COMMENT

THE CATCH-22 OF CORPORATE COOPERATION IN FOREIGN CORRUPT PRACTICES ACT INVESTIGATIONS*

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Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. "That's some catch, that Catch-22," he observed. "It's the best there is," Doc Daneeka agreed.[1]

I. INTRODUCTION

A "Catch-22" is a "problematic situation for which the only solution is denied by a circumstance inherent in the problem."[2] It is a "measure or policy whose effect is the opposite of what was intended."[3] The Catch-22 of corporate cooperation arises when the cooperation that reduces criminal fines also prevents the corporation from invoking the affirmative defense of privilege against future claims of defamation.[4] Cooperation allows a company to mitigate its liability but simultaneously exposes the corporate defendant to new kinds of liability.[5]

1. JOSEPH HELLER, CATCH-22, at 46 (4th prtg. 1961). Joseph Heller's aptly named novel coined the term "Catch-22" to describe a situation in which there is no escape because of inherently contradicting circumstances. *Id.* at 45–46; *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 194 (11th ed. 2003) (noting that the term originates from the "paradoxical rule in the novel *Catch-22*"). In the novel, the main character feigns madness in an attempt to avoid flying dangerous combat missions. HELLER, *supra*, at 45. Paradoxically, this concern for his own safety proves that he is sane and must continue to fly combat missions. *Id.* at 46. In the novel, this military policy is called "Catch-22." *Id.*

2. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 1, at 194.

3. *Id.*

4. *See infra* Parts III–IV (confronting the paradox that cooperation may result in lower fines and the avoidance of trial for foreign bribery violations, but also prevents the use of absolute privilege because of the lack of a judicial proceeding).

5. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2012) [hereinafter

In *Writt v. Shell Oil Co.*, the Fraud Section of the Department of Justice (DOJ) informed Shell that it had information of potential violations of the Foreign Corrupt Practices Act (FCPA) and requested a meeting to discuss the matter.[6] Shell "agreed with the DOJ to undertake the internal investigation" and provide a report "with the understanding that the facts in the report would be used by the DOJ in determining whether or not to prosecute Shell for FCPA violations."[7] Because Shell cooperated with the DOJ's investigation, Shell received a deferred prosecution agreement (DPA) and reduced criminal fines.[8] Shell's cooperation came with a price, however. Robert Writt, an employee allegedly involved in the payment of bribes, sued Shell for making what he considered false and defamatory statements to the DOJ.[9] Though the trial court granted summary judgment in favor of Shell because the statements were absolutely privileged, the appellate court reversed and remanded the case after finding that the communication to the DOJ only deserved a conditional privilege based on public interest.[10] Because of the Catch-22 of cooperation, Shell is entrenched in litigation, the very result Shell hoped to avoid by cooperating with the DOJ and entering into a DPA.[11] This Comment suggests that the Catch-22 can be avoided by granting an absolute privilege to statements made while cooperating with a DOJ investigation.

Enforcement of the FCPA, which prohibits the payment of bribes to foreign officials, is on the rise, and with it, corporations' concerns over their liability.[12] As a result of

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SENTENCING GUIDELINES] (establishing cooperation as a mitigating factor); *infra* Part IV (discussing the exposure of corporations to defamation claims).

6. Writt v. Shell Oil Co., 409 S.W.3d 59, 63 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.).

7. *Id.*

8. *See* Deferred Prosecution Agreement at 4, 8–9, United States v. Shell Nigeria Exploration & Prod. Co., No. 4:10-cr-00767 (S.D. Tex. Nov. 4, 2010) (recognizing that the DOJ considered Shell's cooperation in determining a sentence). Shell received a two-point reduction in its base fine level for cooperation and ultimately received a criminal fine of $30 million, a downward departure from the recommended fine of $34.2 to $68.4 million. *Id.* at 8–9.

9. *Writt*, 409 S.W.3d at 62–63.

10. *Id.* at 62–63, 75–76.

11. *See* MIRIAM F. WEISMANN, CRIME, INCORPORATED: LEGAL AND FINANCIAL IMPLICATIONS OF CORPORATE MISCONDUCT 64 (2009) (discussing the benefits of out-of-court settlements to corporations and commenting that the company's main goal is "damage control").

12. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 15–16 (2010) [hereinafter *Senate Hearings*] (statement of Andrew Weissmann, Partner, Jenner & Block, LLP) (advocating for a "clearer statute" so that corporations have notice of their potential liability).

corporations' voluntary disclosure and cooperation, the DOJ now pursues more violations and brings in more criminal penalties than ever before.[13] The FCPA is painfully vague,[14] and enforcement is subject to the almost unlimited discretion of the DOJ, which tempts corporations into voluntarily disclosing, cooperating, and conducting internal investigations in the hopes of earning a DPA, a non-prosecution agreement (NPA), or reduced criminal fines.[15] In exchange for a deferred indictment and reduced fines, the DOJ expects corporations to implicate culpable individuals and cooperate in their prosecution.[16] Most companies oblige, preferring "voluntary" cooperation to the financial and reputational ruin that could result from indictment and litigation.[17]

FCPA enforcement actions are rarely subject to judicial scrutiny, but as the DOJ continues to prosecute individuals, some scholars expect to see an increased number of FCPA challenges coming from implicated individuals facing incarceration.[18] While many parts of the FCPA beg for clarification, this Comment singularly addresses the possibility that implicated individuals will bring defamation actions against the corporation.[19] When

13. *See infra* Part III.B–C (advancing the argument that corporate cooperation and voluntary disclosure reduces the burden on government resources and results in more FCPA investigations).

14. *See* James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1238 (2007) (arguing that the FCPA is purposefully vague and unfairly leaves companies unable to plan lawful business strategies).

15. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys 5, 7, 17 (Dec. 12, 2006) [hereinafter McNulty Memorandum] ("In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.").

16. *See* SENTENCING GUIDELINES, *supra* note 5, § 8C2.5 cmt. n.13 (stating that full cooperation involves the identification of culpable individuals).

17. *See infra* Part III (commenting on the seemingly involuntary nature of "voluntary" cooperation and demonstrating cooperation's rewards through anecdotal evidence of recent FCPA deferred prosecution agreements (DPAs)).

18. *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 4 (2d ed. 2010) ("Although entities are generally not inclined to contest enforcement actions, this will not be the case with individuals subject to imprisonment. . . . As the criminal prosecution of individuals increases, the basic underpinnings of the FCPA, as well as the application of its provisions, will be subject to more challenges."); ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 249 (2d ed. 2012) ("The substantial increase in the number of individuals charged will very likely lead to more FCPA trials, challenges to DOJ legal theories, and FCPA case law.").

19. *See infra* Part IV (predicting that the DOJ's focus on individual prosecutions will entangle corporations in civil defamation actions as a result of their identification of culpable individuals).

that occurs, the corporation finds itself in a Catch-22 in which the same internal investigation that reduced its FCPA liability exposes the corporation to additional liability for defamation.[20] This Comment proposes that the DOJ should be considered a quasi-judicial body as a matter of law and an absolute privilege should attach to all communications made to the DOJ in the course of an FCPA investigation.[21] Creating an absolute privilege imbues a sliver of certainty into an otherwise ambiguous statute.[22] Further, an absolute privilege will incentivize corporations to cooperate with the DOJ, saving the government time and resources.[23]

II. HISTORY OF THE FCPA AND RECENT RISE IN ENFORCEMENT

A. The Statute and Enforcement Authority

The Foreign Corrupt Practices Act, which was adopted in 1977 in the aftermath of the Watergate Scandal, makes it illegal to bribe a foreign official to obtain a business advantage and requires corporations that are registered with the Securities and Exchange Commission (SEC) to keep accurate books and records.[24] Advocates of the FCPA say it promotes the integrity of businesses and levels the playing field.[25] Opponents of the FCPA say it prevents American companies from competing with foreign companies, which are often unconstrained by strict bribery laws.[26]

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20. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 63 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (supporting the idea that cooperating corporations can be subject to defamation suits).

21. *See infra* Part V (explaining how the Catch-22 of corporate cooperation can be removed to protect corporate disclosures and ensure that cooperation remains an attractive option in FCPA enforcement).

22. *See Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 37–38 (2011) [hereinafter *House Hearings*] (statement of George J. Terwilliger, III, Partner, White & Case LLP) (discussing the apparent ambiguities present within the FCPA statutes and the effects of such uncertainty on corporate behavior).

23. *Id.* at 38 (suggesting that the DOJ incentivize cooperation to ensure that corporations continue to self-report and self-investigate).

24. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3, 78m (2012); Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 442–43 (2010).

25. *See Senate Hearings*, *supra* note 12, at 11 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) ("Foreign bribery cannot be good for business . . . . So we think that good compliance is good for corporations and that our enforcement is not bad for business and that we are leveling the playing field by attacking foreign bribery both here in the United States and abroad.").

26. *House Hearings*, *supra* note 22, at 37 (statement of George J. Terwilliger, III, Partner, White & Case LLP) (arguing that uncertainty of the FCPA's

There are two parts to the statute. The anti-bribery provision makes it illegal for American corporations to bribe foreign officials for the purpose of obtaining or retaining business.[27] The anti-bribery provision makes it a crime to:

> (a) use the mails or any instrumentality of interstate commerce
>
> (b) "corruptly"
>
> (c) "in furtherance of an offer, payment, promise to pay, or authorization of the payment of"
>
> (d) money or anything of value
>
> (e) to any "foreign official"
>
> (f) for the purpose of influencing him to act or omit to act to secure "any improper advantage" in order to assist such corporation in obtaining or retaining business with a foreign government.[28]

The accounting and recordkeeping provision requires companies registered with the SEC to create and maintain accurate books, records, and a system of internal accounting controls.[29]

The DOJ and the SEC share responsibility for FCPA enforcement.[30] The SEC has the authority to bring civil actions against issuers and individuals acting on behalf of issuers.[31] The DOJ has authority over all criminal violations and any civil actions not covered by the SEC.[32] Often, SEC and DOJ proceedings run parallel to one another, allowing the agencies to conserve resources by exchanging information.[33]

B. The Rise in FCPA Enforcement and Priorities Today

For many years after the enactment of the FCPA in 1977, the DOJ and SEC infrequently enforced the statute.[34] By 2001,

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requirements causes companies to "forgo business opportunit[ies] out of concern for FCPA compliance").

27. 15 U.S.C. § 78dd-1(a); Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The* Triton Energy/Indonesia *SEC Consent Decree Settlement*, 18 NW. J. INT'L L. & BUS. 303, 312 (1998).

28. 15 U.S.C. § 78dd-1(a).

29. *Id*. § 78m(b)(2); Mathews, *supra* note 27, at 312.

30. DEMING, *supra* note 18, at 75.

31. *Id*.

32. *Id*.

33. *Id*. at 76.

34. WEISMANN, *supra* note 11, at 103 (noting that before 2002, "the number of prosecutions and civil enforcement actions for FCPA actions has not been great" (quoting

the DOJ had convicted only twenty-one companies and twenty-six individuals for criminal violations of the FCPA.[35] The combined total of fines, fees, and penalties for all FCPA cases prosecuted by the DOJ from 1977 to 1998 was $35.2 million.[36]

DOJ officials say that today's enforcement of the FCPA is critical.[37] FCPA enforcement exploded after 2002 following high-profile, high-dollar scandals like Enron and WorldCom.[38] The SEC and DOJ hired additional employees after 2004 to exclusively handle the growing number of corporate compliance and FCPA cases.[39] By dedicating more resources to the enforcement of the FCPA, the number of FCPA prosecutions more than doubled from 2006 to 2007.[40]

Enforcement efforts are still rising, and each year the DOJ collects more in criminal fines than it has at any other point in the FCPA's history.[41] More companies are being prosecuted and the penalties each company now pays far exceed the liability companies faced in the early days of the FCPA.[42] In 2010, the

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OECD, REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 6 (Oct. 2002)) (internal quotation marks omitted)).

35. *Id.*

36. Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 103 (2010).

37. *Senate Hearings*, *supra* note 12, at 4 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) (relaying the World Bank's estimate that more than $1 trillion in bribes are paid each year).

38. Bixby, *supra* note 36, at 115–17 (commenting that the drastic increase in FCPA enforcement actions results from the enactment of the Sarbanes-Oxley Act of 2002, which was enacted in response to the Enron and WorldCom scandals); *see also* Cindy A. Schipani, *The Future of the Attorney–Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921, 922 (2009) (positing that the increased emphasis on the "prosecution and deterrence of financial crime" was a result of the Enron and WorldCom scandals, which sent the U.S. economy into a "tailspin"); Thomas, *supra* note 24, at 449 ("Whereas there were only three open FCPA investigations in 2002, there were eighty-four open investigations at the end of 2007.").

39. *See* Bixby, *supra* note 36, at 104 (contending that "hundreds of employees" were hired "to enforce corporate compliance cases"); Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 783–84 (2011) (calling the DOJ, SEC, and FBI the "trifecta of federal agencies tasked with investigating and enforcing the FCPA" and chronicling how the growth of each of those agencies has resulted in more "robust enforcement of the FCPA").

40. *See* Bixby, *supra* note 36, at 105 (stating that the SEC brought eight FCPA prosecutions in 2006 and twenty in 2007, while the DOJ brought seven prosecutions in 2006 and eighteen in 2007).

41. *Senate Hearings*, *supra* note 12, at 4 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice); Bixby, *supra* note 36, app. at 129–34 tbl. 6 (chronicling the outcomes of FCPA cases).

42. *See* Stevenson & Wagoner, *supra* note 39, at 783–85. In 2008, Siemens AG paid $450 million, the largest criminal fine to date. Department's Sentencing Memorandum at

DOJ imposed over $1 billion in FCPA fines, "the most criminal penalties in FCPA-related cases in any single 12-month period."[43] The FCPA is a veritable gold mine; half of the $2 billion in fines collected by the DOJ Criminal Division during fiscal year 2010 resulted from FCPA investigations.[44] Yet the DOJ maintains that FCPA enforcement is a priority not because it is profitable, but because a level playing field benefits American companies.[45]

As FCPA enforcement rises, so too does the number of DPAs and NPAs offered by the DOJ to resolve investigations.[46] A company facing the choice between litigation and a DPA need only look to the cautionary tale of the accounting firm Arthur Andersen following the Enron scandal.[47] Arthur Andersen's high-risk decision to go to trial on criminal charges proved unwise, and very few companies since have taken the gamble.[48] Though the conviction was ultimately overturned, the indictment alone was a "corporate death sentence" for Arthur Andersen.[49]

10, United States v. Siemens Aktiengesellschaft, No. 1:08-CR-00367-RJL (D.D.C. Dec. 12, 2008); *see also* Eric Lichtblau & Carter Dougherty, *Bribery Case Will Cost Siemens $1.6 Billion*, N.Y. TIMES, Dec. 16, 2008, at B8 (stating that Siemens's fines "dwarf the previous high for a foreign corruption case"). When combined with the enforcement by the SEC and German officials, Siemens paid fines and penalties in excess of $1.6 billion. Stephen A. Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. 1009, 1012 (2012).

43. *Senate Hearings*, *supra* note 12, at 47 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice).

44. Press Release, Dep't of Justice, Department of Justice Secures More Than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011).

45. Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006) [hereinafter Fisher, Prepared Remarks] ("[L]et me be very clear about one point. We are not combating corruption and enforcing the FCPA just because it is good for the Justice Department. We are doing so because it is good for U.S. business."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 30 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice) ("One of DOJ's chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption.").

46. WEISMANN, *supra* note 11, at 106.

47. *See* Schipani, *supra* note 38, at 925–27 (explaining that the "indictment and subsequent conviction . . . devastated [Arthur Andersen's] reputation" and doomed the firm even though the conviction was later vacated). The indictment charged Arthur Andersen with obstruction of justice for shredding Enron-related documents in the midst of the SEC's investigation. United States v. Arthur Andersen, LLP, 374 F.3d 281, 284 (5th Cir. 2004), *rev'd*, 544 U.S. 696 (2005).

48. Robert J. Sussman & Gregory S. Saikin, *Corporate Crimes: The Penalties and the Pendulum*, 43 ADVOCATE 39, 39, 43 (2008).

49. *Id.* at 39 & n.6; *see also* Thomas, *supra* note 24, at 451 ("In the corporate context, prosecutors faced the unenviable decision to either indict and potentially destroy the company through adverse publicity alone, or let a guilty defendant escape just consequences." (footnote omitted)). Arthur Andersen's demise affected thousands of

The unenviable example of Arthur Andersen has resulted in an increase in plea agreements with the DOJ,[50] and a general trend of avoidance of FCPA litigation.[51] The lack of FCPA case law leaves corporations skeptical about the likelihood of success at trial.[52] In a post-Arthur Andersen world, prosecutors and companies alike are more inclined to "'consider alternative dispositions of corporat[e] criminal cases' . . . to 'avoid criminal prosecution and the de facto death sentence that comes if a company is found guilty.'"[53]

III. NOT SO "VOLUNTARY" COOPERATION

A. Sentencing Guidelines

The U.S. Sentencing Commission established Sentencing Guidelines to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[54] Congress's main objective in establishing the Guidelines was to establish a fair and effective sentencing system that would promote uniformity and proportionality in sentencing.[55] Though the court is required to consider the Guidelines range in issuing a sentence, the court may ultimately render a sentence greater than the highest term or lower than the lowest term if the case presents atypical features and the court describes its reasons for departing from the Guidelines.[56]

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employees and shareholders, the vast majority of whom played no part in the violation. *See* Sussman & Saikin, *supra* note 48, at 39. The DOJ has recognized the devastating ripple effect on innocent people as a public policy rationale for offering alternatives to indictment. *See id.* (calling Arthur Andersen an example of the "potential overkill effect of corporate prosecutions" and discussing the government's prosecutorial alternatives).

50. *See* Sussman & Saikin, *supra* note 48, at 41 (positing that U.S. Attorneys have been using DPAs and NPAs more frequently "to achieve a number of important enforcement objectives without risking the collateral consequences resulting from a corporate prosecution"); *see also* Mathews, *supra* note 27, at 396–97 (discussing the DOJ's identification of "targets" and discretion to grant immunity to those targets).

51. *See* Thomas, *supra* note 24, at 451–54 (describing the options prosecutors have in pursuing corporate criminal violations, including deferred and non-prosecution agreements).

52. *See* Mark J. Rochon & Marc Alain Bohn, *White Collar Crime Policy*, CHAMPION, July 2012, at 55, 55 ("Due in part to . . . a dearth of relevant case law on its various provisions, the government's enforcement of the FCPA . . . [is] at times inconsistent and difficult to predict.").

53. Ralph F. Hall, *Deferred Prosecution and Non-Prosecution Agreements*, *in* JAMES T. O'REILLY ET AL., PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 119, 131 (2009) (quoting Melissa Klein Aguilar, *Post-Enron, Deferred Prosecution Deals Soar*, COMPLIANCE WK., Oct. 10, 2007, at 1).

54. SENTENCING GUIDELINES, *supra* note 5, § 1A1.2.

55. *Id.* § 1A1.3.

56. *Id.* § 1A1.2; *see also* United States v. Booker, 543 U.S. 220, 245–46, 259–61 (2005) (holding that the Sentencing Guidelines provide guidance but are not mandatory because mandatory sentencing would violate the accused's right to trial by jury);

The Guidelines provide separate sentencing rules when the criminal defendant is an organization.[57] The Guidelines establish a range of possible fines based on the seriousness of the offense and the organization's culpability.[58] After an organization's base offense level is established, that offense level is adjusted for six culpability factors.[59] The six factors are: (1) the involvement in or tolerance of criminal activity; (2) the prior history of the organization; (3) the violation of an order; (4) the obstruction of justice; (5) the existence of an effective compliance and ethics program; and (6) self-reporting, cooperation, or acceptance of responsibility.[60] The first four factors increase the fine from the base offense level, while the fifth and sixth factors decrease the corporation's ultimate fine.[61] This Comment focuses on the sixth factor, cooperation, and the resulting Catch-22 of liability facing an organization.[62]

B. Corporate Cooperation

Cooperating is an attractive option because the corporation may be rewarded with a deferred or non-prosecution agreement and a reduced sentence.[63] A company can reduce its offense level by five points by self-reporting an FCPA violation to the DOJ before the government initiates an investigation.[64] A company

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Schipani, *supra* note 38, at 934 ("District courts must calculate the applicable guidelines' sentencing range, but they have discretion to go outside that range in order to 'tailor the sentence in light of the other statutory concerns' . . . ." (quoting *Booker*, 543 U.S. at 245–46)).

57. *See* SENTENCING GUIDELINES, *supra* note 5, § 8. An "organization" is "a person other than an individual" and includes "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." *Id.* § 8A1.1 cmt. n.1.

58. WEISMANN, *supra* note 11, at 7.

59. SENTENCING GUIDELINES, *supra* note 5, §§ 8C2.3, 8C2.5.

60. *Id.* § 8C2.5.

61. *See id.*; *see also* Schipani, *supra* note 38, at 937 (calling the Guidelines a "carrot and stick approach" that imposes higher fines when a company has tolerated illegal activity and allows lower fines when a company demonstrates "its antipathy toward law-breaking" (internal quotation marks omitted)).

62. *See infra* Parts III.B–E, IV (demonstrating the government's reliance on corporate cooperation but recognizing that the government offers no assurance that it will reward cooperation).

63. Richard Deutsch & Kara Altenbaumer-Price, *FCPA Prosecution: Lessons Learned from Deferred and Non-Prosecution Agreements*, *in* INTERNATIONAL BRIBERY: FCPA UPDATE 2011, at 1, 2 (2011), *available at* http://www.andrewskurth.com/media/article/1595_WLJ_FCPA2011_Commentary_Deutsch.pdf.

64. SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g)(1). To receive the reduction of five points, the self-reporting must occur within a reasonably prompt time after discovering the offense and the organization must "fully cooperate[]" in the resulting investigation. *Id.*

whose violation was discovered by the DOJ, rather than self-reported, can still reduce its offense level by two points for "fully cooperat[ing]" in the government's investigation.[65] With thousands or millions of dollars separating each offense level, even a two-point reduction is financially tempting to a corporation.[66]

Any self-reporting to or cooperating with the DOJ is de jure voluntary, but many companies feel that, in practice, they have no choice.[67] Self-reporting and cooperating are the only reactive means of reducing a criminal fine.[68] A company that refuses to cooperate harms its chances of resolving the matter out of court.[69] A corporation's refusal to cooperate with the DOJ may create ill will and negatively affect the corporation's liability.[70]

Only cooperation that is timely and thorough reduces the offense level.[71] The test requires that the "cooperation" help to

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65. *Id.* § 8C2.5(g)(2).

66. *See id.* § 8C2.4(d) (giving examples of amounts of fines for various base offense levels).

67. *See Senate Hearings*, *supra* note 12, at 78 (testimony of Michael Volkov, Partner, Mayer Brown LLP) ("For most corporations that discover a potential FCPA violation, there is simply no other choice but to engage in the voluntary disclosure process.").

68. *See* SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(f)–(g) (offering as the exclusive means of reducing a base level fine (1) the presence of a compliance program and (2) self-reporting, cooperation, or acceptance of responsibility). The compliance program must be implemented *before* the violation, but from a purely mathematical standpoint, a compliance program pays for itself. *See* Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?*, 39 WAKE FOREST L. REV. 565, 567 (2004) (calculating that an organization that sets up an effective compliance program can receive up to a 95% reduced fine, while an organization that refuses could face a fine up to 400% higher). Thus, self-reporting, cooperation, and acceptance of responsibility are the only post-violation courses of action that can reduce a criminal sentence. SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g)(1)–(3).

69. *See infra* Part III.E (highlighting recent FCPA cases in which the government cited corporate cooperation as the main reason for offering the DPA).

70. *See* Mathews, *supra* note 27, at 418 ("[I]t is much more likely that a prosecutor will exercise prosecutorial discretion and choose not to criminally charge a public company . . . if the company diligently cooperates in the government investigation of the corporate wrongdoing."); Schipani, *supra* note 38, at 940–41 (explaining that courts often adopt the government's recommendations about cooperation and sentencing, despite having ultimate decision-making authority). Given the prosecutors' influence in the sentencing, corporations feel an "almost irresistible incentive" to cooperate with government investigators. *Id.* at 940–41 (internal quotation marks omitted).

71. SENTENCING GUIDELINES, *supra* note 5, § 8C2.5 cmt. n.13.

> To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient

identify an individual responsible for the FCPA violation.[72] The cooperation must also take place soon after the organization learns of the investigation, well before indictment.[73] These factors, which the Sentencing Commission says are necessary to earn cooperation credit, may prevent an organization from establishing a privilege defense against a future claim of defamation.[74] Although the corporation reduces its FCPA fine, it may find itself defending a claim for defamation.[75]

Cooperating often takes the form of an internal investigation.[76] The DOJ relies on companies' internal investigations to enforce the FCPA.[77] Without corporate cooperation, the DOJ would not have the resources to investigate all potential violations.[78] It is more difficult for the government to discover FCPA violations committed abroad than crimes that occur domestically; self-disclosure aids the DOJ in uncovering international violations.[79] The corporation is better able to

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> for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

Id.

72. *Id.*

73. *Id.*; *see also* TARUN, *supra* note 18, at 239 ("The vast majority of both SEC and DOJ matters are resolved short of trial and in advance of the filing of criminal or civil charges . . . ."); *infra* Part V.D (observing that "timely" cooperation in an FCPA investigation occurs before a judicial proceeding and thus misses the protection of absolute privilege).

74. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 75–76 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (exemplifying the loss of an absolute privilege against a claim of defamation). Shell cooperated in a timely manner after it was approached by the DOJ, but the court penalized Shell for its timeliness and claimed that Shell could not prove that a criminal judicial proceeding was either "ongoing," "actually contemplated," or "under 'serious consideration'" by the DOJ. *Id.* at 61–64, 76.

75. *See infra* Part IV (describing the problem corporations face when the identification of culpable individuals constitutes defamation per se and precludes an absolute privilege).

76. *See* McNulty Memorandum, *supra* note 15, at 8.

77. *See* Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Succession Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 273–80 (2010) (discussing the way internal investigations are used to enforce corporate compliance); *see also* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 731 (2009) (arguing that the government relies on corporate compliance programs to enforce a variety of laws).

78. *See Senate Hearings*, *supra* note 12, at 78 (testimony of Michael Volkov, Partner, Mayer Brown LLP) ("By encouraging voluntary disclosure, the Justice Department has increased its prosecutions, minimized the use of its investigative resources, and increased the Treasury's coffers with substantial fines."); Ford & Hess, *supra* note 77, at 731 (noting that the government would not be able to complete huge investigations of big companies without heavily relying on companies' internal investigations); Sussman & Saikin, *supra* note 48, at 41 (describing how cooperation builds the government's case against individual criminal defendants and saves the government time and money).

79. *House Hearings*, *supra* note 22, at 54 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) ("Foreign bribery cases . . . . are harder to detect than domestic cases . . . ."); *id.* at 54–55 (statement of George J. Terwilliger, III, Partner, White & Case LLP) (offering a solution to the DOJ's problem of enforcement by

identify culpable individuals and locate relevant evidence.[80] By offering a reduced offense level in exchange for an internal investigation and report, the government conserves financial resources and can pursue more violations than it would otherwise be able to handle on its own.[81] The ability to sustain more open investigations means that more fines can be collected and the DOJ can continue to have record-breaking years like 2010, in which FCPA fines alone totaled $1 billion.[82]

C. Cooperation Best Case Scenario: Deferred Prosecution Agreements, Non-Prosecution Agreements, and Downward Departure

Both the corporation and the government face significant costs and risks in a corporate criminal trial.[83] As a result of these risks, criminal cases with a corporate defendant are generally resolved pretrial.[84] In recent years, the DOJ has embraced settlement as a means of resolving FCPA investigations and eliminating the costs and risks of trial for both parties, while still punishing offenders and preventing future violations.[85] The tools used to settle FCPA investigations are deferred prosecution agreements and non-prosecution agreements.[86]

A deferred prosecution agreement (DPA) is a formal settlement agreement between the government and the corporation establishing a probationary period during which the corporation must comply with the government's terms.[87] Criminal charges are filed with the court but are "deferred" for the period of time defined in the DPA.[88] If the corporation abides by the terms of the DPA

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suggesting that the DOJ further incentivize internal investigations, given that companies are better positioned than the DOJ to gather overseas information).

80. McNulty Memorandum, *supra* note 15, at 7.

81. Ford & Hess, *supra* note 77, at 731.

82. Press Release, Dep't of Justice, *supra* note 44.

83. Hall, *supra* note 53, at 119–20.

84. *See* TARUN, *supra* note 18, at 239; WEISMANN, *supra* note 11, at 64 ("Because of the high risk potential of an unsuccessful bid at acquittal, pretrial resolution is the most common and pragmatic strategy."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994) (finding that most cases in the United States result in settlement, regardless of the subject matter); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 906 (2007) ("[T]he overwhelming majority of organizations charged plead guilty.").

85. Hall, *supra* note 53, at 121.

86. DEMING, *supra* note 18, at 79 ("Deferred and non-prosecution agreements represent a 'middle ground' between the Justice Department declining prosecution and bringing charges against an entity.").

87. Hall, *supra* note 53, at 123–24.

88. DEMING, *supra* note 18, at 79; Hall, *supra* note 53, at 123.

for its duration, the government drops the charges and releases the company from all criminal liability.[89] In the DPA, the corporation states the facts of the FCPA violation, admits to the underlying conduct, and waives its right to dispute those facts in the future.[90] While the DOJ has no concrete guidelines for issuing DPAs, generally DPAs are used when the violation includes "large bribes and profits amounting to millions of dollars."[91] The DPA punishes the corporation for past transgressions and looks to reform the company by imposing obligations on future conduct.[92]

While a DPA is preferable to litigation and the "draconian collateral consequences that accompany a felony conviction," it is still a burdensome punishment.[93] On top of the odious fines included in a DPA,[94] the government can renew the charges if the corporation fails to comply with the terms of the DPA and use the DPA's statement of facts as an admission of guilt without having to prove the conduct at trial.[95]

A non-prosecution agreement (NPA) is an agreement between the government and a corporation in which the government formally releases the corporation from liability.[96] A prosecutor's decision to drop the case is not the same as an NPA.[97] NPAs are less common than DPAs and remain "the exception and not the rule."[98] Unlike DPAs, an NPA is maintained solely between the parties and nothing is filed with the court.[99] NPAs are most often used to reward companies for their voluntary disclosure or cooperation[100] and incentivize other companies to do the same in future investigations.[101]

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89. Hall, *supra* note 53, at 123–24.

90. DEMING, *supra* note 18, at 79.

91. Deutsch & Altenbaumer-Price, *supra* note 63, at 2–3.

92. Hall, *supra* note 53, at 140.

93. *See* WEISMANN, *supra* note 11, at 64, 74 ("[P]retrial resolution is no economic panacea.").

94. *See* DEMING, *supra* note 18, at 80 ("Violations of the anti-bribery provisions can result in stiff penalties."); *infra* Part III.E (detailing the examples of corporations facing fines of millions and billions of dollars despite DPAs).

95. DEMING, *supra* note 18, at 79.

96. Hall, *supra* note 53, at 124–25.

97. *See id.* at 124–26 (extolling the virtues of NPAs because the "breach of an NPA does not risk reinstitution of any charges," while the government could always change its mind about a decision not to prosecute).

98. WEISMANN, *supra* note 11, at 72. NPAs are more commonly reserved for cases in which the bribe amounts to less than $500,000. Deutsch & Altenbaumer-Price, *supra* note 63, at 3.

99. DEMING, *supra* note 18, at 79.

100. WEISMANN, *supra* note 11, at 72 (stating that the "primary purpose" of NPAs "is to obtain necessary cooperation to investigate or prosecute a criminal case").

101. *See* Hall, *supra* note 53, at 125 (observing that NPAs appear to be employed when

While the government offers DPAs and NPAs[102] to settle criminal investigations of all types, by far the greatest number of DPAs and NPAs entered into are to resolve FCPA violations.[103] Corporate cooperation can resolve the violation outside of court and persuade the DOJ to request a downward departure from the fine established by the Sentencing Guidelines.[104] The DOJ considers both objective and subjective factors in resolving FCPA cases.[105] The DOJ is not required to settle any case and does not guarantee that a certain course of conduct will be rewarded by a DPA, NPA, or reduced fine.[106] There is no judicial oversight to review the DOJ's decision to enter or refuse to enter into a DPA or NPA.[107] In the end, the DOJ has unreviewable, "almost unlimited prosecutorial discretion" to decide whether a company cooperated sufficiently to earn a DPA.[108]

D. Naming Names: The Importance of a Scapegoat

The DOJ has recently focused its FCPA investigations on prosecuting individuals.[109] The expansive scope of the FCPA

"the government wants to give tangible value in order to incent other companies to disclose and cooperate in the future").

102. *See* WEISMANN, *supra* note 11, at 73 (commenting that NPAs are rarely granted to corporations and that DPAs are much more common).

103. *See* Hall, *supra* note 53, at 135–36 & tbl.6 (showing that the FCPA gave rise to the greatest number of total DPAs and NPAs for the years 1992–2008).

104. *See infra* Part III.E (offering FCPA cases in which corporate cooperation, voluntary disclosure, and internal investigations have been rewarded with DPAs, a reduction in offense level, and downward departure from the minimum fine established by the Guidelines).

105. *Role of Federal Sentencing Guidelines in FCPA Cases*, TRACE BLOG (Sept. 29, 2009), http://traceblog.org/2009/09/29/role-of-federal-sentencing-guidelines-in-fcpa-cases/ (arguing that the three determinative criteria in sentencing are "(1) how much the company profited from its corruption; (2) the extent of the company's cooperation with the government's investigation; and (3) the quality of the company's remediation efforts" (quoting Billy Jacobson, Chief Compliance Officer at Weatherford) (internal quotation marks omitted)).

106. *See* WEISMANN, *supra* note 11, at 65 (calling the DOJ's decision to offer an NPA or DPA "subjective" and opining that pretrial resolution is largely based on the DOJ's opinion of the strength of its evidence); McNulty Memorandum, *supra* note 15, at 8 (stating that despite an organization's willingness to cooperate, other factors unique to the violation may require prosecution and preclude pretrial resolution).

107. *See* Hall, *supra* note 53, at 144 ("There is no judicial oversight or mandatory judicial approval either of the decision to enter into a DPA or NPA or of the terms of the agreement."); *see also* Garrett, *supra* note 84, at 905 ("Prosecutorial exercise of discretion is generally unreviewable if the prosecutor had probable cause . . . .").

108. Hall, *supra* note 53, at 145; *see* McNulty Memorandum, *supra* note 15, at 5 ("In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.").

109. *See* TARUN, *supra* note 18, at 249 ("The trend toward more individual prosecutions remains unmistakable."). *Compare* WEISMANN, *supra* note 11, at 103 (stating

allows the SEC to hold liable a director or officer for his lack of vigilance in preventing illegal payments, even if he is unconnected to the actual payment of the bribe.[110] The DOJ vigorously pursues individuals who violate the FCPA and considers the real possibility of jail terms to be an "effective deterrent."[111] Only under exceptional circumstances may a prosecutor accept a corporation's guilty plea in exchange for the dismissal of charges against culpable individuals within the corporation.[112] The DOJ and corporate directors agree that prosecuting and imprisoning individuals is an effective threat that increases compliance and prevents foreign bribery.[113]

The rise in prosecuting individuals means that the DOJ is looking for people to name names.[114] Corporate cooperation is crucial to the government's ability to prosecute individuals.[115] Generally, the DOJ conditions a DPA upon the corporation's agreement "to cooperate in the investigation of culpable individuals."[116] One factor the prosecutor considers in deciding whether to offer a DPA or NPA is "whether the corporation appears to be protecting its culpable employees and agents."[117] Cooperation in identifying those responsible may lead to lower fines, but identifying culpable individuals exposes the company to other liability by creating a cause of action for a future defamation suit.[118]

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that only twenty-six individuals were convicted of FCPA violations between 1977 and 2001), *with Senate Hearings*, *supra* note 12, at 4 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) (stating that in less than two years, the DOJ charged over fifty individuals with FCPA violations).

110. Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1452 (2008).

111. *See Senate Hearings*, *supra* note 12, at 4 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) ("We are also vigorously pursuing individual defendants who violate the FCPA, and we do not hesitate to seek jail terms for these offenders, when appropriate. The department has made the prosecution of individuals a critical part of its FCPA enforcement strategy.").

112. McNulty Memorandum, *supra* note 15, at 2 ("Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.").

113. Bixby, *supra* note 36, at 111–12.

114. *See* Sussman & Saikin, *supra* note 48, at 41 ("Ultimately, cooperation is the Government's primary objective with regard to a DPA or NPA, as both . . . effectively enlist the corporation (including all of its corporate resources) as allies in building a case against targeted individuals."); McNulty Memorandum, *supra* note 15, at 7 ("In gauging the extent of the corporation's cooperation, the prosecutor may consider . . . the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.").

115. *See* Garrett, *supra* note 84, at 883 (describing the government's limited resources and the corporation's control over key documents and witnesses).

116. WEISMANN, *supra* note 11, at 67.

117. McNulty Memorandum, *supra* note 15, at 11.

118. TARUN, *supra* note 18, at 189 (noting that while a written report "increases the danger of waiver and exposes the company to litigation over discovery of the

E. Anecdotal Evidence of the Rewards of Cooperation: Recent Cases of Cooperation Credit and Downward Departure

Although corporations receive varied rewards for cooperating,[119] the DOJ assures "there is *always* a benefit to corporate cooperation" and voluntary disclosure will always result in a "*real* benefit."[120] The DOJ has not issued an official policy declaring which situations merit DPAs, NPAs, or other favorable treatment.[121] Anecdotally, cooperation earns a company reduced fines or a deferred or non-prosecution agreement.

In 2007, Baker Hughes Services International entered into a DPA with the DOJ for conspiracy to violate the FCPA, violation of the FCPA, and aiding and abetting in falsifying books and records.[122] The Sentencing Guidelines established a range of possible fines between $19 million and $38 million, which reflected a five-point reduction in the offense level for voluntary disclosure.[123] The DOJ recommended a fine of just $11 million.[124] The Deputy Chief of the DOJ's Fraud Division justified the downward departure from the Sentencing Guidelines by citing Baker Hughes's "exceptional" cooperation, "voluntary disclosure of voluminous information," and provision of "a full and lengthy report of all findings."[125]

In 2008, Siemens Aktiengesellschaft (Siemens) entered into a DPA to resolve multiple FCPA violations spanning decades and continents.[126] Siemens received a two-point reduction in the offense level for cooperation.[127] Siemens only received two points of credit, in comparison to Baker Hughes's five, because Siemens

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report," refusing to share a written report with the government makes a company look uncooperative). "Inartful phrasing" within the report can "give rise to libel claims." *Id.*

119. *Id.* at 189–90 ("The benefits of voluntary disclosure and cooperation vary case by case and are rarely fully known at the time of a company's disclosure decision.").

120. Fisher, Prepared Remarks, *supra* note 45, at 6.

121. TARUN, *supra* note 18, at 189–90.

122. Plea Agreement at 1–2, United States v. Baker Hughes Servs. Int'l, Inc., No. 4:07-cr-00129 (S.D. Tex. Apr. 11, 2007).

123. *Id.* at 10.

124. *Id.* at 11. While the criminal fine was reduced to $11 million, well below the low end of the Guidelines range, Baker Hughes also paid a $10 million civil penalty to the SEC, and more than $24 million in disgorged profits and pre-judgment interest resulting from the corrupt payments, bringing the total amount of economic sanctions to $44 million. Press Release, Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007).

125. Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section, Criminal Div., Dep't of Justice, to Hon. Gray H. Miller at 3–4 (Apr. 24, 2007).

126. Department's Sentencing Memorandum, *supra* note 42, at 3.

127. *Id.* at 12.

did not voluntarily disclose the bribe to the government and only began cooperating after a government raid revealed misconduct.[128] According to the Sentencing Guidelines, Siemens's criminal fine should have been between $1.35 billion and $2.70 billion.[129] The DOJ recommended a criminal penalty of just $450 million, only a third of the lowest amount recommended by the Guidelines.[130] The main justification for such an extreme downward departure was the "extraordinary cooperation" Siemens showed in launching a sprawling, "unprecedented" internal investigation following the discovery of violations, including an internal document review costing over $100 million.[131]

In 2012, Pfizer H.C.P. Corporation entered into a DPA with the DOJ to settle violations of the books and records provision of the FCPA.[132] Pfizer's voluntary disclosure of the offense before a government investigation earned it a five-point reduction, the maximum amount of cooperation credit.[133] The fine range was $22.8 million to $45.6 million.[134] The DOJ recommended a monetary penalty of $15 million, a 34% reduction from the lowest end of the Guidelines range.[135] This reduced fine was justified by "Pfizer's voluntary, prompt and thorough disclosure of the misconduct at issue, the nature and extent of Pfizer's extensive cooperation in this matter, . . . and Pfizer's extraordinary and ongoing remediation."[136]

The lessons learned from Baker Hughes, Siemens, and Pfizer are clear: cooperation pays. In fact, cooperation pays double. In the above FCPA investigations, the corporation received a reduction in the offense level, either two points for cooperation with an ongoing investigation or five points for voluntarily disclosing the violation to the DOJ.[137] The two-point or five-point reduction in the offense level lowered each

128. *Id.* at 16.

129. *Id.* at 12.

130. *Id.* at 10–14.

131. *Id.* at 2–3, 18–19, 21. In total, Siemens paid $1.6 billion in civil and criminal fines, the largest FCPA action to date. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008).

132. Deferred Prosecution Agreement at 1, United States v. Pfizer H.C.P. Corp., No. 1:12-cr-00169-ESH (D.D.C. Aug. 7, 2012).

133. *Id.* at 6.

134. *Id.* at 7.

135. *Id.*

136. *Id.*

137. SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g)(1)–(2).

company's fine range.[138] In addition to reducing the offense level because of corporate cooperation, the DOJ recommended an actual fine that was significantly lower than the lowest end of the fine range established by the Guidelines.[139] As justification for this downward departure, the DOJ again cited the company's cooperation.[140] The corporations were rewarded twice for the same cooperation. The DOJ praised these three corporations for their cooperation through internal investigations, document production, and the provision of full reports. Though the DOJ refuses to create a mandatory policy to credit corporate cooperation[141] and has virtually unlimited discretion with regard to out-of-court settlements, the success stories of Baker Hughes, Siemens, and Pfizer provide corporations in the midst of an FCPA investigation with ample anecdotal evidence that the DOJ will reward those who cooperate.[142]

IV. THE CATCH-22 OF COOPERATION: DEFAMATION AND ITS DEFENSES

A. The Catch

A "Catch-22" is a "dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions."[143] The Catch-22 of corporate cooperation is that a corporation that cooperates reduces its FCPA liability but increases its liability elsewhere.

A corporation that discovers an illegal bribe and voluntarily discloses it to the DOJ, as in the cases of Baker Hughes and Pfizer, receives a five-point reduction.[144] But if the DOJ, rather

138. *Id.*

139. *See* Deferred Prosecution Agreement, *supra* note 132, at 7 (recommending a $7.8 million downward departure); Department's Sentencing Memorandum, *supra* note 42, at 10–14 (recommending a $900 million downward departure); Plea Agreement, *supra* note 122, at 10–11 (recommending an $8 million downward departure).

140. *See* Deferred Prosecution Agreement, *supra* note 132, at 7 ("extensive cooperation"); Department's Sentencing Memorandum, *supra* note 42, at 3, 18 ("extraordinary cooperation," "exceptional . . . cooperation efforts"); Letter from Mark F. Mendelsohn to Hon. Gray H. Miller, *supra* note 125, at 3 ("[T]he cooperation provided by defendants in this matter was exceptional.").

141. *See* Fisher, Prepared Remarks, *supra* note 45, at 5–6 (arguing against a defined policy for giving cooperation credit and disagreeing that the promises of lenient treatment and "one-size-fits-all" solutions are in the best interests of law enforcement).

142. *See* DEMING, *supra* note 18, at 4 ("[U]ntil the courts have definitively clarified ambiguities in the FCPA, the prudent approach in providing guidance to clients is to rely on the manner in which the FCPA has been historically applied by U.S. enforcement officials.").

143. THE NEW OXFORD AMERICAN DICTIONARY 270 (1st ed. 2001).

144. *See* Deferred Prosecution Agreement, *supra* note 132, at 6; Plea Agreement, *supra* note 122, at 10.

than the corporation, discovers the violation, and the corporation immediately begins cooperating in the investigation, as in the cases of Siemens and Shell, the corporation receives a two-point reduction.[145] If the DOJ discovers the violation, it becomes irrelevant whether the corporation offers to cooperate or the government requests cooperation and the corporation complies; both courses of action receive a two-point reduction.[146] In the context of privilege, this distinction matters.[147] In *Writt v. Shell Oil Co.*, the court held that a plaintiff could bring a defamation suit against a corporation who provided the DOJ with a "voluntarily-made investigative report," even though the report was part of an agreement reached during a meeting called by the Deputy Chief of the Fraud Section of the DOJ.[148]

Full cooperation, as defined in the Guidelines, helps lead to the identification of culpable individuals.[149] A person whom the corporation implicated in the FCPA violation may bring a civil suit for defamation against the corporation.[150] The Catch-22 is that by protecting itself from higher criminal fines by thoroughly cooperating, the corporation exposes itself to additional liability for defamation.[151]

A corporation faces many unknowns when crafting a rational and responsible response to an FCPA violation.[152] These unknowns include the lack of transparency and

145. *See* Deferred Prosecution Agreement, *supra* note 8, at 4, 8; Department's Sentencing Memorandum, *supra* note 42, at 12.

146. *See* SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g) (suggesting no difference exists between cooperation offered by a corporation or cooperation given at the request of the government). *But see* DEMING, *supra* note 18, at 676 (arguing that companies should offer their cooperation and not passively wait for the government to request it because "the last to cooperate can expect to suffer the most severe consequences").

147. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 61, 74–75 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (concluding that Shell's internal investigative report to the DOJ was information "implicating another in wrongful conduct" and not a matter preliminary to a criminal proceeding and therefore not protected by an absolute privilege); 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 257 (Tex. App.—Fort Worth 2004, pet. denied) (holding that an absolute privilege attaches only to communications made related to "proposed and existing judicial and quasi-judicial proceedings").

148. *Writt*, 409 S.W.3d at 61–64.

149. SENTENCING GUIDELINES, *supra* note 5, § 8C2.5 cmt. n.13.

150. *See Writt*, 409 S.W.3d at 62–63 (stating that Writt sued Shell for defamation for statements Shell made in a report to the DOJ which implicated Writt in certain bribes Shell paid to foreign officials in violation of the FCPA).

151. *See id.* (exemplifying a civil defamation suit that resulted from a corporation's cooperation with the DOJ's request for an internal investigation).

152. *See* Doty, *supra* note 14, at 1238 (arguing that the FCPA is purposely vague and unfairly leaves companies unable to plan lawful business strategies).

consistency in the DOJ's plea agreements,[153] the lack of FCPA case precedent,[154] and the undetermined privilege attached to the corporation's statements to the DOJ.[155] This Comment offers a solution to eliminate the uncertainty surrounding defamation actions by making the DOJ a "quasi-judicial body" as a matter of law and granting an absolute privilege to all statements made to the DOJ at any point in an FCPA investigation.[156]

B. Defamation Defined

Defamation consists of the two torts of libel and slander.[157] To state a cause of action for defamation, there must be:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[158]

Defamation occurs when a statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[159] A communication is defamatory if it "expose[s] another to hatred, ridicule, or contempt"; reflects unfavorably on

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153. Jim Hawkins, *When Justice is Unjust: The Attorney–Client Privilege in the Hands of the Department of Justice*, 36 ADVOCATE 44, 48 (2006).

154. DEMING, *supra* note 18, at 4; Doty, *supra* note 14, at 1239.

155. *See Writt*, 409 S.W.3d at 86–87 (Brown, J., dissenting) (pointing out that under the majority opinion, the privilege received depends on how soon the DOJ commences a criminal action against the corporation, if at all, leaving the speaker unaware how his statements will be treated in the future).

156. *See infra* Part V.

157. Piper M. Willhite, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541, 542 (1994). Libel covers written or printed words; slander constitutes everything not covered by libel, generally spoken words and gestures. RESTATEMENT (SECOND) OF TORTS § 568 (1977).

158. RESTATEMENT (SECOND) OF TORTS § 558; *see also* Fourcade v. City of Gretna, 598 So. 2d 415, 418 (5th Cir. 1992) ("The essential elements of a defamation action are defamatory words, publication or communication to a third person, falsity, malice (actual or implied) and resulting injury.").

159. RESTATEMENT (SECOND) OF TORTS § 559. The statement need not sway the opinions of everyone in the community to constitute defamation; it need only influence a minority of the population to think less of the defamed. *See* Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009) (articulating the test for defamation as an inquiry into whether the statement "may reasonably be read as discrediting [the plaintiff] in the minds of any considerable and respectable class of the community" (quoting Disend v. Meadowbrook Sch., 604 N.E.2d 54, 55 (Mass. App. Ct. 1992))).

one's "personal morality or integrity"; or "tend[s] to discredit his financial standing in the community."[160]

"Publication" of the defamatory matter occurs when it is communicated, intentionally or negligently, to anyone other than the person defamed.[161] Presently, defamation occurs even if the corporation only shares the information with the DOJ in the course of an FCPA internal investigation.[162] Even if the corporation communicates exclusively to the DOJ about an employee who offered a bribe, the defamatory matter has been "published" because the communication was made to someone other than the defamed.[163] As discussed above, this "publication" to the DOJ as part of cooperation is technically "voluntary" but only truly voluntary for the rare company who is willing to "bet the farm" by allowing an indictment and taking the case to trial.[164] The ghost of Arthur Andersen still haunts the corporate world and cautions against corporate criminal litigation.[165] If the DOJ is considered a quasi-judicial body as a matter of law, as this Comment proposes, there could be no cause of action for defamation when a report is published *solely* to the DOJ and no one else.[166]

C. You Say It, You Pay It: Defamation Per Se

As it stands after *Writt*, a case of first impression, any corporation who cooperates with the DOJ and accepts a resolution that is not a "judicial proceeding" is subject to claims

160. RESTATEMENT (SECOND) OF TORTS § 559 cmt. b.

161. *Id.* § 577.

162. Writt v. Shell Oil Co., 409 S.W.3d 59, 75 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (stating that Shell's communication with the DOJ is protected by a "conditional" privilege, so the communication is still open to a charge for defamation); *see also* RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (stating that "publication" merely requires that the defamatory statement be communicated to *anyone* other than the defamed). The imputation of criminal activity is per se defamatory and the plaintiff need not prove that he was harmed by the defamation. *Id.* § 571.

163. *See* Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 244 (1st Cir. 1994) ("It is enough that [the defamatory matter] is communicated to a single individual other than the one defamed." (quoting RESTATEMENT (SECOND) OF TORTS § 577 cmt. b)); *Fourcade*, 598 So. 2d at 421 ("An element of defamation is publication.").

164. *See* Garrett, *supra* note 84, at 905 (illustrating that few companies are willing to take the risk and "the overwhelming majority of organizations charged plead guilty").

165. *See* Schipani, *supra* note 38, at 925 ("The demise of the accounting firm Arthur Anderson . . . illustrates the impact that prosecution may have upon the future of a firm.").

166. *See infra* Part V (addressing the need for more predictability in the FCPA by arguing that the DOJ should be a quasi-judicial body and all statements made to the DOJ should be absolutely privileged).

for defamation, even defamation per se.[167] Accusing someone of a crime, such as bribery, which also disparages his business reputation, is considered defamatory per se.[168] There are four subjects of communication that are defamatory per se: (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with a person's business, trade, profession, or office; and (4) serious sexual misconduct.[169] Identifying a person as culpable for an FCPA violation is defamatory per se because it imputes criminal conduct to a person,[170] the accusation of which is also incompatible with that person's business.[171]

Accusing someone of criminal activity is defamatory per se if the offense attributed to the person "would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude."[172] An accusation of a serious crime, like bribery or fraud, is defamatory per se and actionable without the need to establish damages.[173] This means that even if the corporation's report to the DOJ remained confidential and no one in the community knew that the plaintiff was accused of a crime, the plaintiff still has a claim for defamation per se because he does not have to prove that he was damaged by the defamation; it is enough that defamatory material was published. Therefore, informing the DOJ that an individual violated the FCPA by bribing a foreign official constitutes defamation per se.[174]

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167. *See Writt*, 409 S.W.3d at 62 & n.8 (allowing a defamation per se claim because there was no open judicial proceeding at the time of the report and the DOJ did not initiate a proceeding until twenty months after the report).

168. *See Lyons*, 30 F.3d at 244 ("It is enough that [the defamatory matter] is communicated to a single individual other than the one defamed." (quoting RESTATEMENT (SECOND) OF TORTS § 577 cmt. b)).

169. RESTATEMENT (SECOND) OF TORTS § 570.

170. *See* Boyd v. Nationwide Mut. Ins. Co., 208 F.3d 406, 409 (2d Cir. 2000) ("A false accusation of serious crime constitutes slander *per se*."); *infra* note 174 and accompanying text (discussing defamation per se for accusing another of a serious crime).

171. *See* McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698, 710 (10th Cir. 2012) ("To be actionable [as a *per se* matter], the defamatory or disparaging words must affect the plaintiff in some way that is peculiarly harmful to one engaged in his trade or profession." (quoting Abromats v. Wood, 213 P.3d 966, 969 (Wyo. 2009))).

172. RESTATEMENT (SECOND) OF TORTS § 571. Inference of minor unlawful activity is not defamatory per se; a statement regarding a person's traffic violations will hardly cause him to lose esteem within the community. Liberman v. Gelstein, 605 N.E.2d 344, 348 (N.Y. 1992).

173. *See* Bolanos v. Madary, 609 So. 2d 972, 976 (La. Ct. App. 1992) (holding that statements about misusing profits are defamatory per se because they could be construed as imputing fraud); *Liberman*, 605 N.E.2d at 348 (stating that accusations of bribery are defamatory per se and "actionable without the need to establish special harm").

174. *See* 15 U.S.C. § 78dd-1(a) (establishing foreign bribery as a crime); *Liberman*, 605 N.E.2d at 348 (calling bribery a crime of sufficient severity that imputation of bribery

A statement is also defamatory per se if it ascribes "conduct, characteristics or a condition" to someone that would "adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office."[175] Disparaging an employee's honesty in business by accusing him of paying bribes in violation of the FCPA constitutes defamation per se.[176] Given the recent expansion of FCPA investigations[177] and the trend toward implementing corporate compliance programs,[178] a person accused of bribery is a veritable pariah, unemployable in the field.[179]

D. Defenses to Defamation

There are three affirmative defenses to defamation: truth,[180] privilege,[181] and consent.[182] The only route truly available for an organization in an FCPA investigation is privilege. First, if the corporation pursued the truth defense, the corporation would likely have the burden of proof in the defamation case to prove

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is defamation per se); Letter from Mark Filip, Deputy Att'y Gen., to The Hon. Patrick J. Leahy, Chairman of the S. Comm. on the Judiciary, and The Hon. Arlen Specter, Ranking Member of S. Comm. on the Judiciary 1 (July 9, 2008) (recognizing bribery as punishable by criminal indictment and prosecution).

175. RESTATEMENT (SECOND) OF TORTS § 573. Disparagement of someone's general character does not rise to the level of defamation per se when it applies equally to all persons of all professions. *Id.* § 573 cmt. e.

176. *See id.* § 573 cmt. c (offering as an example of defamation per se under the business exception a communication questioning a merchant's honesty in business).

177. *See* Thomas, *supra* note 24, at 449 ("Whereas there were only three open FCPA investigations in 2002, there were eighty-four open investigations at the end of 2007.").

178. Ford & Hess, *supra* note 77, at 694; *see also* Fiorelli, *supra* note 68, at 567 (calculating that an organization that sets up an effective compliance program can receive up to a 95% reduced fine, while an organization that refuses could face a fine up to 400% higher); Schipani, *supra* note 38, at 936 (enumerating that one goal of the Sentencing Guidelines was to incentivize organizations to "create and maintain internal mechanisms for preventing and detecting criminal conduct").

179. *See Liberman*, 605 N.E.2d at 348 (holding that bribery is defamatory per se and calls into question the defamed's fitness for a certain business).

180. RESTATEMENT (SECOND) OF TORTS § 581A ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."); *see also* Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 108 (1st Cir. 2000) ("[O]nly statements that are 'provable as false' are actionable . . . ." (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990))).

181. *See* RESTATEMENT (SECOND) OF TORTS ch. 25, topic 2, tit. B, intro. note (commenting that the law justifies certain "privileges" because of the policy that "the ends to be gained by permitting defamatory statements" outweigh "the harm that may be done to the reputation of others").

182. *Id.* § 583 ("[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation."); *see also* Romero v. Buhimschi, 396 F. App'x 224, 236 (6th Cir. 2010) ("[A] publication is absolutely privileged if the defamed party. . . consented to the publication.").

that the individual actually violated the FCPA.[183] If the defamation action occurs before the close of the criminal FCPA investigation, this amounts to asking the corporation to offer evidence against itself on the issue of its FCPA violation.[184] The DOJ's decision to go to trial or offer a DPA or NPA often hinges on the strength of their case against the corporation.[185] To ask a corporation to rely on the truth defense is to ask it to risk losing its chance for a DPA, which could potentially save it millions of dollars in fines.[186] Second, it is hard to imagine that the corporation would have the individual's consent to defame about illegal activity that imputes dishonesty in business.[187] Thus, the only affirmative defense available to the corporation is privilege.

V. ABOLISHING THE CATCH-22: PROPOSING AN ABSOLUTE PRIVILEGE TO DEFAME TO THE DOJ

The "privilege to defame" is based on a policy that the benefits gained by permitting the defamatory statement outweigh the harm to the defamed.[188] Public policy favors eliminating corruption and efficiently enforcing the law.[189] If someone accuses an employee of violating the FCPA on the witness stand in a courtroom, instead of in a report to the

183. *Compare* RESTATEMENT (SECOND) OF TORTS § 581A cmt. b ("It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof."), *with id.* § 613 caveat (refusing to comment on the extent to which the common law rule of placing the burden on the defendant has changed because of a constitutional requirement putting the onus on the plaintiff to first establish that the defendant acted negligently or with greater fault).

184. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). A corporation that proves the truth of its employee's FCPA violation in a civil defamation case exposes itself to greater liability in criminal FCPA litigation. *See* TARUN, *supra* note 18, at 190 ("Voluntary disclosure has both legal and practical ramifications. On the legal side, there is a risk that counsel's disclosure will constitute a statement against interest or an admission. As important, civil litigants may try to gain access to disclosure materials in parallel civil proceedings . . . ." (footnote omitted)).

185. *See* WEISMANN, *supra* note 11, at 65 (calling the DOJ's decision to offer an NPA or DPA "subjective" and opining that pretrial resolution is largely based on the DOJ's opinion of the strength of its evidence).

186. *See* Deferred Prosecution Agreement, *supra* note 132, at 7 (recommending a $7.8 million downward departure); Department's Sentencing Memorandum, *supra* note 42, at 10–14 (recommending a $900 million downward departure); Plea Agreement, *supra* note 122, at 10–11 (recommending an $8 million downward departure).

187. *See* RESTATEMENT (SECOND) OF TORTS § 583 cmt. c (requiring affirmative consent and stating that a mere indifference to defamatory publications does not constitute consent).

188. *Id.* ch. 25, topic 2, tit. B, intro. note.

189. *See* Hall, *supra* note 53, at 120–21 ("The government has a strong policy interest not only in punishing corporate wrongdoers but also in reforming and changing a company's or even an entire industry's practices, policies, and culture.").

DOJ, it is absolutely privileged, and the speaker cannot be liable for defamation.[190] It is in the best interest of the government and corporations, however, to avoid the courtroom.[191] The best way to avoid the courtroom and benefit both parties is through an out-of-court settlement.[192] The government benefits from out-of-court settlements because corporate cooperation saves investigative and prosecutorial resources but still punishes an offending company and incentivizes other companies to create compliance programs to prevent FCPA violations.[193] The government exhibits its desire to settle out of court by frequently using DPAs, whose stated purpose is to hold the company liable without causing its demise.[194] A corporation similarly wants to settle out of court because it does not want to be ruined by the reputational and financial costs of indictment and litigation.[195] This Comment proposes that the DOJ's pre-indictment investigation into crimes, specifically FCPA violations,[196] should be defined as a quasi-judicial proceeding and afforded an absolute privilege against defamation.

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190. *See* Briscoe v. LaHue, 460 U.S. 325, 334 (1983) (reasoning that the absolute privilege for statements made in judicial proceedings was "based on the policy of protecting the judicial process" (quoting Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring))).

191. *See* Hall, *supra* note 53, at 119–21 (recognizing that the risks and costs of litigation are extremely high for both the government and the corporation under investigation).

192. *See id.* at 120–21 (noting the prosecutorial trend toward using out-of-court instruments such as DPAs and NPAs, rather than litigation, to accomplish the government's goal of reforming a company's "practices, policies, and culture"); Thomas, *supra* note 24, at 451–52 (arguing that out-of-court settlement agreements benefit all parties involved).

193. *See* Garrett, *supra* note 84, at 883 (characterizing as "significant[]" the DOJ's dependence on corporate internal investigations to build a case against an individual criminal defendant); Hall, *supra* note 53, at 121 ("The right settlement tool can minimize the risks and cost of trial while maximizing the remedial and restorative goals of the judicial system.").

194. *See* Hall, *supra* note 53, at 128 (contending that the DOJ's increased willingness to offer DPAs is because of a desire to "avoid the type of companywide havoc seen most acutely in the case of Arthur Andersen" (quoting Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A1)).

195. *See* Thomas, *supra* note 24, at 451 (advocating that corporate defendants benefit from out-of-court settlement because they can avoid the "severe collateral consequences of indictment" (quoting Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008)) (internal quotation marks omitted)).

196. The DOJ collects more money from enforcement of the FCPA than any other criminal statute. Press Release, Dep't of Justice, *supra* note 44.

A. Proposal

The FCPA statute is already too uncertain in its meaning and enforcement.[197] The DOJ has virtually boundless prosecutorial discretion in handling FCPA violations,[198] and corporations are left clinging to cooperation to avoid demise, only to encounter new liabilities like defamation.[199] This Comment proposes two changes that would enable a corporation to limit its exposure in an FCPA investigation.

First, the DOJ should be a quasi-judicial body as a matter of law.[200] Second, a corporation's communications to the DOJ, as a quasi-judicial body, should be absolutely privileged, free from liability for defamation.[201] In this situation, the public interest in eradicating corporate corruption should trump an individual's right to be free from defamation.[202] The DOJ has a strong public interest in eliminating corruption and should incentivize corporations to cooperate with FCPA investigations.[203] These two proposals create a small amount of clarity in an otherwise gray area, and corporations will be more likely to cooperate if they can plan their response to an FCPA investigation by predicting their potential exposure.[204]

B. Absolute Privilege to Defame

A communication that is "absolutely privileged" frees the speaker from all civil liability, regardless of the statement's

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197. Doty, *supra* note 14, at 1235.

198. *See* McNulty Memorandum, *supra* note 15, at 5; Garrett, *supra* note 84, at 905.

199. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 64–65 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (describing how Shell's cooperation with the DOJ in conducting an internal investigation earned it a DPA but exposed Shell to Writt's defamation suit).

200. *See id.* at 87–88 (Brown, J., dissenting) (arguing that the DOJ's investigation is a quasi-judicial proceeding and communications made in response to a law enforcement agency's request for cooperation should be accorded an absolute privilege); *infra* Part V.C (applying a six-factor test and finding that the DOJ exercises quasi-judicial powers).

201. *See* 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 257 (Tex. App.—Fort Worth 2004, pet. denied) (recognizing the policy arguments for extending absolute privilege to quasi-judicial proceedings, including the citizens' right to communicate with the government and the effective administration of justice); *infra* Part V.B.

202. *See* RESTATEMENT (SECOND) OF TORTS ch. 25, topic 2, tit. B, intro. note (1977) (weighing the gains in allowing defamatory statements in certain circumstances with the harm done to the reputation of the defamed when creating "privileges").

203. *See* Hall, *supra* note 53, at 120–21 ("The government has a strong policy interest not only in punishing corporate wrongdoers but also in reforming and changing a company's or even an entire industry's practices, policies, and culture.").

204. *See* Doty, *supra* note 14, at 1239 (stating that business people do not want to deal in corrupt environments, but they desire clarity by which they can legally operate their companies and plan for liability).

falsity or the malice behind it.[205] Absolute privilege is most often granted when the public interest recognizes that "certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests."[206] Nowhere is the free flow of information more important than in judicial proceedings.[207] Judicial proceedings also carry the safeguard of the oath; untrue statements made under oath carry a penalty of perjury.[208]

An absolute privilege attaches to all published communications that "bear some relationship to a pending or proposed judicial proceeding."[209] Absolute privilege also extends to proposed and existing *quasi-judicial* proceedings.[210] In order for the absolute privilege to apply to proceedings before "executive officer[s], board[s], or commission[s]," the entity must exercise quasi-judicial powers—it must "have the authority to investigate and decide the matters at issue."[211] The next Subpart argues that the DOJ is a quasi-judicial body and the absolute privilege should attach to all communications to the DOJ in the course of an ongoing investigation.

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205. *See* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 768 (Tex. 1987) (stating that absolute privilege can be characterized as an "immunity" because it protects the speaker from liability without requiring a good faith belief in the truth of the statement).

206. RESTATEMENT (SECOND) OF TORTS ch. 25, topic 2, tit. B, intro. note. A qualified privilege grants immunity from liability provided that the speaker makes the statement in good faith, absent malice, and believing it to be true. *See Hurlbut*, 749 S.W.2d at 768 (distinguishing qualified privileges from absolute in that a qualified privilege is lost when it is abused, as when the speaker knows the statement to be false or is motivated by malice). In this way, a qualified privilege protects negligently defamatory statements while still imposing liability on intentionally defamatory statements. Willhite, *supra* note 157, at 545–46.

207. *See* RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (discussing the need for an attorney to speak freely to give his best efforts in representing his client); *id.* § 587, cmt. a (discussing the public interest in the parties being able to speak freely); *id.* § 588, cmt. a (arguing that a witness's testimony should not be restricted by a fear of a private suit for defamation). This absolute privilege to defame in a judicial proceeding extends to judicial officers, attorneys, parties, and witnesses. *Id.* §§ 585–588.

208. Willhite, *supra* note 157, at 545.

209. Clark v. Jenkins, 248 S.W.3d 418, 431 (Tex. App.—Amarillo 2008, pet. denied).

210. *Id.* Absolute immunity is extended to *quasi-judicial* proceedings for public policy reasons: "[E]very citizen should have the unqualified right to appeal to governmental agencies for redress 'without the fear of being called to answer in damages' and that the administration of justice will be better served if witnesses are not deterred by the threat of lawsuits." 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 257 (Tex. App.—Fort Worth 2004, pet. denied) (quoting Parker v. Holbrook, 647 S.W.2d 692, 695 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.)).

211. *Clark*, 248 S.W.3d at 431.

C. The Department of Justice Is a Quasi-Judicial Body

This Comment proposes that the absolute privilege attaches to written and spoken statements to the DOJ during all parts of an FCPA investigation because the DOJ should be considered a quasi-judicial body as a matter of law. Some courts are concerned by the lack of a "clear definition of what constitutes a quasi-judicial proceeding before a quasi-judicial body."[212] Other jurisdictions use six factors to determine whether a body is quasi-judicial:

> (1) the power to exercise judgment and discretion;
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> (2) the power to hear and determine or to ascertain facts and decide;
>
> (3) the power to make binding orders and judgments;
>
> (4) the power to affect the personal or property rights of private persons;
>
> (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and
>
> (6) the power to enforce decisions or impose penalties.[213]

A government entity need not satisfy all six factors to be considered a quasi-judicial entity.[214]

The DOJ does not fit comfortably into these six factors.[215] This Comment does not claim to prove how many factors of a quasi-judicial body the DOJ satisfies. This Comment only seeks to show that the already subjective six factors are inconsistently applied to the DOJ as a body because the various prosecutorial tools at the DOJ's disposal—for example, DPAs, NPAs, and declinations to prosecute—carry differing results under the six factors. For example, the DOJ exercises more independence through an NPA or declination to prosecute, but is dependent on the judiciary in litigation or a DPA.[216]

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212. Kocontes v. McQuaid, 778 N.W.2d 410, 417 (Neb. 2010) (quoting Vultaggio v. Yasko, 572 N.W.2d 450, 456 (Wis. 1998)) (internal quotation marks omitted).

213. Shanks v. AlliedSignal, Inc., 169 F.3d 988, 994 (5th Cir. 1999); *Kocontes*, 778 N.W.2d at 416–17; Craig v. Stafford Const., Inc., 856 A.2d 372, 377 (Conn. 2004); Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P., 291 S.W.3d 448, 453 (Tex. App.—Fort Worth 2009, pet. denied).

214. *See Kocontes*, 778 N.W.2d at 417 (stating that the more factors the entity satisfies, the more likely that it will be found to be quasi-judicial).

215. *See* Writt v. Shell Oil Co., 409 S.W.3d 59, 88–89 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (Brown, J., dissenting) (recognizing that the DOJ does not meet all six factors but stating that this does not disqualify the DOJ from being considered a quasi-judicial body).

216. *See* DEMING, *supra* note 18, at 79.

As to the first factor, the DOJ has the statutory authority to prosecute offenses and, in deciding to bring charges, exercises its discretion and judgment.[217] As to the second factor, the DOJ has the initial power to "ascertain facts and decide" whether to indict or decline to prosecute,[218] but a judge or jury would have the power to "ascertain facts and decide" if the case goes to trial,[219] and a judge would decide a sentence if a DPA is filed with the court.[220] Similarly, the judge makes binding orders and judgments with regard to DPAs.[221] The DOJ exercises its authority to make binding orders when it enters into an NPA, which is not filed with a court but precludes the government from filing criminal charges in the future.[222] By contrast, in a DPA situation, the DOJ's suggestion carries great weight, but the court ultimately has the power to deviate from the DOJ's recommendation, even if it rarely does so.[223] As to the fourth factor, the DOJ has the power to affect property because it can impose criminal fines.[224] As to the fifth factor, the DOJ has the power to examine witnesses and compel the attendance of witnesses.[225] The sixth factor is likely the weakest argument that the DOJ is a quasi-judicial body because enforcement most often comes at the hands of the court.[226] However, the sixth factor of enforcement is inapplicable when the DOJ uses its discretion to grant an NPA. NPAs are inherently unenforceable; there are no consequences for a corporation's breach of its NPA because the

217. 28 U.S.C. § 547.

218. *See* Mathews, *supra* note 27, at 397 (recognizing that the DOJ has the authority to grant immunity).

219. *See* Serfass v. United States, 420 U.S. 377, 388 (1975) (noting that the trier of the facts can be either judge or jury).

220. DEMING, *supra* note 18, at 81.

221. *See id.* at 79 (recognizing that DPAs must be filed with a court); Garrett, *supra* note 84, at 922 ("[C]ourts must review deferred prosecution agreements and approve any deferral."); Deferred Prosecution Agreement at 14, United States v. Computer Assocs. Int'l, Inc., No. 04-CR-00837-ILG (E.D.N.Y. Sept. 22, 2004) (noting that the agreement must be approved by the court).

222. *See* Hall, *supra* note 53, at 124 (describing an NPA as a formal agreement between the government and the corporation releasing the corporation from liability).

223. *See* Schipani, *supra* note 38, at 940–41 ("'Although courts ultimately decide . . . [the applicable fine], the government's recommendation, based on its assessment of whether a corporation has . . . timely [and] thorough[ly]' cooperated, often significantly influences the ultimate sentence." (alterations in original) (quoting American College of Trial Lawyers, *The Erosion of the Attorney–Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 320 (2003))).

224. DEMING, *supra* note 18, at 80. Fines associated with an NPA do not require court approval, while those arising from a DPA require the rubber stamp of the court. *See id.* at 79; Garrett, *supra* note 84, at 922.

225. 15 U.S.C. § 78dd-3(d)(2) (2012).

226. *See* DEMING, *supra* note 18, at 79.

DOJ has negotiated away its right to prosecute the FCPA violation.[227] A quasi-judicial body need not meet all six elements, and the DOJ ultimately satisfies most of the elements of the six-factor test for the exercise of quasi-judicial power.[228] Because application of the factors yields different results depending on the prosecutorial tool used, the DOJ should be considered a quasi-judicial body to imbue one constant in the otherwise vague world of FCPA enforcement.

D. Eliminating the Problem of Timing

Establishing the DOJ as a quasi-judicial body as a matter of law eliminates the problem of timing. Some courts have held that the timing of the statement is determinative of whether an absolute or qualified privilege applies.[229] Often, an initial complaint made to a public official only receives a qualified privilege.[230] Most of the DOJ's white-collar criminal investigations begin at an informal level, and the FCPA is no exception.[231] The current structure conditions the absolute privilege on the investigation ultimately resulting in litigation and does not recognize an internal investigation as leading up to a proposed quasi-judicial proceeding when it ends with a DPA, NPA, or declination to prosecute.[232]

This timing dilemma creates another Catch-22 because a corporation receives more credit for voluntarily disclosing an

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227. *See* Hall, *supra* note 53, at 124–26 ("[A] breach of an NPA does not risk reinstitution of any charges . . . .").

228. Writt v. Shell Oil Co., 409 S.W.3d 59, 89 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet. h.) (Brown, J., dissenting).

229. *See id.* at 62, 72–73 (majority opinion) (denying an absolute privilege because the DOJ opened a judicial proceeding twenty months after Shell provided the investigative report containing the allegedly defamatory statements to the DOJ); *see also* Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P., 291 S.W.3d 448, 452 (Tex. App.—Fort Worth 2009, pet. denied) (stating that one requirement for absolute privilege is that the "communication must bear some relationship to a pending or proposed quasi-judicial proceeding").

230. *See* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 768 (Tex. 1987) (stating that an initial complaint to a public officer only receives a qualified privilege because it is subject to the conditions that the speaker is acting in good faith, absent malice, and believing the statement to be true); Zarate v. Cortinas, 553 S.W.2d 652, 655 (Tex. Civ. App.—Corpus Christi 1977, no writ) (recognizing a qualified privilege for communications reporting allegedly wrongful acts to an official, thereby requiring good faith, because of concerns of malicious reporting).

231. Mathews, *supra* note 27, at 416.

232. *See* 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 257 (Tex. App.—Fort Worth 2004, pet. denied) (asserting that privilege only attaches to proposed and existing judicial and quasi-judicial proceedings). Even when the investigation leads to a DPA, a court may conclude that the cooperation and defamatory statement were not given as part of a proposed quasi-judicial proceeding. *See Writt*, 409 S.W.3d at 62–63, 75, 72–73.

FCPA violation than it does for merely cooperating with an investigation into a violation discovered by the DOJ.[233] The paradox under the current structure is that a proactive company that brings the violation to the DOJ's attention only receives a qualified privilege, while a company that waits to be discovered by the DOJ and delays cooperation receives an absolute privilege for the same communication.[234] The Sentencing Guidelines for corporations clearly illustrate that the DOJ prefers companies to voluntarily disclose violations rather than wait to be discovered.[235] At the time the corporation publishes defamatory matter to the DOJ, it does so hoping to avoid litigation.[236] The corporation should not have to subject itself to FCPA litigation to salvage its absolute privilege to make a statement that would have been privileged had the matter continued to trial.[237] These Catch-22s discourage full cooperation and should be eliminated for the benefit of the government and companies.[238] Considering the DOJ as a quasi-judicial body eliminates the problem of timing because all disclosures to the DOJ would receive an absolute privilege, whether they are made before or after the DOJ begins investigating.[239]

VI. CONCLUSION

The DOJ has been clear that increased enforcement of the FCPA is here to stay and, along with it, a focus on holding

233. *See* SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g).

234. *See Writt*, 409 S.W.3d at 74 (finding that even though Shell waited to be approached by the DOJ, its cooperation was not in "serious consideration" of the "possibility of a judicial proceeding" and thus not deserving of an absolute privilege).

235. *See* SENTENCING GUIDELINES, *supra* note 5, § 8C2.5(g).

236. *See supra* Part III.E (exhibiting three corporate FCPA defendants who received DPAs because of cooperation).

237. *See Writt*, 409 S.W.3d at 62, 72–74 (suggesting that a criminal proceeding initiated twenty months after the report was too far removed to be considered in contemplation of a judicial proceeding). By the majority's reasoning, Shell could only be *certain* to receive an absolute privilege if it refused to cooperate until the DOJ formally initiated a criminal action. *See id.* The DOJ eventually initiated a criminal proceeding against Shell but the government's twenty-month delay cost Shell its absolute privilege. *See id.* A corporation like Shell cannot predict the actions or efficiency of the DOJ and this type of uncertainty "frustrates the kind of frankness, cooperation, and self-reporting that is vital to the DOJ's prevention and prosecution of corporate misconduct in international business dealings under the FCPA." *Id.* at 77 (Brown, J., dissenting).

238. *See* TARUN, *supra* note 18, at 190 (commenting that the DOJ relies on corporations to conduct internal investigations because its "resources are limited"); *supra* Part V.A (discussing the risks a corporation faces because of cooperation and proposing a solution to eliminate those risks so as to incentivize cooperation).

239. *See Writt*, 409 S.W.3d at 88–91 (Brown, J., dissenting) (concluding that a DOJ investigation into an FCPA violation is a quasi-judicial proceeding and deserving of an absolute privilege).

individuals responsible.[240] Using DPAs as a carrot to incentivize corporations to cooperate has allowed the DOJ to save resources, open more investigations, collect greater fines, and prosecute more individuals.[241] Corporations currently find themselves in a Catch-22 in which their involvement in implicating individuals who violate the FCPA exposes them to liability for civil defamation claims.[242] It is in the best interests of the corporation and the government for cooperation to remain the most attractive means of resolving an FCPA investigation.[243] Corporations have been calling for more certainty and consistency within the FCPA statute and its enforcement.[244] This Comment proposes two changes toward clarity: (1) the DOJ should be a quasi-judicial body as a matter of law; and (2) an absolute privilege should attach to communications made to the DOJ during all stages of an FCPA investigation. If statements made to the DOJ were absolutely privileged, regardless of when they were made, a corporation could free itself of the Catch-22 of corporate cooperation.

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240. *See Senate Hearings*, *supra* note 12, at 6 (statement of Greg Andres, Deputy Assistant Att'y Gen., Department of Justice) ("With respect to the prosecution of corporations and individuals, it is not an either/or proposition for the department. We seek to prosecute both corporations and individuals who have violated the FCPA.").

241. *See supra* Part III.B–C (describing the benefits of DPAs).

242. *See Writt*, 409 S.W.3d at 62–65, 72 (chronicling Shell's cooperation with the DOJ in identifying allegedly culpable individuals, which resulted in a DPA and a defamation suit).

243. *See* TARUN, *supra* note 18, at 190 (noting that the DOJ wants corporations to cooperate because the DOJ has limited resources and the corporations similarly want to cooperate in hopes of avoiding indictment or receiving a DPA).

244. *See* Doty, *supra* note 14, at 1239 ("Consistency and predictability are not matters of grace granted to corporate citizens at the government's pleasure; the government *owes* consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues . . . ."); Rochon & Bohn, *supra* note 52, at 55 (recognizing that the dearth of FCPA case law creates uncertainty among corporations about proceeding with litigation).