RESTORING INTEGRITY IN AMERICAN BUSINESSES: A BROAD INTERPRETATION OF THE FOREIGN CORRUPT PRACTICES ACT

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I. INTRODUCTION

By touting increased job opportunities and lower prices, Wal-Mart expanded quickly throughout Mexico in the 2000s and built stores in highly populated neighborhoods where others were prohibited to build.[1] In particular, in 2004 Wal-Mart built a store on alfalfa fields near Teotihuacan's famous ancient pyramids, notwithstanding a 2003 zoning map which expressly banned commercial development of this field to protect the nation's cultural landmarks.[2] Recent reports have surfaced that Wal-Mart paid $52,000 to government officials to alter this zoning map—a drop in the ocean in light of further reports of similar acts by nineteen other Mexican Wal-Mart stores, culminating in $24 million in suspicious payments.[3]

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC), with Wal-Mart's cooperation, are currently conducting investigations on these allegations, which may be violations of the Foreign Corrupt Practices Act (FCPA).[4] FCPA is a federal law that criminalizes bribing foreign officials in order to obtain or retain business.[5]

Some view bribes as a necessary expense to succeed in a foreign country's environment and therefore argue that these bribes should not be covered under the FCPA or that the scope should be narrowly construed.[6] An FCPA violation must fulfill the "obtain or retain

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1. David Barstow & Alejandra Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES, Dec. 18, 2012, http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html.

2. *Id.*

3. *Id.* (The whistle-blower was a former Wal-Mart lawyer who reported bribes were paid "to subvert democratic governance—public votes, open debates, transparent procedures" and evade regulatory safeguards). The bribes were allegedly covered up by Wal-Mart executives. *See also* Jef Feeley, *Wal-Mart Accused of Using Mexican Governor to Push Bribes*, BLOOMBERG (Jan. 29, 2013, 4:34 PM), http://www.bloomberg.com/news/2013-01-29/wal-mart-accused-of-using-mexican-governor-to-push-bribes.html.

4. Feeley, *supra* note 3.

5. 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (West 2013).

6. Tim Worstall, *Wal-Mart and Corruption in Mexico: So What?*, FORBES (Apr. 22, 2012, 9:34 AM), http://www.forbes.com/sites/timworstall/2012/04/22/wal-mart-and-

business" element unless it falls under the facilitating payment exception of ministerial and clerical acts.[7] Herein lies the gray area that raises the question of whether all payments by Wal-Mart subsidiaries were to obtain or retain business or rather were just permissible facilitating payments. Where payments to alter zoning maps or to procure government contracts may likely qualify as blatant acts to obtain or retain business, indirect payments, like donations to a national institute protecting Teotihuacan's pyramids or to provide supplies to a Mexican school are arguable.[8]

Although bribes may create efficiency for businesses in the short run, the long-term effects hurt both the briber's business and the foreign country's economy.[9] A broad prohibition on bribery under the FCPA would therefore help businesses *and* international economies. Bribery causes a disproportionate impact on developing countries' development, a distortion on economic competition, and decreases in economic growth.[10]

This Note will examine the legislative intent Congress had in enacting the FCPA, arguing that the FCPA should be broadly construed in regards to the business nexus test to "obtain[] or retain[] business." It will suggest that Congress intended for the FCPA to play a major role in fighting foreign corruption to protect the integrity of our businesses and international relations.[11] Part II of this Note will explore the history of

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corruption-in-mexico-so-what/ (discussing how it is customary in Russia to pay protection money to gangs or local police to protect staff and business). Bribes are a "way of life" in developing countries. *See, e.g.*, James Surowiecki, *Invisible Hand, Greased Palm*, THE NEW YORKER, May 14, 2012, *available at* http://www.newyorker.com/talk/financial/2012/05/14/120514ta_talk_surowiecki ("[F]ear of potential prosecution effectively raises the cost of doing business in high-corruption countries" and makes it difficult to enter a country's market.).

7. *See* 15 U.S.C.A. § 78dd-1(b) (West 2013).

8. Mike Koehler, *Wal-Mart Again on the Front Page of the New York Times*, FCPA PROFESSOR (DEC. 18, 2002), http://www.fcpaprofessor.com/wal-mart-again-on-the-front-page-of-the-new-york-times; *see also* DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE, No. 97-02 (Nov. 5, 1997), http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf (approving donations for elementary school construction).

9. Surowiecki, *supra* note 6. Paying one bribe opens the door to paying others. Officials have "an incentive to make the permit process as difficult and arcane as possible" and "to misdirect government money: buying fighter jets provides more opportunity for collecting bribes than investing in education." *Id.*

10. *Transparency and Anti-corruption*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/aboutthegc/thetenprinciples/anti-corruption.html (last visited March 28, 2013) ("The World Bank has stated that bribery has become a $1 trillion industry.").

11. *See infra* Part II.A.

the FCPA and how it has evolved over time. It will also set forth the legal precedent of the business nexus test set by the Fifth Circuit.

Part III will analyze two criticisms of broadly construing the business nexus test. It will also argue that a broad reading will allow the U.S. to be consistent with its international obligations, using the *Charming Betsy* doctrine. Finally, Part IV will conclude that the business nexus test should continue to be broadly interpreted in order to abide by Congress's intent and to follow the international trend of combating foreign corruption.

II. BACKGROUND

A. Corruption and Bribery

Corruption is both a domestic[12] and an international problem that affects every country.[13] Widely seen as unethical,[14] the impact of corruption damages more than morals; it hurts economies of countries by distorting the market, inefficiently distributing public resources, and raising costs of businesses and prices for consumers.[15] Although there are many different types of corruption, corruption may be defined as "blatant acts of bribery" and the "use of political power to advance one party or

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12. *See* Thomas F. McInerney, *The Regulation of Bribery in the United States*, 73 INT'L REV. OF PENAL L. 81, 100 (2002) (supporting the proposition that state laws govern bribery of public officials).

13. *See generally Corruption by Country/Territory*, TRANSPARENCY INT'L, http://www.transparency.org/country (last visited May 7, 2014) (providing data and research on corruption for the world, in addition to a corruption perception index for each country).

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

15. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE. & ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA Guidance], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf. In its relevant parts, the FCPA Guidance states:

> Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law. And it threatens stability and security by facilitating criminal activity . . . . Corruption is anti-competitive, leading to distorted prices and disadvantaging honest businesses that do not pay bribes. It increases the cost of doing business globally and inflates the cost of government contracts in developing countries. Bribery has [the] destructive effects of undermining employee confidence . . . and fostering a permissive atmosphere for . . . misconduct, such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior.

Id. at 2-3.

faction's agenda."[16] Traditionally, corruption takes on the form of bribery in criminal law.[17] Combining bribery with an authority figure, such as officials in public office, has led to an abuse of power and a violation of society's trust.[18]

In 1962, Congress passed a federal bribery statute, 18 U.S.C. § 201(b), to combat public corruption by permitting the prosecution of individuals who bribe any federal employee.[19] The Watergate scandal during Nixon's presidency incited further action against public corruption.[20] Watergate indirectly led to a broad SEC investigation which uncovered "$300 million in questionable or illegal payments made to foreign government officials, politicians, and political parties by over 400 U.S. corporations, 117 of which were Fortune 500 companies."[21] The resulting SEC report directly called for Congress to clear up a treacherous problem stemming from these questionable corporate payments.[22] Thereafter, Congress recognized that a prohibition of bribery to domestic officials was inadequate and passed the FCPA in 1977 to extend prohibition of bribery to bribes paid to foreign officials.[23]

B. The Foreign Corrupt Practices Act (FCPA)

To eliminate corruption via bribes made by U.S. businesses to foreign officials, the FCPA has two provisions: an accounting provision

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16. Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 793 (2001).

17. *Id.* at 801.

18. *Id.* at 828 ("There is omnipresent potential for misconduct resulting in personal gain or misuse of resources by those holding public power that cuts across all levels of government authority . . . .").

19. *Id.* at 830. Henning further notes that:

> Section 201(b) requires the government to prove that the offeror transmitted the payment with the intent to 'influence any official act' and that the public official 'corruptly demands, seeks, receives, or agrees to receive or accept anything of value personally or for any other person or entity in return for . . . being influenced' in the exercise of authority.

Id.

20. Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 93 (2010).

21. *Id.* Stanley Sporkin, the SEC enforcement chief at the time, uncovered illegal payments to President Nixon's reelection campaign by corporate executives. This compelled the SEC to conduct formal inquiries into American corporations in general. *Id.*

22. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976).

23. James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 825 (2012).

and anti-bribery provision.[24] The accounting provision, regulated by the SEC, creates a uniform standard for disclosure and maintenance of accounting records of businesses traded on U.S. stock exchanges.[25] The SEC and DOJ enforce the anti-bribery provision, which criminalizes acts by stock exchange issuers, U.S. individuals and corporations, and some foreign individuals and corporations that involve the "transfer of money or other gifts to foreign officials and political actors for purposes of influence to obtain or retain business."[26] This Note will focus primarily on the anti-bribery provision, rather than the accounting provision.[27]

1. Anti-Bribery Provision

According to the reasoning set forth by the Fifth Circuit, the FCPA makes it a crime to:

> (1) willfully; (2) make use of the mails or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage; (7) in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.[28]

The SEC or DOJ must also present specific proof of an FCPA violation.[29]

Two potential affirmative defenses are available to defendants if payments they made were (1) legal under the foreign country's written

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24. 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (West 2013) (anti-bribery provisions); 15 U.S.C.A. § 78m (West 2013) (accounting provision).

25. Barta & Chapman, *supra* note 23, at 827.

26. *Id.*

27. The accounting provision usually comes into play after the anti-bribery provisions have been violated, often when a company writes down the bribe in their record books as something else to disguise the payment.

28. United States v. Kay, 513 F.3d 432, 439-40 (5th Cir. 2007) [hereinafter *Kay IV*] (quotations omitted).

29. Bixby, *supra* note 20, at 94.

laws or (2) a reasonable and bona fide expense.[30] There is also a facilitating payment exception for non-discretionary "routine governmental action" for payments made in the daily course of business.[31]

2. 1988 and 1998 Amendments to the FCPA

The enactment of the FCPA made the United States a leading pioneer in international anti-corruption.[32] The U.S. was the first country to prohibit bribery of foreign officials and paved the way for similar international collective action.[33] In order to facilitate this momentum against anti-corruption, the United States amended the FCPA twice—first in 1988 and again in 1998.[34]

The Omnibus Trade and Competitiveness Act of 1988 prompted the FCPA's 1988 amendment and was enacted primarily to keep the U.S. trade deficit from increasing by promoting anti-corruption laws in other countries.[35] This amendment added the two previously mentioned affirmative defenses and required knowledge of the bribe rather than a lower standard of "reason to know."[36]

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30. 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (West 2013).

31. Barta & Chapman, *supra* note 23, at 842 (noting that facilitating payments are also called grease payments).

32. The House recognized that the FCPA may reach acts not made on U.S. soil, however it deemed this extended jurisdiction was necessary to be an effective deterrent and would close a loophole. The House opined that this application was supported by international law principles. *See* H.R. REP. NO. 95-640, at 12 (1977).

33. Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corruption Practices Act*, 45 GA. L. REV. 489, 501 (2011); *see also* Henning, *supra* note 16, at 795 (noting that the Organization of American States adopted an anti-corruption treaty in 1996); Mark Srere et al., *International Bribery: FCPA Update 2011*, WESTLAW EXPERT COMMENTARY SERIES, Jan. 2011, at 6 (noting that the OECD ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 and it is signed by 38 countries); Barta & Chapman, *supra* note 23, at 851. The UN adopted the Convention Against Corruption in 2003 and the EU adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the EU in 1997. The Council of Europe adopted the Criminal & Civil Law Convention on Corruption and the African Union adopted the Convention on Preventing and Combating Corruption in 2006. The WTO established a Working Group on Transparency in Government Procurement. Finally, the World Bank and IMF have also implemented anti-corruption provisions in their programs. *Id.* at 851-56.

34. Westbrook, *supra* note 33, at 544.

35. Bixby, *supra* note 20, at 97 (noting that the purpose of the amendments was to promote U.S. corporations to participate in international trade and to direct Congress to recommend anti-corruption laws to other countries).

36. Westbrook, *supra* note 33, at 502.

The 1998 amendment was made primarily to bring the FCPA in accordance with the 1997 OECD Convention.[37] It expanded the jurisdictional reach of the FCPA to create liability for foreign entities and foreign individuals that violate FCPA provisions while in U.S. territory and also prohibited payments to gain improper advantages.[38] By adding "any person" to the FCPA, it allowed the government to also reach agents of corporations or foreign officials.[39] This broadened jurisdictional reach exposes corporations to greater potential liability and increases opportunities for FCPA enforcement.[40] As a result, it has generated many requests from those subject to enforcement for guidance and clarity on the boundaries of the FCPA.[41]

C. Caselaw & Legislative History

One source of contention regarding interpretation of the FCPA is the lack of caselaw interpreting its elements.[42] Specifically, this Note will focus on interpreting the element of obtaining or retaining business under the FCPA.[43] This element, which has been labeled the business nexus test, requires "a connection between the bribery payment and its anticipated effect."[44] In the breakthrough case, *United States v. Kay*, the Fifth Circuit analyzed the scope of the business nexus test.[45]

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37. *Id.*

38. *Id.*

39. Bixby, *supra* note 20, at 101-02. An example that Bixby notes is the case of DPC Ltd., which pled guilty to a FCPA violation although it did not commit any act on U.S. territory. However, it was a wholly-owned subsidiary of a U.S. company and therefore was considered an agent within jurisdictional reach of the FCPA. *Id.*

40. Pete J. Georgis, *Settling with Your Hands Tied: Why Judicial Intervention is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 255 (2012); *see also* Westbrook, *supra* note 33, at 502.

41. *Gorgis*, *supra* note 40, at 260.

42. *Kay IV*, 513 F.3d 432, 439-40 (5th Cir. 2007) (noting that the district court initially dismissed the case because the types of actions the defendants were accused of were not covered by the FCPA; on appeal, the Fifth Circuit reversed the dismissal).

43. The business nexus test sets out the initial scope of the FCPA, which the Fifth Circuit has held includes acts more than just obtaining and retaining government contracts, but also other acts such as obtaining and retaining favorable tax consequences. This has remained highly contentious because the Supreme Court declined to hear this issue and there is very little judicial guidance available. *Id.*

44. Georgis, *supra* note 40, at 246.

45. *Kay IV*, 513 F.3d at 432.

1. United States v. Kay

David Kay and Douglas Murphy, executives of rice export company American Rice, Inc., were indicted for bribing Haitian officials in order to lower duties and taxes.[46] Initially the District Court for the Southern District of Texas dismissed the case in *United States v. Kay* (*Kay I*),[47] holding that payments to lower "substantial portions of customs duties and sales taxes to obtain or retain business are not the kind of bribes that the FCPA criminalizes."[48] The Fifth Circuit in *Kay II*[49] reversed and found that no prior law plainly controlled this issue and that customs duties and sales taxes were within the FCPA's scope.[50] On remand, the jury found both defendants guilty on all charges.[51]

Prior to the 2004 decision in *Kay II*, "obtaining or retaining business" had only applied to circumstances where payment was made to acquire or maintain a particular contract.[52] The defendants argued the FCPA applied only to payments "for a new government contract or the renewal of an existing government contract" and did not relate to tax consequences.[53] However, the DOJ argued that the statute covered all direct and indirect payments that will give an "'improper advantage' that *always* will assist in obtaining or retaining business in a foreign country" such as favorable tax consequences.[54]

2. Legislative History

In creating the FCPA in 1977, the House did not initially include a business nexus element and therefore the language could be interpreted as *any* act, whereas the Senate included "so as to direct business to . . . maintain an established business opportunity with . . . [or] divert any business opportunity from any person."[55] Congress ultimately decided to adopt the Senate's proposal in the form of the current business nexus element in order to reflect a more narrow scope than the *any* act first proposed by the Senate.[56]

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46. *Id.* at 439.
47. United States v. Kay, 200 F. Supp. 2d 681 (S.D. Tex. 2002) [hereinafter *Kay I*].
48. United States v. Kay, 359 F.3d 738, 740 (5th Cir. 2004) [hereinafter *Kay II*].
49. *Id.*
50. *Id.*
51. *Kay IV*, 513 F.3d at 439 (affirming the jury decision at the district court).
52. Westbrook, *supra* note 33, at 540.
53. *Kay II*, 359 F.3d at 743.
54. *Id.*
55. *Id.* at 746.
56. *Id.* at 746-47.

This enacted language is similar to the SEC report that recommended the legislature act against corruption.[57] The original report specifically included "obtaining and retaining *government contracts*." The Fifth Circuit opined that this exact language would have been adopted had "Congress wanted to carry over the exact, narrower scope of the SEC Report."[58] Therefore, the Fifth Circuit concluded that Congress's intent was to broadly interpret the business nexus element.[59]

This is further indicated by the 1988 amendment where both the House and Senate declared that their respective amendments "only clarified ambiguities without changing the basic intent or effectiveness of the law."[60] The House had also proposed adding clarification to the business nexus element by adding that the payments must be made to "procure[] legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government."[61] The Fifth Circuit found that Congress's decision to exclude this language was not persuasive for adopting a narrower application because unrevised statutory language carried "little or no weight" when analyzing subsequent legislative history.[62]

The nature of the 1998 amendment was to implement OECD's Anti-Bribery Convention, which corroborates the Fifth Circuit's interpretation of a broad FCPA scope.[63] The Fifth Circuit's application of the FCPA to bribes lowering custom duties and sales tax, rather than the conventional bribe to obtain government contracts, opened a door for broader FCPA enforcement.[64]

D. Enforcement of FCPA

The potential penalties of an FCPA violation reflect Congress's fear of the severe consequences of corruption. Each FCPA criminal conviction of an individual can lead to a maximum fine of $100,000 and/or a maximum prison term of five years, whereas an entity can be fined up to two million dollars for each violation.[65] The DOJ and SEC

57. *Id.* at 747.
58. *Id.* at 748.
59. *Kay II*, 359 F.3d at 748.
60. *Id.* at 750.
61. *Id.* at 751.
62. *Id.* at 752.
63. *Id.* at 756.
64. Georgis, *supra* note 40, at 243.
65. Barta & Chapman, *supra* note 23, at 847-50.

may also bring a civil suit, which can impose additional penalties up to $16,000 per violation.[66]

1. Increase in FCPA Enforcement

The DOJ and SEC brought a total of sixty cases the first twenty-five years the FCPA was enacted.[67] In the wake of the Enron scandal in 2001[68] and the enactment of the Sarbanes-Oxley Act in 2002,[69] the SEC and DOJ carried out a more intense scrutiny of businesses for FCPA violations.[70]

After *Kay IV*,[71] FCPA enforcement skyrocketed; the DOJ and SEC brought a combined 111 FCPA cases from 2007 through 2009.[72] Fines have also increased drastically: while one of the first FCPA prosecutions in 1979 saw a modest fine of $50,000,[73] the highest penalty to date was seen in 2008 for $800 million dollars.[74]

Current DOJ and SEC investigations of Wal-Mart have garnered high-profile media scrutiny, with rumors that this could be the worst scandal yet in FCPA history.[75] If the investigations result in FCPA criminal charges, some predict that substantial fines will be imposed, ranging anywhere from five to thirteen billion dollars.[76]

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66. *Id.*; *see also* FCPA Guidance, *supra* note 15, at 69; 15 U.S.C.A. §§ 78dd-2(g)(1)(B), 78dd-3(e)(1)(B), 78ff(c)(1)(B) (West 2013).

67. Bixby, *supra* note 20, at 105.

68. *The Fall of Enron*, NPR, http://www.npr.org/news/specials/enron (last visited Apr. 6, 2014).

69. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as U.S.C.A. § 1658(b) (West 2013)).

70. Bixby, *supra* note 20 at 104 (noting that the SEC hired hundreds to monitor compliance, the DOJ hired two attorneys to handle solely FCPA violations, and the FBI created a new FCPA unit to focus only on investigations).

71. *Kay IV*, 513 F.3d 432, 432 (5th Cir. 2007).

72. Westbrook, *supra* note 33, at 522.

73. Bixby, *supra* note 20, at 124 (discussing the case of United States v. Kenny International, 79-CR-372 (D.D.C. 1979), where Kenny International was fined $50,000 and also had to pay $337,000 in restitution to the Cook Islands government).

74. Westbrook, *supra* note 33, at 556 (describing the Siemens AG settlement).

75. Michael Scher, *Is Wal-Mart Armstronging America?*, THE FCPA BLOG (Jan. 18, 2013), http://www.fcpablog.com/blog/2013/1/18/is-wal-mart-armstronging-america.html. Since initial reports, the investigation has expanded to include Wal-Mart's counterparts in India, China, and Brazil—30% of Wal-Mart stores are in Mexico, Brazil, and China. *See* Stephanie Clifford & David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html.

76. Eric Platt, *How a Walmart Bribery Fine Could Spiral Up Over $13 Billion*, BUSINESS INSIDER (Apr. 23, 2012, 2:42 PM), http://www.businessinsider.com/how-walmarts-fine-could-spiral-up-to-144-billion-2012-4.

2. Agency Guidance

The combination of increased enforcement, broadened interpretation of the FCPA, and limited judicial guidance have prompted the business community to call for a bright line test between prohibited and lawful conduct and for guidance in creating corporate compliance programs.[77] In response to this, the DOJ and SEC have attempted to provide guidelines regarding FCPA enforcement and scope. For example, in March 2008, the DOJ issued guidance on internal compliance as well as a memorandum called "Lay Person's Guide to the FCPA."[78] Furthermore, an individual can request an FCPA Opinion Procedure Release from DOJ.[79] However, critics found that these resources still provided little clarification.[80]

Most recently, in November 2012, the DOJ and SEC jointly released "A Resource Guide to the U.S. FCPA" (hereinafter "FCPA Guidance").[81] Of the 130-page document, two pages cover the business nexus test. However, a caveat of the FCPA Guidance is that it is non-binding; it is only the agencies' interpretation of the FCPA and how they plan to enforce it.[82] Despite this new guidance, many are still calling for statutory reform because they believe the FCPA is outdated.[83] However, in looking at the business nexus test, the current broad reading reflects Congress's intent in 1977 as well as present international anti-bribery standards, and no additional reform of the FCPA is needed.

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77. Georgis, *supra* note 40, at 275.

78. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & DEP'T. OF COMMERCE, LAYPERSON'S GUIDE TO THE FCPA (2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

79. Westbrook, *supra* note 33, at 564-65 (discussing the Siemens AG settlement).

80. *Id.* at 565.

81. *See* FCPA Guidance, *supra* note 15, at 2-3, 12-14. The guidance refers to the business nexus test as the business purpose test. It also provides eight "Examples of Actions Taken to Obtain or Retain Business," including the following: (1) winning a contract; (2) influencing the procurement process; (3) circumventing the rules for importation of products; (4) gaining access to non-public bid tender information; (5) evading taxes or penalties; (6) influencing the adjudication of lawsuits or enforcement actions; (7) obtaining exceptions to regulations; and (8) avoiding contract termination. *Id.*

82. *Id.* at ii (The guidance is "non-binding, informal, and summary in nature, and the information contained [in it] does not constitute rules or regulations. . . . [It] may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter.").

83. Samuel Rubenfeld, *Chamber Picks Apart Guidance in Letter, Demands Statutory FCPA Reform*, WALL ST. J. CORRUPTION CURRENTS (Feb. 19, 2013, 3:56 PM), http://blogs.wsj.com/corruption-currents/2013/02/19/chamber-picks-apart-guidance-in-letter-demands-statutory-fcpa-reform/.

III. ANALYSIS

Reactions to the FCPA Guidance have been widespread—with some tremendously happy with it[84] and others arguing it adds little value to current ambiguities in the statute.[85] In particular, some have lamented that the "most disturbing portion of the FCPA Guidance concerns the 'obtain or retain business' element of the FCPA" and that the eight examples[86] of actions taken to obtain or retain business are not very informative in practice.[87] However, the agencies' guidance on this business nexus test appropriately adheres to Congress's intent and is in harmony with international standards.

A. FCPA Guidance is Consistent with Legislative Intent and International Law

Two criticisms of the FCPA Guidance pertaining specifically to the business nexus test are: (1) the DOJ is incorrect that the 1998 FCPA

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84. *New Guidance Gives Clarity on FCPA Enforcement Without Shifting Policy*, INSIDE US-CHINA TRADE (Nov. 21, 2012), at 1. The U.S. Chamber of Commerce's Institute for Legal Reform applauds having the guidance all in one document rather than a "patchwork" of documents and remarked that the "guidance 'addresses several areas of concern outlined by ILR.'" Heather Lowe, director of government affairs at Global Financial Integrity, does not see any future basis for criticism. Civil society groups call for the Chamber and business groups to halt their FCPA criticism. *Id.*

85. *See* Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, 7 WHITE COLLAR CRIME REP. 961 (2012) ("Guidance is an advocacy piece and not a well-balanced portrayal of the FCPA, as it is replete with selective information, half-truths, and information that is demonstratively false."); *see also* Catherine Dunn, *Following FCPA Guidance, Call for Further Clarification*, CORPORATE COUNSEL (Jan. 17, 2013), *available at* http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202584715917&slreturn=20130020133700. The Manhattan Institute for Policy Research issued a brief criticizing the FCPA Guidance and called for legislative reform, in particular regarding: jurisdiction, foreign officials, and facilitating payments as an exception to obtaining or retaining business. *Id.*

86. FCPA Guidance, *supra* note 15, at 12-14.

87. Koehler, *supra* note 85, at 5 ("The Guidance boldly and unequivocally states that 'payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test,' [but] the above information is indicative of something much different when the enforcement agencies are put to their burdens of proof in such a case."). *Id.*

amendments were not meant to conform with the OECD Convention,[88] and (2) the Guidance overlooks relevant case law in *United States v. Duran*[89] and *SEC v. Mattson*.[90] Taking a closer look at these arguments will demonstrate that the precedent set out in *US v. Kay*[91] appropriately interprets Congress's intent to broadly construe the business nexus test.

1. FCPA and Conformity with OECD Convention

The FCPA Guidance explicitly states that one purpose for the 1998 FCPA amendments was to conform to the 1997 OECD Anti-Bribery Convention.[92] Resistance against this statement stems from a lack of judicial scrutiny, therefore allowing agency interpretations to inappropriately act as "de facto case law."[93]

The Convention prohibits bribes to foreign officials "in order to obtain or retain business *or other improper advantage* in the conduct of international business."[94] In comparison, the language of the FCPA differs slightly in the placement of "improper advantage"; the FCPA prohibits bribes to foreign officials to secure "any improper advantage ... to assist such corporation in obtaining or retaining business."[95]

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88. *Id.* ("The notion that the FCPA's 1998 amendments conformed the FCPA to the OECD Convention and expanded the FCPA's scope to include payments made to secure 'any improper advantage' is demonstratively false.").

89. *Id.* The U.S. District Court for the Southern District of Florida acquitted Duran in April of 1990 because the bribes made to Dominican Republic officials "to obtain the release of two aircraft[s] seized by the government" did not fall under the business nexus test. *See* Judgment of Acquittal, United States v. Pou, No. 1:89-CR-00802 (S.D. Fla. Apr. 17, 1990), *available at* http://www.scribd.com/doc/92621430/USA-v-Pou-Et-Al-Alfredo-Duran-s-Motion-for-Judgment-of-Aquittal.

90. *Id.* at 5. Mattson's motion to dismiss was granted by U.S. District Court for the Southern District of Texas in 2002 based on allegations of bribes "to an Indonesian tax official for a reduction in a tax assessment." *See* Memorandum and Order, SEC V. Mattson, No. 4:01-cv-03106 (S.D. Tex. Sept. 6, 2002), *available at* http://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris.

91. *Kay II*, 359 F.3d 738, 754 (5th Cir. 2004).

92. FCPA Guidance, *supra* note 15, at 4; *see also* Westbrook, *supra* note 33, at 502 (discussing the history of FCPA amendments).

93. Dunn, *supra* note 85, at 1 (quoting Paul Enzinna, a specialist in white-collar crimes) ("The guidance's issuance steepens the climb for reformers, because it has created the perception of removing the element of uncertainty upon which much of the reformers' claims of unfairness were premised," quoting former U.S. Attorney General Alberto Gonzalez.).

94. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD at 7, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/combating-bribery.pdf (emphasis added).

95. *Kay IV*, 513 F.3d 432, 439-40 (5th Cir. 2007).

Opponents argue that since the 1998 amendment of the FCPA clearly differed in the placement of "improper advantage," there was no legislative intent to conform to the Convention in this regard.[96] Further, *Kay II* held that a violation of the FCPA must demonstrate that the bribe produced an *effect* that assisted or would "assist in obtaining or retaining business."[97] This carves out a narrow category that does not fall under the FCPA, where an effect does not obtain or retain business and does nothing but increase profitability of a company.[98]

Despite the differences in statutory language between the Convention and the FCPA, the court in *Kay II* "agree[d] with the government that there really was no need for Congress to add 'or other improper advantage to the requirement,'" finding that the addition could have caused confusion about facilitating payments.[99] *Kay II* also used Congress's ratification of the Convention to bolster the court's conclusion on the broad scope of the business nexus test.[100]

A closer look at the legislative intent behind the 1998 amendment reveals that the Senate report explicitly stated that "[t]he draft bill would amend the FCPA to conform to the requirements of and to implement the OECD Convention . . . . The bill would make explicit that payments made to secure 'any improper advantage,' the language used in the OECD Convention, are prohibited by the FCPA."[101] Likewise, President Clinton's signing statement indicates the purpose of the amendment was to make the proper changes in the FCPA to implement the Convention and aid in the United States' ratification of the Convention.[102] These denote Congress's intent to conform the 1998 amendments to the OECD Convention, including the Convention's language of improper advantages. In interpreting this intent, it is now appropriate to look to case law in *United States v. Duran*[103] and *SEC v. Mattson*.[104]

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96. Koehler, *supra* note 85, at 5.

97. *Kay II*, 359 F.3d 738, 756 (5th Cir. 2004) (noting that tax savings are an example of an effect).

98. *Id.* at 760.

99. *Id.* at 754. Grease payments are facilitating payments that are allowed under the FCPA as an affirmative defense. *But see id.* at 755 n.68 (noting that the case at bar did not require the court to address potential discrepancies between the Convention and the statute because the court concluded that the conduct in the case had the potential to violate the FCPA).

100. *Id.* at 756.

101. S. REP. NO. 105-277, at 6 (1998), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/senaterpt.pdf.

102. William J. Clinton, Statement by the President (Nov. 10, 1998), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf.

103. Indictment, United States v. Pou, No. 89-00802 (S.D. Fla. Nov. 21, 1989); Judgment of Acquittal, United States v. Duran, No. 89-00802 (S.D. Fla. Apr. 17, 1990).

2. United States v. Duran and SEC v. Mattson Do Not Control

In *United States v. Duran*, Alfredo Duran was charged with a conspiracy to violate the Prohibited Foreign Trade Practices Act[105] for bribing Dominican Republic officials in order to release an airplane that was confiscated for association with drug trafficking.[106] The district court granted Duran's judgment of acquittal, in part because "no reasonable jury could find that he entered any conspiracy having the illegal objective" of obtaining or retaining business.[107] The court opined that it originally denied a motion to dismiss because allegations were sufficient to satisfy the business nexus test but granted acquittal because of a lack of proof to support the argument.[108]

Initially Duran's dismissal could be seen as a limit to the business nexus test,[109] however, the case was litigated in 1990, before both the 1998 FCPA amendments and the revolutionary Fifth Circuit decisions in *Kay*.[110] With both of these defining developments to the scope of the business nexus test applicable today, it is unknown how modern courts would rule on the facts presented in *Duran*. With precedent demonstrating increasing enforcement and the court's current broad interpretation of the business nexus test, it is unlikely that the same outcome in *Duran* would result today.

In a more recent development in 2002, Eric Mattson was granted a motion to dismiss for a charge that he authorized a bribe to an Indonesian official, under the guise of a goodwill payment, in return for a tax assessment reduction.[111] In granting the dismissal, the court based its

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104. SEC v. Mattson, H-01-3106 (S.D. Tex. 2002).

105. Defendant Duran's Motion for Judgment of Acquittal and Memorandum of Law at 2, United States v. Pou et al., No. 89-802-CR-KEHOE (S.D. Fla. Apr. 17, 1990), *available at* http://www.scribd.com/doc/92621430/USA-v-Pou-Et-Al-Alfredo-Duran-s-Motion-for-Judgment-of-Aquittal [hereinafter Duran's Motion].

106. *Feb. 2006 FCPA Case Digest*, SHEARMAN & STERLING LLP, 2006, at 21.

107. Duran's Motion, *supra* note 105, at 6.

108. *Id.* at 7; *see also* SHEARMAN & STERLING LLP, *supra* note 106, at 21 ("The court excluded evidence relating to his original codefendant, Pou, and after presentation of the prosecution's case, Duran was acquitted for lack of evidence.").

109. Koehler, *supra* note 85, at 5 (criticizing that the FCPA Guidance does not mention *Duran* and *Mattson*; these cases are "indicative of something much different when the enforcement agencies are put to their burdens of proof in such a case").

110. *Kay II*, 359 F.3d at 754; *see also Kay IV*, 513 F.3d at 439-40.

111. Memorandum and Order, SEC v. Mattson, et al., No. H-01-3106 (S.D. Tex. Sep. 9, 2002), *available at* http://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris. Defendants also argued that this was a case of extortion, where the Indonesian official requested the goodwill payment be paid. The defendants' accountant in Indonesia actually calculated that a tax refund was due, while Indonesian officials originally calculated a $3.2 million tax liability. *Id.* at 2-3.

decision on *Kay I*, where the district court had applied a narrow business nexus test.[112]

After the Fifth Circuit reversed the *Kay I* decision in *Kay II* in 2004,[113] the SEC filed and was granted a motion to remand based upon *Kay II*.[114] The Fifth Circuit granted the motion because the same issue was present in both *Kay* and *Mattson*, therefore the "appellate decision in *Kay* thus might have 'a significant [and] dispositive bearing on the outcome of the *Mattson* appeal.'"[115] The *Mattson* appeal would have forced the Fifth Circuit to elaborate on its *Kay II* decision and decide if the tax reduction was a sufficient effect[116] that fell under the business nexus test of the FCPA.[117] However, this question was never answered because SEC dismissed its *Mattson* appeal shortly thereafter.[118]

Without resolution of the issues set out in *Kay*, *Mattson* cannot be controlling. It was originally based on the rationale of *Kay I*, which was overturned by *Kay II*. With the SEC dismissal of its appeal, one can only speculate how the courts would rule on similar facts today. With the government cracking down on corruption and construing the business nexus test broadly, the current broad interpretation is likely to continue—which is consistent with current international motivations to combat corruption.[119]

3. A Broad Interpretation of the FCPA is Consistent with International Consensus

Even if the FCPA had not been amended in 1998 to conform to the OECD Convention of 1997, the FCPA should be read not to conflict with

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112. *Id.* at 8-11.

113. *Kay II*, 359 F.3d 738, 738 (5th Cir. 2004).

114. Plaintiff's Motion for Summary Reversal and Remand, SEC v. Mattson, No. 03-20342 (5th Cir. Mar. 3, 2004).

115. *Id.* at 6.

116. *Kay II*, 359 F.3d at 756.

117. Client Memorandum, *SEC Drops Appeal in FCPA Enforcement Action*, WILLKIE FARR & GALLAGHER LLP, Sept. 27, 2004, at 1. The Fifth Circuit held in *Kay II* that a bribe paid "to secure reduced customs or tax liabilities *may* constitute a payment" that falls under the business nexus test, if the government shows "a nexus between the tax benefit sought by the payor and the payor's ability to 'obtain or retain business.'" *Id.* It would not violate the FCPA without this showing. *Id. Mattson's* appeal would have considered "whether the Commission adequately alleged a nexus between the alleged tax benefit sought and PTEC's ability to obtain or retain business." *Id.*

118. Press Release, SEC, SEC Action Against Baker Hughes Incorporated's Former Chief Financial Officer and Controller is Concluded (Sept. 1, 2004), *available at* http://www.sec.gov/litigation/litreleases/lr18863.htm (noting that the SEC filed its motion on July 13, 2004 and the Fifth Circuit dismissed the case on July 14, 2004).

119. *See infra* Part III.A.3.

the United States' international agreements. One way to prevent international conflict and strained foreign relations is to employ the *Charming Betsy* canon,[120] which provides that "ambiguous congressional statutes should be construed in harmony with international law"[121] as long as such an interpretation is not contrary to congressional intent.[122]

The business nexus test is ambiguous[123] therefore it should be read broadly so as not to conflict with international law, pursuant to the *Charming Betsy* canon.[124] The Fifth Circuit held the language of "obtaining or retaining business" was ambiguous and looked to legislative history for interpretation.[125] In examining prior legislation, the Fifth Circuit concluded that Congress intended that the business nexus test be broadly interpreted.[126] This is bolstered by Congress's statements that it actually intended for the 1998 FCPA amendments to conform to OECD Convention requirements as a means to ratify the agreement.[127] Therefore, under the *Charming Betsy* canon, the business nexus test should be read broadly, consistent with the Convention, so as not to conflict with international anti-bribery movements.

Anti-corruption has become customary in international law, or at a minimum, is emerging as customary in international law.[128] The Convention's implementation in 1997 began the international battle with corruption and created international legal norms.[129] Originating with the

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120. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1217-18 (2008); *see also* Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) (involving the ambiguous meaning of "under the protection" of the United States in the Nonintercourse Act of 1800). At issue in *Murray* was whether a ship captain who switched his and his ship's nationality from American to Danish would fall under this language. *Id.*

121. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008).

122. Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1357 (2006).

123. *Kay II*, 359 F.3d 738, 744-45 (5th Cir. 2004).

124. *See* Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1217-18 (2008).

125. *Kay II*, 359 F.3d at 744-45. The court gave four reasons for ambiguity: (1) the language failed to "give a clear indication of the exact scope of the business nexus element"— that is the link between the bribe and the briber's goal; (2) the plain meaning from the dictionary can support multiple interpretations of "business"—volume of trade, purchase and sale of goods, assignment, or project; (3) both parties' arguments were not persuasive to prove scope of the FCPA; and, (4) the title of the Act was generic.

126. *See supra* Part II.C.2.

127. *See infra* Part III.A.1

128. *See* FCPA Guidance, *supra* note 15, at 63 (noting that an international consensus is emerging on guidance for anti-bribery compliance).

129. Alhaji B.M. Marong, *Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa*, 30 DENV. J. INT'L L. & POL'Y

United States' FCPA,[130] other regions followed,[131] including the European Union,[132] Africa,[133] China,[134] Mexico,[135] Colombia and Russia.[136] There are many treaties and NGOs established to prevent international bribery,[137] but the OECD Convention is the most noteworthy.[138] In order to maintain momentum in the international fight

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99, 100-01 (2002). Marong discusses how Europe and the Americas "generated sufficient common understandings of the relationship between economies and corruption, and gave rise to legal norms to combat corruption." *Id.* These efforts spread worldwide, notably, "African countries have joined the process of formation of an emergent customary norm." *Id.* at 101.

130. *See* Henning, *supra* note 16 and accompanying text.

131. *But cf.* Mike Koehler, *Q. Do Other Countries Have "FCPA-like" laws?*, FCPA PROFESSOR, http://www.fcpaprofessor.com/fcpa-101#q25 (last visited Apr. 6, 2014) (noting that other countries may have similar laws to the FCPA, but the level of enforcement varies).

132. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 395-99 (2000); *see also* White Collar Defense and Investigations Client Alert, *New UK Bribery Act Guidance Covers Facilitation Payments, Self-Reporting and Hospitality*, JENNER & BLOCK, Oct. 12, 2012, at 1 (discussing the 2010 passage of the UK's counterpart to the FCPA, which has been called the "the toughest anti-corruption legislation in the world" due to its exclusion of facilitating payments and bona fide expenses that are available defenses under the FCPA); MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 (2011), *available at* http://www.justice.gov.uk/guidance/bribery.

133. *See* Marong, *supra* note 129.

134. Eric Carlson, *China's Overseas Bribery Law One Year On*, FCPA BLOG (May 29, 2012, 3:28 AM), http://www.fcpablog.com/blog/2012/5/29/chinas-overseas-bribery-law-one-year-on.html (noting how China criminalized bribery to "non-Chinese government officials and officials of international organizations" in February of 2011); *see also* Eric Carlson, *China's Releases New Judicial Interpretation on Bribery Enforcement*, FCPA BLOG (January 3, 2013), http://www.fcpablog.com/blog/2013/1/3/china-releases-new-judicial-interpretation-on-bribery-enforc.html (discussing China's passage of a new law on Jan. 1, 2013 about enforcing bribery crimes).

135. Maria Dolores Hernandez J., *Mexico's New President Begins Anti-Corruption Fight*, FCPA BLOG (DECEMBER 6, 2012, 1:43 AM), http://www.fcpablog.com/blog/2012/12/6/mexicos-new-president-begins-anti-corruption-fight.html (discussing how after the November 2012 Mexican Presidential election, the newly elected President Enrique Peña Nieto began working with his congress to create a National Anti-Corruption Commission).

136. *Colombia Joins OECD Anti-Bribery Convention*, OECD NEWSROOM (Nov. 12, 2012), http://www.oecd.org/newsroom/colombiajoinsoecdanti-briberyconvention.htm (noting that Colombia joined the OECD on January 19, 2013 and that Argentina, Brazil, Bulgaria, Russia, and South Africa also recently joined, bringing the total number of members to forty).

137. FCPA Guidance, *supra* note 15, at 63. The FCPA Guidance specifically listed: the Asia-Pacific Economic Cooperation, the International Chamber of Commerce, Transparency International, the United Nations Global Compact, the World Bank, and the World Economic Forum. *Id.*

138. *Id.* ("Most notably, the OECD's 2009 Anti-Bribery Recommendation and its Annex II . . . set forth specific good practices for ensuring effective compliance programs

against corruption, Congress appointed the Commerce Department to monitor the Convention's implementation and enforcement.[139] The Convention's monitoring system consists of three phases: Evaluation, Assessment, and Phase 3.[140]

One focus of the Phase 3 evaluation of the FCPA was the business nexus test, underlining the FCPA's placement of "improper advantage" when compared to the Convention.[141] The OECD working group found that the business nexus language "might be read to only address bribes for the purpose of obtaining or retaining business *per se*,"[142] but the *Kay IV* decision appropriately broadened the business nexus to cover "the kinds of advantages required to be covered by the Convention."[143] The Convention's recommendation was to "revise the Criminal Resource Manual to reflect . . . that the 'business nexus test' in the FCPA can be broadly interpreted, such that bribes to foreign public officials to obtain or retain business or 'other improper advantage in the conduct of international business' violate the FCPA."[144]

Phase 3 demonstrates that the Convention expects and believes the FCPA's business nexus test fully complies with the language of the Convention.[145] As the Convention is an important tool to combat international corruption, it is important that it does not conflict with the United States' obligation—unless it can be shown that Congress's intent was contrary to this.[146] However, it is significant that both Congress and the President passed the 1998 amendments expecting conformance to the Convention,[147] and the Senate did not take a reservation when ratifying the Convention.[148] Since the Fifth Circuit deemed the business nexus test

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and measures for preventing and detecting foreign bribery."); *see also Corruption as a Threat to the Rule of Law*, ABA INTERNATIONAL RULE OF LAW SYMPOSIUM (Apr. 16, 2007) (discussing how the OECD collects extensive information on corruption).

139. Posadas, *supra* note 132, at 381.

140. *Phase 3 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm (last visited May 8, 2014) (Phase 3 is a more focused, shorter version of assessment than the one used in Phase 2).

141. *See supra* Part III.A.1.

142. OECD WORKING GROUP, UNITED STATES PHASE 3, at 25 (2010), *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/46213841.pdf.

143. *Id.* at 26.

144. *Id.* at 62.

145. *Id.*

146. *See* Alford, *supra* note 122.

147. *See supra* Part III.A.1.

148. *Kay II*, 359 F.3d 738, 755 (5th Cir. 2004) ("[T]he Senate ratified without reservation and Congress implemented . . . ."); *see also* Frederic L. Kirgis, *Reservations*

to be ambiguous and there is a lack of congressional intent to the contrary, the business nexus element should be read broadly, consistent with the Convention's expectations. Despite some disagreement on the use of the *Charming Betsy* doctrine, it is appropriate to apply it to the FCPA.

4. Opposition to the Charming Betsy Doctrine

The *Charming Betsy* doctrine is much older than the FCPA as it was first used nearly 200 years ago during the Marshall Court.[149] Since then, the U.S. has grown into a major superpower and international law has changed significantly.[150] In particular, where traditional international law developed from customary practices that nations considered legal obligations, modern international law also includes treaties created by consensus between countries.[151] In addition, international law traditionally regulated relations between nations, but it has transformed to apply between nations and individual citizens.[152] This evolution over time changed the original reach and power of the *Charming Betsy* doctrine and many question whether it should be applied in the same way.[153]

However, others see this overlap of international and domestic law and the impact of globalization to be a reason that the *Charming Betsy* doctrine will persist and become increasingly valuable for courts.[154] *Charming Betsy* also aids the separation of powers by decreasing the likelihood that courts will interpret a federal law contrary to the intent of the other branches and of Congress infringing upon the President's

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to Treaties and United States Practice, AMERICAN SOCIETY OF INTERNATIONAL LAW (May 2003), http://www.asil.org/insigh105.cfm (noting that the U.S. is traditionally reluctant to enter into treaties without attaching reservations, especially when the treaties regulate private conduct).

149. *See* Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1216, 1236 (2008). A fledgling United States relied on international law as natural law for concerns with international relations in order to protect U.S. commercial interests. *Id.* at 1236. During this time, the United States wished to prevent any international conflict that would be "economically and militarily disastrous." *Id.*

150. *Id.*

151. *Id.* at 1226.

152. *Id.* (describing that international law regulates domestic matters such as human rights).

153. *Id.* at 1231.

154. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 536 (1998).

powers.[155] In interpreting domestic laws to be consistent with international law, the extraterritorial application of the FCPA would be "less offensive if violations of international prescriptive jurisdiction would not result."[156] Therefore, the application of the *Charming Betsy* doctrine to FCPA interpretation of the business nexus test will help foreign relations and also support the extraterritorial reach of the FCPA.

B. Why a Broad Interpretation of the FCPA is Best for Everyone

Casting a "wide net over foreign bribery"[157] with a broad reading of the business nexus test allows the FCPA to initially have a widespread reach, which Congress hoped would restore the public's confidence in American businesses, bring stability to our markets, and maintain business morals.[158] Rather than restricting the scope of the FCPA through the business nexus test, businesses should shoulder the burden to show that a facilitating payment exception or an affirmative defense applies to them in order to receive safe harbor from the FCPA.[159]

This is appropriate because the potential social costs of public corruption could be disastrous, on top of being economically inefficient. Wal-Mart's alleged bribes were able to undermine Mexico's initiatives to protect its cultural pyramids and unfairly overshadowed local businesses.[160] The impacts of corruption may not be apparent until it is too late to fix. The construction of a high-speed railway in China was initially a sign of the country's global power, but poor designing and improper testing procedures of the high-speed train resulted in one of China's worst accidents since 2008.[161] The Chinese government reported

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155. *Id.* at 525-26. The *Charming Betsy* canon "reduces the number of occasions in which the courts, in their interpretation of federal enactments, place the United States in violation of international law contrary to the wishes of the political branches." This also reduces instances where Congress obstructs the President's diplomatic efforts unintentionally.

156. Alford, *supra* note 122, at 1388-89.

157. *Kay II*, 359 F.3d 738, 749 (5th Cir. 2004).

158. S. REP. NO. 95-114, at 3 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

159. *See* 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (West 2013) (facilitating payment exception); 15 U.S.C.A. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (West 2013) (bona fide business expense defense); 15 U.S.C.A §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (West 2013) (local law defense).

160. *See supra* Part I.

161. Agence France-Presse, *Corruption the Killer in China Rail Crash: US Family*, JAKARTA GLOBE (Nov. 30, 2012, 10:53 AM), http://www.thejakartaglobe.com/asia/corruption-the-killer-in-china-rail-crash-us-family/559043 (noting that a surviving family member of victims in the train crash blames corruption for the death of his parents and that bribes to China's train minister

that these irregularities were the product of corrupt payments to a former railway minister.[162] The impact of these bribes can also be seen in education, public water access, and healthcare.[163] These consequences are apparent with all improper payments, not only the narrow categories of procuring contracts and tax advantages.

A broader understanding of the business nexus test would place all $24 million of alleged bribes paid by Wal-Mart within the scope of the FCPA, rather than limiting it to procuring contracts or favorable tax benefits. Wal-Mart would have to demonstrate that its expenses were either facilitating expenses or allowed under the foreign country's laws.[164]

Another possible remedy that would help lessen a business's burden, while also ensuring there are measures in place to protect the public from corruption, would be for Congress to amend the FCPA and create a compliance defense. This defense would allow businesses to show that they had an adequate monitoring system implemented to detect violations falling under the FCPA.[165] The FCPA Guidance also goes into great detail about creating a corporate compliance program and states that a program could influence whether the agency will decide to defer or not to prosecute.[166] If the FCPA were amended to allow this compliance

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caused rapid expansion of the train system and allowed the system to operate without proper testing).

162. *Id.*

163. Claire Furphy, *Corruption in Africa: A Crime Against Development,* CONSULTANCY AFRICA INTELLIGENCE (Nov. 16, 2010), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=605:corruption-in-africa-a-crime-against-development&catid=87:african-finance-a-economy&Itemid=294.

164. Andrew Longstreth, *Analysis: How Gray Area of Bribery Law Could Play Out in Wal-Mart,* REUTERS (Apr. 25, 2012, 6:06 PM), http://www.reuters.com/article/2012/04/25/us-walmart-grease-idUSBRE83O1GJ20120425.

165. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FCPA, 11-14 (Oct. 2010). This would create a duty of care similar to the Caremark standard available in corporate governance. Although the UK Bribery Act of 2010 does not have a facilitating payments exception, it does recognize a compliance defense. The UK Bribery Act compliance defense has six principles: risk assessment, top-level commitment, due diligence, clear policies and procedures, effective implementation, monitoring, and review. *Id.*

166. *See* FCPA Guidance, *supra* note 15, at 56-63; *see also*, Richard L. Cassin, *2012: The Year in Declinations*, FCPA BLOG (Dec. 27, 2012, 4:18 AM), http://www.fcpablog.com/blog/2012/12/27/2012-the-year-in-declinations.html (noting that declinations to prosecute are not always disclosed, but institutions have counted a general increase from 2008-2012); Grifols, S.A., Report of Foreign Issuer Pursuant to Rule 13a-16 or 15d-16 of the Securities Exchange Act of 1934, Form 6-K (Nov. 2012), *available at*

defense it would be a way to balance corporate needs with the public welfare.[167]

A broad interpretation would also give businesses the incentive to voluntarily disclose potential violations and work to fix compliance issues. Since the Fifth Circuit's ruling in *Kay II*,[168] there has been a significant jump in voluntary disclosures.[169] The DOJ and SEC also factor in voluntary disclosures when deciding whether to prosecute and in implementing sentencing guidelines.[170] The American Bar Association has even recommended disclosure as a way to raise public awareness to aid in the international campaign against corruption.[171]

A broad business nexus test is appropriate to maintain the growing momentum of international anti-corruption. The FCPA was the first of its kind, and the United States has been a major player in the international campaign; scaling back U.S. efforts could greatly hinder this campaign.[172]

IV. CONCLUSION

The business nexus test should encompass more than obtaining and retaining government contracts. This adheres to Congress's intent in enacting the FCPA and is consistent with the United States' international obligation under the OECD Convention.

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http://www.sec.gov/Archives/edgar/data/1438569/000110465912081081/a12-28378_16k.htm (noting the recently announced public declination for Grifols, S.A., partially given due to its compliance program).

167. *See infra* note 169 and accompanying text.

168. *Kay II*, 359 F.3d 738, 754 (5th Cir. 2004).

169. Jacqueline C. Wolff & Pamela Sawhney, *FCPA Voluntary Disclosures: A Risk/Benefit Analysis*, COVINGTON & BURLING LLP (2008), http://www.cov.com/files/Publication/97ca6c31-614b-4ace-a441-6dab61135c65/Presentation/PublicationAttachment/3980bda8-c3b1-4f62-9df9-7845d53e1764/FCPA%20Voluntary%20Disclosures%20-%20A%20Risk-Benefit%20Analysis.pdf (noting that the increase in voluntary disclosure can in part be attributed to the Sarbanes-Oxley Act and that disclosures encompassed 64% of FCPA enforcement of the 2006-2007 year).

170. *See* FCPA Guidance, *supra* note 15, at 54-56.

171. *See* ABA INTERNATIONAL RULE OF LAW SYMPOSIUM, *supra* note 138, at 9. This is important because corruption tends to be hidden from public view, therefore the affects of anti-bribery measures are not easily measured.

172. Roger Alford, *How to Jump Start Enforcement of Anti-Bribery Laws*, OPINIO JURIS (Jun. 22, 2012, 7:08 PM), http://opiniojuris.org/2012/06/22/how-to-jump-start-enforcement-of-anti-bribery-laws/ (describing a study documenting that leading anti-bribery enforcers with large markets could affect domestic enforcement in other jurisdictions). The study calculated that U.S. FCPA extraterritorial enforcement increased the likelihood that a corresponding country would bring their first case of domestic anti-bribery enforcement by 20 times. *Id.*

The FCPA was amended in 1998 in order to conform to the requirements of the 1997 OECD Convention. Although the language of the FCPA is not an exact match with the Convention's language, the Fifth Circuit opined that Congress did not want to cause any confusion with the FCPA's facilitating payment exception and intended for the amendment to implement its ratification of the Convention.

Caselaw in *U.S. v. Duran* and *SEC v. Mattson* are not persuasive and do not narrow the scope of the business nexus test. *Duran* came before the groundbreaking decision of the Fifth Circuit in *U.S. v. Kay*, and the same facts are not likely to achieve the same outcome today. In addition, the Fifth Circuit was not able to elaborate on the impact of *Kay II* on the *Mattson* case since the SEC dismissed its appeal prematurely. Since both *Mattson* and *Duran* do not take into consideration the controlling law in *Kay II*, they do not control and a broad reading of the business nexus test should continue to prevail.

This would also maintain international relations and help the United States comply with its international obligation under the OECD Convention. The Fifth Circuit stated that the business nexus test was indeed ambiguous, so applying the *Charming Betsy* doctrine would be appropriate here. This would abide by Congress's intent to continue support for the international fight against bribery.

A broad reading would encourage international enforcement of anti-bribery laws and provide better public policy. It would put the burden to businesses to prove affirmative defenses, prove an exception for facilitating payments, or demonstrate that a proper compliance program was in place. This not only helps maintain the integrity of American businesses, but also increases economic competitiveness, helps level the playing field in all countries, and maintains reasonable standards for the public welfare.