corp.].

5. Letter from Nicola J. Mrazek, Senior Litig. Counsel, Criminal Div., DOJ, to Nathaniel B. Edmonds, Paul Hastings LLP, Counsel for CDM Smith Inc. (June 29, 2017), https://www.justice.gov/criminal-fraud/page/file/976976/download; Letter from Lauren N. Perkins, Assistant Chief, Criminal Div., DOJ, to Lucina Low & Thomas Best, Steptoe & Johnson LLP, Counsel for Linde Gas America, Inc. (June 16, 2017), https://www.justice.gov/criminal-fraud/file/974516/download.

an inherently oxymoronic statement. What occurs in these dispositions involves neither a declination nor disgorgement. Yet the inappropriate use of these terms is not without significant repercussions. Misusing the legal lexicon creates a crisis surrounding the expressive function of law and legal language[6] and constructs a metaphorical Tower of Babel for lawmakers, regulators, companies, and stakeholders.[7]

This Article contributes to the literature by analyzing 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's 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 a historical look at the remedy of disgorgement and its rise to omnipresence 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 to not pursue charges against a defendant. It is not a contract or bilateral agreement. Yet the "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 dispositions settled by only the DOJ in the Pilot Program, disgorgement is wholly inappropriate because it is not a punitive remedy available to the DOJ in conjunction with a declination.

To the cynical observer, these "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, these dispositions could be viewed as examples of governmental extortion—if these "disgorgement" amounts are not

6. *See, e.g.*, Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

7. *See infra* Parts III and IV and accompanying notes.

paid, the government will threaten to continue the investigation and even will threaten possible prosecution. The problems with either of these scenarios should be obvious. If the government can prove that 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 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,[8] aimed at eradicating bribery occurring overseas for the purpose of

8. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S. Code). The FCPA ("the Act") has been amended twice since its passage. *See* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff

obtaining business.[9] 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, with the knowledge 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.[10] 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.[11] Likewise, the internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.[12]

The jurisdictional reach of the statute is global, meaning that it applies to activity occurring within the United States as well as to conduct that takes place exclusively in foreign countries.[13] Under the FCPA's statutory framework, only the DOJ has criminal enforcement authority, yet both the DOJ and the SEC have civil enforcement authority.[14] According to the FCPA Guidance, 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,"[15] whereas the SEC may pursue civil actions

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(1994)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2012)).

9. 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. 297, 307–09 (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. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 954 (2012); Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its 20th Birthday*, 18 NW. J. INT'L. L. & BUS. 269, 271–75 (1998). .

10. 15 U.S.C. §§ 78dd-1(a), -2(a) (2012).

11. 15 U.S.C. § 78m(b)(2)(A) (2012).

12. 15 U.S.C. § 78m(b)(2)(B) (2012).

13. 15 U.S.C. § 78dd-1(g) (2012).

14. *Id.*

15. DOJ, CRIMINAL DIV. & SEC, ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 69 (2012) [hereinafter FCPA GUIDANCE], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf. According to the FCPA Guidance, the DOJ has exercised this civil authority in limited circumstances in the last thirty years. *Id.* at 117 n.357; *see, e.g.*, United States v. KPMG Siddharta Siddharta & Harsono, 4:01-

against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions."[16] The agencies often work together to simultaneously bring criminal and civil proceedings against an entity.[17]

The FCPA contains very specific guidelines and penalties for violations of both the anti-bribery and accounting provisions of the Act.[18] An entity's criminal violation of the anti-bribery provision may result in a fine of up to $2 million per violation.[19] 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.[20] For criminal violations of the accounting provisions, entities can be assessed fines up to $25 million,[21] and individuals may face up to twenty years in prison and/or fines up to $5 million.[22] In addition, under the Alternative Fines Act, courts may impose higher penalties than those that are statutorily provided by the FCPA.[23]

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cv-03105, (S.D. Tex. Sept. 13, 2001), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/08/16/kpmg-siddharta-siddharta-final-judgement.pdf (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. Am. Totalisator Co., 3 FCPA Rep. 699.067 (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 Mfg., Inc., 3 FCPA Rep. 698.6914 (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, 2 FCPA Rep. 645 (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 Int'l Corp., 2 FCPA Rep. 649 (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).

16. FCPA GUIDANCE, *supra* note 15, at 69–70.

17. *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 42 (2005).

18. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff (2012).

19. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).

20. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571 (b)(3), (e) (2012) (criminal fining authority that supersedes FCPA-specific fine provisions).

21. § 78ff(a).

22. *Id.*

23. 18 U.S.C. § 3571(d) (2012). The fine can be as much as twice the pecuniary gain that the defendant obtained by making the corrupt payment, provided the government can prove its case beyond a reasonable doubt. *Id.*

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.[24] The SEC has discretion to impose a fine, seek injunctive relief, or do both.[25] For violations of the anti-bribery provisions, the SEC may fine both entities and individuals up to $16,000 per violation.[26] 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, ranging from $5,000 to $100,000 for an individual and $50,000 to $500,000 for a company.[27]

The clearly delineated penalty scheme set forth in the FCPA is of the utmost importance when analyzing cases in which the SEC and the 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, at least in terms of enforcement, until the 2000s.[28] From its enactment in 1977 until 2001, the SEC brought only nine enforcement actions under the FCPA.[29] The DOJ brought, on average, three cases per year during that same time period.[30] Since those original cases, the FCPA industry, which includes both regulators and defense counsel, has enjoyed a boom that has not yet waned. In 2001 alone, the SEC brought five enforcement actions, including

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24. *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L. L. 907, 981 (2010).

25. *See* DEMING, *supra* note 17, at 44–45.

26. 15 U.S.C. §§ 78dd-2(g)(1)–(2)(B), 78dd-3(e)(1)–(2)(B), 78ff(c)(1)–(2)(B) (2012).

27. 15 U.S.C. § 78u(d)(3) (2012).

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

29. *See SEC Enforcement Actions: FCPA Cases*, SEC, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml [https://web.archive.org/web/20171124192557/https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml] (last visited Nov. 24, 2017). Note that this list includes only the SEC enforcement actions and not the parallel DOJ proceedings that occurred in many of these cases.

30. *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008).

one administrative proceeding.[31] Correspondingly, the DOJ brought seven cases in 2001.[32] In 2007, as an example, the SEC's enforcement actions under the FCPA rose to eighteen.[33] In 2010, the SEC created a specialized unit in its Enforcement Division that is devoted solely to FCPA matters.[34] Likewise, in 2010, the SEC brought twenty-six enforcement actions, and the DOJ brought forty-eight.[35] Since 2007, there have been at least eight SEC enforcement actions each year, and the number skyrocketed to thirty-two in 2016.[36] The number of DOJ enforcement actions have not dipped below ten since 2007, which rose to twenty-one in 2016.[37] The following table provides data on the enforcement actions taken since 2007.[38]

31. *SEC Enforcement Actions*, *supra* note 29. The administrative proceeding was brought against Chiquita Brands International. Chiquita Brands Int'l, Inc., Exchange Act Release No. 44902 (Oct. 3, 2001). Two major cases in 2001 included KPMG Siddharta Siddharta & Harsono and Baker Hughes. The SEC brought follow-on actions against individuals in both of these matters. *See* SEC v. Mattson, No. 4:01-cv-03106 (S.D. Tex. Sept. 6, 2002), https://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris; United States v. KPMG Siddharta Siddharta & Harsono, 4:01-cv-03105, (S.D. Tex. Sept. 13, 2001), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/08/16/kpmg-siddharta-siddharta-final-judgement.pdf.

32. *See Foreign Corrupt Practices Act Related Enforcement Actions: Chronological List, 2001*, DOJ, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2001 [https://web.archive.org/web/20171124194818/https://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2001] (last visited Nov. 1, 2017).

33. *SEC Enforcement Actions*, *supra* note 29. These cases included three administrative proceedings against Dow Chemical Co., Delta & Pine Land Co. and Turk Deltapine, Inc., and Gioacchino De Cherico & Immucor, Inc. *Id.*

34. 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), https://www.sec.gov/news/press/2010/2010-5.htm.

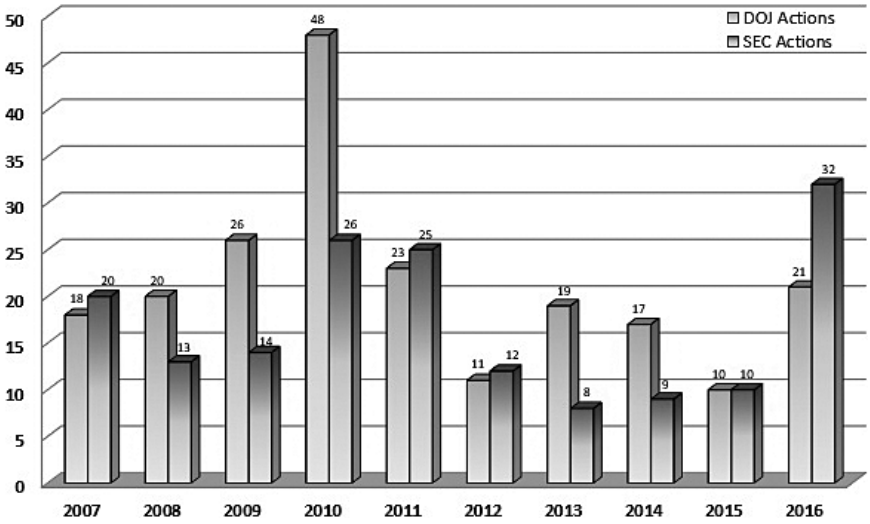
35. GIBSON DUNN, 2016 YEAR-END FCPA UPDATE 2 (2017), http://www.gibsondunn.com/publications/documents/2016-Year-End-FCPA-Update.pdf.

36. *Id.*

37. *Id.*

38. *Id.*

NUMBER OF FCPA ENFORCEMENT ACTIONS PER YEAR



The fines associated with FCPA violations rose as quickly as the number of enforcement actions. The largest total combined penalty associated with an FCPA enforcement action occurred in 2017 against Telia Company AB ("Telia action").[39] Prior to the Telia action, the largest penalty for an FCPA enforcement action was $800 million which was levied against Siemens Aktiengesellschaft in 2008.[40] The following five largest penalties include three that occurred in 2016: $772 million against Alstom (2014);[41] $579 million against KBR/Halliburton (2009);[42] $519 million against Teva Pharmaceuticals Industries, Ltd. (2016);[43] $419 million against

39. Press Release, SEC, Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017), https://www.sec.gov/news/press-release/2017-171.

40. SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over $1.6 Billion, Litigation Release No. 20829 (Dec. 15, 2008), https://www.sec.gov/litigation/litreleases/2008/lr20829.htm.

41. Press Release, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

42. SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations, Litigation Release No. 20897A (Feb. 11, 2009), https://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.

43. Press Release, DOJ, Teva Pharmaceutical Industries Ltd. Agrees to Pay More than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.

Braskem/Odebrecht (2016);[44] $412 million against Och-Ziff Capital Management Group LLC (2016).[45] In 2016, the corporate fines exceeded $2 billion for the first time in the history of the FCPA.[46] Importantly, these numbers include the disgorgement amounts owed 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.[47] Corporate liability in general seemed to be an increasing priority, thanks in part to the instruction of the DOJ's Holder Memorandum and the SEC's Seaboard Report.[48] At that point, the prosecutorial decision was ultimately a binary one: prosecutors would either bring a charge or

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44. Press Release, DOJ, 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), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve. The total amount listed in the title includes payments to Brazilian and Swiss authorities. *Id.*

45. Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.

46. GIBSON DUNN, 2016 YEAR-END FCPA UPDATE *supra* note 35, at 9.

47. *See* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption is* Not *Part of the SEC's Mission,* 73 OHIO ST. L.J. 1093, 1102 (2012). 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. *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. 1727, 1756–7 (2017). For instance, what constituted "quid pro quo" was hotly debated as recently as this year, despite decades of intense enforcement of the statute. *See* Ben Protess and Alexandra Stevenson, *JPMorgan Chase to Pay $264 Million to Settle Foreign Bribery Case*, NY TIMES: DEALBOOK (Nov. 17, 2016), https://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html?_r=0.

48. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm. Memorandum from Eric Holder, Deputy Att'y Gen., DOJ, on Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF; *see also* Paul Larkin, Jr. & John Michael Siebler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 18 (2016) (discussing the expansion of corporate liability).

The Holder Memorandum provided guidance to DOJ prosecutors regarding factors to consider when conducting investigations and either bringing charges or negotiating plea agreements. *See* Memorandum from Eric Holder, *supra.* Notably, the Holder memorandum did not reference any other form of disposition, as DPAs and NPAs had not yet become a tool

issue a declination. Pretrial alternatives were not on the radar.[49] However, the collapse of Arthur Anderson following its criminal conviction led to a growing acknowledgment that corporate criminal convictions can be the death knell of companies—which forced a change in enforcement tactics.[50] In response, in 2003, Deputy Attorney General Thompson issued an official DOJ memorandum, supplanting the Holder Memorandum, which referenced the option of pretrial diversion as a consideration in prosecutorial decisions.[51] As a result, alternative pretrial settlement arrangements such as Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs") became some of the most oft-used

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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).

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. *SEC Spotlight: Enforcement Cooperation Program*, SEC, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml [https://web.archive.org/web/20171124200940/https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml] (last updated Sept. 20, 2016). 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.

Id.

49. *See* Koehler, *Measuring the Impact of Non-Prosecution*, *supra* note 48, at 500–01.

50. *See* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 18 (2014).

51. 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 by 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"); *see* Memorandum from Mark Filip, Deputy Att'y Gen., DOJ, on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memorandum], http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf. *But see* Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163 (2008). (showing that DPAs for individual prosecutions have existed for a number of decades).

negotiation and settlement tools for both corporations and prosecutors alike.[52]

At present, DPAs and NPAs represent the primary legal mechanism for concluding enforcement actions against corporate defendants.[53] DPAs and NPAs are just as pervasive in FCPA dispositions, with a growing acknowledgment of the strict liability nature of the statute[54] and the view of corporations and the defense bar that compliance programs may not catch every possible violation of the FCPA.[55] 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.[56] In addition to the use of DPAs and NPAs, the DOJ adopted a Pilot Program in 2016, discussed herein.

1. Deferred Prosecution Agreements (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.[57] 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

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52. *See* Cunningham, *supra* note 50; Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775 (2011).

53. *See generally* Cunningham, *supra* note 50.

54. *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, 403 (2013).

55. Cunningham, *supra* note 50, at 41. *See generally* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 928 (2007); F. Joseph Warin & Andrew S. Boutrous, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. ONLINE 121 (2007).

56. *See* Press Release, SEC, 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; Press Release, SEC, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corp. Involving FCPA Misconduct (Apr. 22, 2013), https://www.sec.gov/news/press-release/2013-2013-65htm. The SEC entered into its first DPA with Tenaris in 2011, and Tenaris paid $5.4 million in disgorgement and pre-judgment interest. Press Release, SEC, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 11, 2011), https://www.sec.gov/news/press/2011/2011-112.htm. Yet outside of the three cases associated with the Pilot Program, the SEC has required disgorgement pursuant to an NPA only once, in the case of Ralph Lauren. *See* Press Release, SEC, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corp. Involving FCPA Misconduct, *supra.*

57. *See* Garrett, *supra* note 55 at 927–28 (defining DPA agreements in the context of court review when the DOJ unilaterally terminates them)*; see also* FCPA GUIDANCE, *supra* note 15, at 74.

included in the agreement describing the conduct at issue, and cooperate with the government.[58] 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.[59] Although DPAs are filed in court, the judicial review of the agreement is minimal, and often amounts to "rubber-stamp" approval.[60]

Prior to 2003, the DOJ used a DPA to settle enforcement actions fewer than twenty-five times.[61] Since 2003, however, the boom over the use of DPAs has not dissipated, with over 200 signed since 2003.[62] The first DPA for an FCPA allegation was agreed to in 2005.[63] For the FCPA enforcement in particular, DPAs remain an oft-used settlement approach.[64] DPAs are attractive to both the government and the companies. For companies, it is an avenue in which they can resolve potential FCPA violations without a finding of guilt. A guilty plea can result in collateral consequences such as ineligibility to bid for government or World Bank contracts, for example. For the government, DPAs represent an easier way to reach

58. *See* FCPA GUIDANCE, *supra* note 15, at 74 ("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.").

59. *Id.*

60. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME 28 (2009), http://www.gao.gov/assets/300/299781.pdf. The "rubber stamp" approval became even more entrenched after a recent D.C. Circuit opinion slapping down Judge Leon of the District of Columbia District Court. United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016). Judge Leon rejected the DPA, stating that it would "undermine the public's 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 . . . ." United States 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. *Fokker Servs*, 818 F.3d at 749–50; *see also* GIBSON DUNN, 2016 YEAR-END UPDATE ON CORPORATION NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 9 (2017) [hereinafter GIBSON DUNN, UPDATE ON NPAS AND DPAS], http://www.gibsondunn.com/publications/documents/2016-Year-End-Update-Corporate-NPA-and-DPA.pdf; Cunningham, *supra* note 50, at 46.

61. Cunningham, *supra* note 50, at 19. *See generally* GIBSON DUNN, UPDATE ON NPAS AND DPAS, *supra* note 60.

62. *See Data & Documents*, CORP. PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html (last visited Nov. 3, 2017) (enter "DP" in the search field "Disposition Result").

63. Press Release, DOJ, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), https://www.justice.gov/archive/opa/pr/2005/January/05_crm_008.htm.

64. *See generally* GIBSON DUNN, YEAR UPDATE ON NPAS AND DPAS, *supra* note 60.

a resolution, while still extracting a fine. In addition, the government is able to keep the door open for further prosecution if the company is unable to meet the terms of the DPA.

2. Non-Prosecution Agreements (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."[65] 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 absolutely no judicial scrutiny of [the agreement] . . . [meaning] there is no independent review [of the government's findings or conclusions] . . . ."[66]

Interestingly, the first pretrial resolution in FCPA enforcement occurred in 2004 and came in the form of an NPA rather than a DPA.[67] 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.[68] NPAs are a powerful tool in that both the government and the regulated companies see the merits of this pretrial diversion. The DOJ is able to extract a fine pursuant to the agreement with potentially fewer resources expended on investigation,[69] companies are able to "walk away" without any finding of guilt and

65. FCPA GUIDANCE, *supra* note 65, at 75.

66. Koehler, *Measuring the Impact of Non-Prosecution*, *supra* note 48, at 505.

67. *See* Press Release, DOJ, Invision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2004), http://www.justice.gov/archive/opa/pr/2004/December/04_crm_780.htm.

68. GIBSON DUNN, UPDATE ON NPAS AND DPAS, *supra* note 60 at 1; *see, e.g.*, Richard Cassin, *Tenet Healthcare Pays $513 Million for Fraud and Kickbacks, Whistleblower Awarded $84 Million*, FCPA BLOG (Oct. 7, 2016, 8:28 AM), http://www.fcpablog.com/blog/2016/10/7/tenet-healthcare-pays-513-million-for-fraud-and-kickbacks-wh.html; Press Release, DOJ, PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges (Feb. 16, 2016), https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges.

69. *See* Press Release, SEC, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), https://www.sec.gov/news/pressrelease/2016-109.html ("When companies self-report and lay all their cards on the table, non-prosecution agreements are an

also without a proverbial sword of Damocles hanging over their heads in the form of a DPA.[70]

3. DOJ Pilot Program

Entering into this current FCPA enforcement landscape of skyrocketing fines and disgorgement amounts, increased enforcement efforts, and an uptick in pretrial 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."[71] 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 . . . ."[72]

The Pilot Program memorandum sets out finite requirements companies must meet before being eligible for mitigation credit.[73]

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effective way to get the money back and save the government substantial time and resources while crediting extensive cooperation . . . .").

70. 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. FCPA GUIDANCE, *supra* note 15, at 71.

71. PILOT PROGRAM MEMO, supra note 1, at 2.

72. *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. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., DOJ, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/archives/dag/file/769036/download; *see also* PILOT PROGRAM MEMO, supra note 1, at 2 (referencing the 2015 Yates Memorandum). 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. Yates Memo, *supra*, at 2–3. 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. *Id.*

73. PILOT PROGRAM MEMO, *supra* note 1, at 3–9.

The first requirement is timely, voluntary self-disclosure. The disclosure must occur "prior to an imminent threat of disclosure or government investigation";[74] it must occur "within a reasonably prompt time after becoming aware of the offense";[75] and the disclosure must be fulsome.[76] Second, the company must cooperate fully in all FCPA matters, which means that it must provide ongoing disclosure of the facts relevant to the wrongdoing at issue;[77] preserve, collect, and disclose all relevant documents; provide updates and disclose relevant facts discovered in the corporate internal investigation;[78] make employees available for interviews by the government;[79] facilitate third-party production of documents from foreign jurisdictions and provide translations as necessary.[80] Third, companies must perform timely and appropriate remediation, which includes implementation of an effective compliance and ethics program;[81] appropriate discipline of employees responsible for misconduct;[82] and any additional measures the company believes would identify future risks and would demonstrate the recognition of the seriousness of misconduct.[83]

If the above requirements are met, companies are eligible for mitigation credit.[84] According to the Pilot Program memorandum, mitigation credit can be in the form of a different type of disposition, a reduction in fine, or not requiring a monitor.[85] 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.[86] However, the factors are not simply

74. *Id.* at 4 (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (U.S. SENTENCING COMM'N 2016)).

75. *Id.*

76. *Id.* This includes facts about individuals as well as the corporation. *Id.*

77. *Id.* at 5.

78. *Id.*

79. *Id.*

80. *Id.* at 5–6. Additional factors for cooperation include de-confliction of internal investigation, if necessary, and disclosure of any criminal activity. *Id.* at 5. The Pilot Program Memo also states that cooperation may be different depending on the size of the company and related expenses for cooperation. *Id.* at 5 n.4.

81. *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. *Id.*

82. *Id.* at 8.

83. *Id.*

84. *Id.* at 2.

85. *Id.* at 3.

86. *See* FCPA GUIDANCE, *supra* note 15 at 52–63.

suggestions or "best practices," but are requirements for eligibility in the Pilot Program itself.

To date, the DOJ has highlighted on its website seven companies that have received declinations from the DOJ in conjunction with the Pilot Program.[87] Three of these seven companies have disgorged profits to the SEC under the parameters of the Program in return for a declination from the DOJ.[88] Of these three, two disgorged profits pursuant to NPAs with the SEC,[89] and the third disgorged profits pursuant to a cease-and-desist order.[90]

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.

But in September 2016, the DOJ granted two "declinations with disgorgement" under its Pilot Program for which the DOJ authorized both the declination and the disgorgement.[91] 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 the SEC's by issuing the novel "declination with disgorgement."

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.[92] Specifically, the DOJ alleged that HMT sales agents illegally paid $500,000 in bribes disguised as agents' commissions or subcontracting fees to government officials in Venezuela.[93] In China, an HMT subsidiary engaged a distributor who "paid bribes on almost all transactions in China."[94] 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

87. *See Foreign Corrupt Practices Act, Pilot Program, Declinations*, DOJ, https://www.justice.gov/criminal-fraud/pilot-program/declinations (last updated June 29, 2017).

88. These companies are Nortek, Inc., Akamai Technologies, Inc., and Johnson Controls, Inc. *See* sources cited *supra* note 3.

89. Press Release, SEC, SEC Announces Two Non-Prosecution Agreements in FCPA Cases, *supra* note 69 (detailing the agreements that required Akamai Technologies and Nortek Inc. to disgorge profits related to bribes paid to Chinese officials by foreign subsidiaries).

90. Johnson Controls, Inc., Exchange Act Release No. 78287, 2016 WL 4363463 (July 11, 2016).

91. Letter to HMT, LLC, *supra* note 4; Letter to NCH, Corp., *supra* note 4.

92. Letter to HMT, LLC, *supra* note 4 at 1.

93. *Id.*

94. *Id.* at 2.

cooperation, its comprehensive global investigation, the remedial steps that HMT took (including its robust compliance program), and HMT's agreement to disgorge all profits it made from the illegal conduct, totaling $2,719,412 to the DOJ.[95]

Likewise, in the case of NCH Corporation, the DOJ's letter to counsel uses 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."[96] 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.[97] These bribes were recorded in NCH's books as "customer maintenance fees," "customer cooperation fees," and "cash to customer."[98] 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.[99]

The declinations granted to NCH and HMT in September 2016 represented the first of DOJ's novel "declinations with disgorgement" program. Since then, the DOJ has continued this practice and awarded two other companies "declinations with disgorgement" in the first half of 2017.[100]

Obviously, one major distinction between these latter declinations and the other three from the Pilot Program is the fact that the DOJ demanded disgorgement. In addition, these declination letters for NCH, HMT, and Linde required the companies' consent.[101] 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,[102] a point that will be discussed below. These DOJ dispositions are a novel concept but create a legal and theoretical morass with the oxymoronic phrase "declination with disgorgement."

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95. *Id.*

96. Letter to NCH, Corp., *supra* note 4 at 1.*Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2.

100. Letter from Nicola J. Mrazek to Nathaniel B. Edmonds, *supra* note 5; Letter from Lauren N. Perkins to Lucina Low & Thomas Best, *supra* note 5.

101. Letter to HMT, LLC, *supra* note 4, at 3; Letter to NCH, Corp., *supra* note 4, at 2.; Letter from Nicola J. Mrazek to Nathaniel B. Edmonds, *supra* note 5; Letter from Lauren N. Perkins to Lucina Low & Thomas Best, *supra* note 5.

102. *See, e.g.*, GIBSON DUNN, 2016 YEAR-END FCPA UPDATE, *supra* note 35, at 6 ("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

II. "DECLINATIONS WITH DISGORGEMENT"

In order to understand 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. This section concludes with an analysis regarding why a "declination with disgorgement" is both inappropriate and should not be available to the DOJ and discusses the dangerous, practical ramifications of these dispositions.

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."[103] In essence, it is the use of prosecutorial discretion to decline further action—a decision driven by certain factors including, perhaps, a realization that the charges could not be proven beyond a reasonable doubt.[104] As noted above, prior to the rapid rise of DPAs and NPAs in FCPA actions, the prosecutorial decision-making was essentially a binary exercise: charge a company (and/or enter into plea negotiations) or decline to prosecute further.[105]

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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.").

103. James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, 2 BLOOMBERG L. REP.—CORP. COUNS., no. 8, 2011, at 1, 1, https://www.millerchevalier.com/sites/default/files/news_updates/attached_files/miller_chevalier_tillen_bohn_article.pdf.

104. All criminal charges require proof beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 363 (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.'") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

105. *See* Koehler, *Measuring the Impact of Non-Prosecution*, *supra* note 48, at 503–08. Koehler looks to the Filip Memorandum of 2008, in which one finds the first discussion of DPAs and NPAs as pretrial options. *Id.* at 507–509 The Filip Memorandum states:

> [I]t 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

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, in its FCPA Guidance, the DOJ has outlined the factors involved for considering a declination. These decisions are to be made pursuant to the *Principles of Federal Prosecution of Business Organizations*.[106] According to the *Principles*, prosecutors should consider ten factors when deciding whether to prosecute:

1. 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;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's willingness to cooperate in the investigation of its agents;
5. the existence and effectiveness of the corporation's pre-existing compliance program;
6. the corporation's timely and voluntary disclosure of wrongdoing;

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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* note 51, at 18.

106. DOJ, UNITED STATES ATTORNEYS' MANUAL §§ 9-28.000–.1500 (2015), https://www.justice.gov/usam/united-states-attorneys-manual. For individuals, prosecutors are to reference the Principles of Federal Prosecution. *See id.* § 9-27.000.

7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
8. 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;
9. the adequacy of remedies such as civil or regulatory enforcement actions; and
10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[107]

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.[108]

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 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 or may not elicit investigation.[109] The most transparency the DOJ and SEC provided prior to the Pilot Program was a list of six examples of companies to which the agencies had provided declinations.[110] For each of the six companies, the FCPA Guidance lays out in bullet-point form the factors that were taken into consideration for that particular company to obtain

107. *Id.* § 9-28.300.

108. *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").

109. *See generally* Woody, *No Smoke and No* Fire, supra note 47.

110. *See* FCPA GUIDANCE, *supra* note 15, at 77–79.

a declination.[111] 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.[112]

2. "Declinations" in Conjunction with the Pilot Program

Importantly, unlike a DPA or NPA, a declination is *not* an agreement between two parties but is instead 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 bastardizes the term "declination." As noted above, these "declinations" instead are actually NPAs in disguise, which begs the question of why the DOJ refers to these as declinations at all.[113] The declination letters in the 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, HMT, Linde NA, and CDM Smith included a longer summary of "facts" that the government alleged.[114] These 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.[115] 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 declinations with disgorgement matters. A declination with strings

111. *Id.*

112. *Id.*

113. *See infra* Part III (addressing this question).

114. *See* sources cited *supra* note 4.

115. In such a situation, a criminal fine would be entirely distinct from disgorgement as the term has historically been used. *See infra* Part II-B.

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.[116] Just as the term "declination" was analyzed above, this Part takes the same approach toward the term "disgorgement." Specifically, 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 a historical remedy, with its roots dating back to Emperor Justinian.[117] At its base, disgorgement means to "strip of ill-gotten gains."[118] Disgorgement in today's jurisprudence is

116. 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, DOJ, Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes (Feb. 23, 2012), 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. Feb. 23, 2012) (imposing punishment on a guilty plea entered into on September 3, 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 (1993) ("[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.") (internal citations omitted).

117. *See* JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 45–47 (1951); *see also* Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1413 ("Disgorgement of a defendant's wrongful gains is an ancient remedy.").

118. *See, e.g.*, United States v. Nacchio, 573 F.3d 1062, 1079 (10th Cir. 2009) ("[Disgorgement] seeks to strip the wrongdoer of ill-gotten gains . . . ."); Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 396 ("Disgorgement is the forfeiture of the ill-gotten gains received by the defendant."); *see also Disgorgement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.").

typically understood as a remedy in equity[119] and lies within the core judicial power of a court.[120] It is not intended as a punitive measure nor is it available outside of an equitable resolution.[121] Despite a reference to disgorgement in the U.S. Sentencing Guidelines,[122] criminal disgorgement is rarer than its use in civil matters.[123] 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 is now seen as a commonplace remedy in SEC enforcement,[124] but it was not used in conjunction with regulatory actions until the latter half of the twentieth century.[125] The agency first obtained disgorgement in insider trading case, *SEC v. Texas Gulf Sulphur Company*, despite the fact that Congress had never explicitly authorized the SEC by statute to seek disgorgement in a

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119. 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. *See, e.g.*, Russell Ryan, *The Equity Facade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (2013), http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Fa%C3%A7ade-of-SEC-Disgorgement.pdf. 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. *Id.* at 2. 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.*

120. *See, e.g.*, 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. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Disgorgement is 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.").

121. *See, e.g.*, Ryan, *supra* note 119, at 12. *But see* Kokesh v. SEC, 137 S. Ct. 1635, 1639–41 (2017).

122. U.S. SENTENCING GUIDELINES MANUAL § 8C2.9 (U.S. SENTENCING COMM'N 2016) (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.").

123. *See* JAMES T. O'REILLY ET AL., PUNISHING CORPORATE CRIME 191–92, 202 (2009) (querying if disgorgement is "A Second-Class Citizen" in criminal statutes and referring to civil action, "[i]n the majority of statutory or regulatory schemes . . . the courts have found the authority to impose the fully panoply of equitable remedies including . . . disgorgement"). 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. *Id.* at 191–92.

124. SEC v. Berlacher, No. 07-3800, 2010 WL 3566790, at *14 (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.").

125. James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS., ENTREPRENEURSHIP, & L. 131, 133 (2014); *see also* SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd in part,* 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971).

federal court.[126] In 1990, the Securities Enforcement Remedies and Penny Stock Reform Act allowed the SEC, in an *administrative* proceeding, to "enter an order requiring accounting and disgorgement, including reasonable interest."[127] 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.[128] 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."[129]

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 recent Supreme Court review of a circuit split regarding whether the five-year statute of limitations applies to disgorgement.[130] The case centered on the application of the Supreme Court's decision in *Gabelli v. SEC*, 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.[131] The 2017 Supreme Court case, *Kokesh v. Securities and Exchange Commission*, addressed whether claims for disgorgement should be subject to the *Gabelli* holding.[132] The Eleventh

126. 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd in part,* 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971); 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 utilization of such an enforcement tool by the SEC.") (internal citations omitted); *see also* Ryan, *supra* note 119. 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. *Id.* at 2.

127. 15 U.S.C. § 78u-2(e) (2012). 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. [Citation Needed]. 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.

128. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §305(b), 116 Stat. 745 (2002) (codified at 15 U.S.C. § 78u(d)(5) (2012)).

129. *Id.*

130. Kokesh v. SEC, 137 S. Ct. 1635, 1639–41 (2017).

131. Gabelli v. SEC, 568 U.S. 442, 446–47 (2013).

132. Kokesh, 137 S. Ct. at 1639–41.

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.[133] The Tenth Circuit, in *Kokesh*, held that disgorgement is not the equivalent of forfeiture.[134] 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.[135] The Supreme Court ultimately agreed with the logic of the Eleventh Circuit and held that disgorgement is more akin to a penalty and therefore should be subject to the statute of limitations.[136]

Because disgorgement is defined as "ill-gotten gains,"[137] the government is only permitted to receive the profits if it can prove that the disgorgement amount is derived from the allegedly 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.[138] 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.[139] As such, the threshold burden of the SEC is to give merely a "reasonable approximation of [the] profits [which are] causally connected to the violation."[140] 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.[141]

Despite being only a fairly recently-demanded remedy, disgorgement is by far the largest category of money collected by the SEC.

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133. SEC v. Graham, 823 F.3d 1357, 1363 (11th Cir. 2016).

134. SEC v. Kokesh, 834 F.3d 1158 (10th Cir. 2016).

135. *Id.* at 1164.

136. Kokesh, 137 S. Ct. at 1645.

137. *See supra* note 118 and accompanying text.

138. SEC v. First City Fin. Corp., 890 F.2d 1215, 1231–32 (D.C. Cir. 1989).

139. *See id.*

140. *Id.*; *see also* Elaine Buckberg & Frederich C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. L. 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."); Ryan, *supra* note 119, at 4–5 (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).

141. *First City Fin. Corp.*, 890 F.2d at 1231–32. This is typically done by proving intervening events or causes affected the calculation of profits. *Id.* at 1232.

In fiscal year, 2014, the SEC collected $2.788 billion in disgorgement and half that in penalties, $1.38 billion.[142] 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.[143] 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,[144] 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 and has never required disgorgement in FCPA matters until September 2016.[145]

As described in section I, the FCPA lays out authorized statutory penalties. Disgorgement is neither included in the statute nor even mentioned in the original House or Senate reports of 1977, the discussion regarding its amendments,[146] or the 1981 U.S. General

142. SEC, SELECT SEC AND MARKET DATA: FISCAL YEAR 2014 2 tbl.1 (2014), http://www.sec.gov/about/secstats2014.pdf.

143. Sasha Kalb & Marc Alain Bohn, Miller & Chevalier LLP, *Disgorgement: The Devil You Don't Know*, CORP. COMPLIANCE INSIGHTS, (Apr. 10, 2010) 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. *Id.*

144. *See, e.g.*, Robert L. Cheney & Daniel M. Sibears, *Disgorgement in SEC Insider Trading Cases: Toward a New Measure of Disgorgement,* 26 BOS. B.J. 5 (1982)*;* Thomas C. Mira, Comment, *The Measure of Disgorgement in SEC Enforcement Actions Against Inside Traders Under Rule 10b-5*, 34 CATH. U. L. REV. 445 (1985); John K. Robinson, Note, *A Reconsideration of the Disgorgement Remedy in Tipper-Tippee Insider Trading Cases*, 62 GEO. WASH. L. REV. 432 (1994).

145. *See, e.g.*, Einer Elhauge, *Disgorgement as Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009); James Lowe et al., *DOJ Seeks Unprecedented Disgorgement Remedy in a Civil Antitrust Case*, WILMERHALE (Feb. 26, 2010), https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=88585. Disgorgement is often used interchangeably with "restitution," particularly in criminal dispositions but there is a significant difference between the two terms. *See* O'REILLY, supra note 123, at 196 ("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."). *See infra* Part II-C.3 and accompanying notes (discussing the introduction of the use of disgorgement by the DOJ Pilot Program).

146. H.R. REP. NO. 95-640 (1977); S. REP. NO. 95-114 (1977); *see also* David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence,* 30 MICH. J. INT'L L. 471, 474 (2009). Weiss writes that "the history surrounding the passage of the FCPA indicates that it is unclear

Accounting Office Report.[147] 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.[148]

The first use of disgorgement in the settlement of an FCPA action by the SEC was in 2004, in the case of ABB Ltd.[149] Since that time, the SEC has sought disgorgement in "virtually every FCPA enforcement action it has brought."[150] The amount of disgorgement, like the number of FCPA enforcement actions, has increased over the past fifteen years.[151] In fact, most of the highest amounts of disgorgement extracted by the SEC occurred in the past two years.[152] 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.,

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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.* at 496.

147. U.S. GOV'T ACCOUNTABILITY OFF., AFMD-81-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981).

148. *See* 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A) (2012); *see also supra* Part I.

149. Consent of Defendant, SEC v. ABB Ltd., 10-CV-01648-PLF (D.D.C. Oct. 12, 2010), http://fcpa.stanford.edu/fcpac/documents/3000/001564.pdf; Sec Sues ABB Ltd in Foreign Bribery Case, Litigation Release No. 18775 (July 6, 2004), https://www.sec.gov/litigation/litreleases/lr18775.htm. 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. Consent of Defendant, SEC v. ABB Ltd., 10-CV-01648-PLF, *supra*.

150. Koehler, *The Façade of FCPA Enforcement*, *supra* note 24, at 981 (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. *Id.* at 982. 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. *Id.*

151. *See* Karen E. Woody, *No Smoke and No Fire, supra* note 47, at 1751–52.

152. *See* Richard L. Cassin, *Teva Pays Second Biggest FCPA Disgorgement,* FCPA BLOG (Sept. 25, 2017, 8:22 AM), http://www.fcpablog.com/blog/2017/9/25/telia-also-tops-our-new-top-ten-disgorgements-list.html. The disgorgement amounts paid in 2016 and 2017 that land in the top ten list of highest disgorgement amounts to date are: Telia, $457 million; Teva Pharmaceuticals, $236 million; Och-Ziff, $199 million; VimpelCom, $375 million; and JPMorgan Chase, $130.5 million. *Id.* The other largest disgorgement amount remains that of Siemens, $350 million, which was settled in 2008. *Id.*

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, HMT, Linde NA, and CDM Smith, the declination letters made clear both that 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."[153] Further, both companies had to agree that "no tax deduction may be sought in connection with any part of [ ] payment of the Disgorgement amount."[154]

The DOJ's process related to disgorgement in FCPA matters differs from the SEC's, and seems to suggest that the "disgorgement" amounts in the 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.[155]

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.[156] This raises the question whether, in these declinations with disgorgement, the DOJ merely conflated its two statutory jurisdictional authorities. In other words, 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 a myriad of 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. First, the declinations with disgorgement were issued pursuant to the Pilot Program, which is housed in DOJ Criminal Fraud.[157] Second, the letters themselves were issued on DOJ Criminal Fraud letterhead and signed by a DOJ prosecutor.[158] Finally, the text of the declination letters themselves

153. Letter to HMT, LLC, *supra* note 4, at 2; Letter to NCH, Corp., *supra* note 4, at 2.

154. Letter to HMT, LLC, *supra* note 4 at 2. ; Letter to NCH, Corp., *supra* note 4 at 2.

155. *See* Daniel Patrick Wendt, *So How Does the DOJ Calculate Disgorgement?*, FCPA BLOG, Nov. 30, 2016, (Nov. 30, 2016, 8:22 AM), http://www.fcpablog.com/blog/2016/11/30/daniel-patrick-wendt-so-how-does-the-doj-calculate-disgorgem.html.

156. See *supra* Part I-A.

157. Letter to HMT, LLC, *supra* note 4; Letter to NCH, Corp., *supra* note 4.

158. *Id.*

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 that does not clearly set out the standards of proof, the jurisdictional authority, and the proper terms, particularly if the government muddies the water in the manner it has with combined 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.[159] On the other hand, if the company rightly deserves prosecutorial discretion in the form of a 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.

159. 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 infra* Part III.

1. "Declinations with Disgorgement": Government Extortion?

Prior to the Pilot Program, the DOJ had never required disgorgement of profits in any of its FCPA enforcement actions. In the 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.[160] 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 contest 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 cannot refuse. The only catch, of course, is that companies must pay a "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.[161] Perhaps more aptly, declinations with disgorgement may meet the elements of extortion under the color of official right.[162]

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 check or balance by the judiciary.[163] This fact

160. *See* PILOT PROGRAM MEMO, *supra* note 1. Effectively, the DOJ could expend exactly nothing in terms of resources or investigation costs and reach the same resolution.

161. 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).

162. 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*, 141 U. PA. L. REV. 1695, 1696 (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.

163. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) (statement of Hon. Michael Mukasey) ("The primary statutory interpretive function therefore is performed almost exclusively by the DOJ Fraud Section and the SEC . . . [b]y negotiating resolutions in many cases

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 government is extorting companies by requiring disgorgement, the same transaction can been seen as a company bribing the government to issue a declination.[164]

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.[165] 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.[166] The Pilot Program inserts into that analysis the potential ability to have the DOJ and SEC cease investigation and rely

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before an indictment or enforcement actions is filed . . . . We are left with a circumstance in which 'the FCPA means what the enforcement agencies say it means.' "). 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 Inv., Ltd., 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* United States v. Aguilar, 831 F. Supp. 2d 1180 (C.D. Cal. 2011); Order for Dismissal, United States v. Cinergy Telecomm., Inc., No. 09-CV-21010 (S.D. Fla. Feb. 24, 2012), http://fcpa.stanford.edu/fcpac/documents/3000/001659.pdf.

164. *See generally* United States v. v. Holzer, 816 F.2d 304, 311 (7th Cir. 1987) ("Extortion 'under color of official right' equals the knowing receipt of bribes; they need not be solicited."); James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 815–20 (1988) (noting that the two crimes often are not separated).

165. *See supra* Part II-A.

166. *See, e.g.*, Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 949, 949 n.1 (2009) (citing Laurie Brannen, *Price of Sarbanes-Oxley Declines,* BUS. FIN. (May 1, 2006), http://businessfinancemag.com/bpm/upfront-price-sarbanes-oxley-compliance-declines, and noting that in 2006, eighty-five percent of financial executives who undertook a survey

upon the corporation's internal investigation with the cost to the company 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 that 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.[167] The government sends out the mixed message that the corporate conduct at issue is not conduct

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did not believe that the benefits of compliance outweighed the costs); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2102–03 (2016) (discussing the average budgets for compliance efforts and variations among industries); Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2 WIS. L. REV. 609 (2012); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 488 (2003).

167. This argument closely aligns with Lon Fuller's in Lon L. Fuller, MORALITY OF LAW (rev. ed. 1969). Fuller identifies eight requirements of the rule of law. Laws must be *general*, specifying *rules* prohibiting or permitting behavior of certain kinds. *Id.* at 241–42. Laws must also be widely *promulgated*, or publicly accessible. *Id.* 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. *Id.* Laws must be *clear*, meaning citizens should be able to identify what the laws prohibit, permit, or require. *Id.* Laws must be *non-contradictory*. One law cannot prohibit what another law permits. *Id.* Laws must be *able to be obeyed*. The demands laws make on citizens should remain relatively *constant*. *Id.* Finally, there should be *congruence* between what written statutes declare and how officials enforce those statutes. *Id.*; *see* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 240–41 (2005); *see also* David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, 18 SOC. PHIL. & POL'Y 176 (2001); Gerald J. Postema, *Implicit Law*, 13 L. & PHIL. 361 (1994); Jeremy Waldron, *Why Law—Efficacy, Freedom or Fidelity?*, 13 L. & PHIL. 259 (1994).

that is egregious enough to warrant prosecution, while at the same time demanding 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.[168] These actions signal to society what type of social conduct is valued and what social conduct is sanctioned.[169] In other words, laws themselves, as well as the enforcement of laws (or lack thereof) send 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.[170] Professor Uhlmann, in particular, dissects the purpose of *corporate* criminal prosecution through the lens of expressive theory and expressive function.[171] He argues that the 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.[172] 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

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168. *See, e.g.*, Sunstein, *supra* note 6, at 2024–25. 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. *Id.*; *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946–48 (1995); William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 520–21 (2001).

169. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–20 (1999); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); *see also* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 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").

170. *See* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1203–04 (2015).

171. Uhlmann, *The Pendulum Swings*, supra note 169, at 1243. 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. *Id.*; *see* David M. Uhlmann, *Reconsidering Corporate Criminal Prosecution*, COLUM. L. SCH. BLUE SKY BLOG (Aug. 19, 2015), http://clsbluesky.law.columbia.edu/2015/08/19/reconsidering-corporate-criminal-prosecution/.

172. Uhlmann, *The Pendulum Swings*, *supra* note 169, at 1260–1.

upholds the rule of law, reinforces core societal values, provides accountability, and ensures that justice has been done."[173] 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.[174]

As a result, Uhlmann argues, 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.[175] 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.[176]

The message the law sends 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.[177]

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 analyzing the ultimate dispositions undertaken

173. *Id.* at 1260.
174. *Id.* at 1263–4.
175. *Id.*
176. Stuntz, *supra* note 168, at 521–22.
177. *Id.*

in the Pilot Program; finally, expressive theory underscores the importance of a clear jurisdictional split between civil and criminal authority, as relevant to recent declinations with disgorgement.

First, the goals of the Program, as detailed by the DOJ in its memorandum, are increased transparency by the government and deterrence for companies that may violate the FCPA. The government wants to express the importance of both the 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. It 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 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, and even more so to the declinations with disgorgement. In these cases, we see the ultimate "blurring of lines" as to what conduct is acceptable and what is condemned.[178] 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, which means that 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, 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* its criminal authority to issue a declination, the practical

178. *See* Feinberg, *supra* note 169, at 416–17; *see also* Stuntz, *supra* note 168, 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").

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.[179]

In other words, there is significant expressive function in the distinction between a criminal act and one that is merely 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 expand 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, but so to do the *words* and *terms* used in the prosecutorial process. This notion is rooted in textualist theory[180] and can be

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179. Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404–05 (1958) (quoted in Uhlmann, *The Pendulum Swings*, *supra* note 169, at 1259 n.107). 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). *Id.* at 403. 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. *Id.* at 404–05. Rather, the thrust of his argument is that the moral condemnation of criminal law is what sets it apart from civil wrongs. *Id.* at 405–06.

180. 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.

seen as an outgrowth of the famous Derrida quote: "[t]here is nothing outside the text."[181] The meanings commonly understood from the terms of the text bind all stakeholders in the word-meaning agreements.[182] This simply is the "prime purpose of language"[183] and is of utmost importance when considering legal terms and definitions.[184]

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.[185] Simply put, words matter. Words describing the criminal dispositions of corporations are the building blocks 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.[186] Similarly, when the government uses the incorrect terms to describe what sanctions it gives to 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.[187]

In the case of the recent "declinations with disgorgement," a declination 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

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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. *Id.*

181. JACQUES DERRIDA, LIMITED INC. 148 (1988).

182. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 18–19 (2005).

183. *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).

184. 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).

185. 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* 15 L. THEORY 25 (2009).

186. Uhlmann, *The Pendulum Swings*, *supra* note 169, at 1264.

187. *See* Fish, *Intention Is All There Is*, *supra* note 183, 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).

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 to be. 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.[188] The term used for what the inmate 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.[189] However, if what the defendant paid was termed "administration fees" or, as Colorado argued, "compensation," the case looks entirely different in terms of legal and equitable resolutions.[190] 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

188. Nelson v. Colorado, 137 S. Ct. 1249 (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. Garrett Epps, *Can States Make People Pay Even When Their Convictions Are Overturned?* ATLANTIC (Jan. 6, 2017), https://www.theatlantic.com/politics/archive/2017/01/can-states-make-people-pay-even-when-their-convictions-are-overturned/512360/.

189. In fact, Chief Justice Roberts seemed to have agreed with this theory. *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), http://www.scotusblog.com/2017/01/argument-analysis-justices-skeptical-colorados-approach-returning-payments-defendants-whose-convictions-reversed-appeal/. The State of Colorado argued that the inmates should not be compensated absent a clear finding of innocence. *Id.* In other words, the Solicitor General of Colorado 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." *Id.* Specifically, the Chief Justice stated, "you keep talking about compensation. The issue is restitution." *Id.*

190. *See id.*

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. There may be myriad reasons for the declination. 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. Further muddying the water by using either "declination" or "disgorgement" to create 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 to the detriment of the enforcement scheme. Due to the fact that the meanings have been distorted from their literal, conversational, and legal understandings, one is stuck asking the questions, "what is a declination?" and "what is disgorgement?"[191]

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 the government and companies. It is therefore 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.

191. *See* Fallon, *supra* note 180.

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, jeopardizing the expressive function of the law. 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 Part II, these dispositions are not declinations, nor is what they demand "disgorgement." Using the correct terminology for what 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 FCPA's expressive function: 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. That is to say, 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 usages 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.[192] 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

192. *See, e.g.*, Woody, *No Smoke and No Fire, supra* note 47, at 1751, 1756.

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 suggests that the novel pretrial diversion scheme of declination with disgorgement creates more problems than it solves, both practically and theoretically, and should not be the optimal course of action despite the ease with which it creates resolutions for companies and the government. The slippery slope is the deterioration of remedial options and legal terms themselves.