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INTRODUCTION

In the United States, the Foreign Corrupt Practices Act of 1977, as amended 15 U.S.C. §§ 78dd-1, *et seq.* (FCPA), is the principal statute used by United States enforcement agencies to criminalize certain types of payments made by business entities, or their agents, to foreign government officials for assistance in obtaining or retaining business on favorable terms.[1] Despite the widely understood importance of reducing corruption, the FCPA remains one of the most controversial and hotly debated international regulatory statutes. Scholars and politicians have weighed in with all manner of opinions regarding its effectiveness, its fairness, its extraterritoriality, and its impact on American companies seeking to do business abroad.[2] Although the FCPA was designed to improve the international marketplace by criminalizing bribery, the predominant method enforcement agencies use to resolve violations of the FCPA seemingly conflicts with the broader spirit of the statute in strengthening the rule of law. Enforcement agencies may settle violations of the FCPA without the accused party ever admitting guilt or going to trial through pretrial diversion processes.

While there may be economic efficiencies to utilizing pretrial diversion, this note takes the position that current pretrial diversion practices in FCPA enforcement actions do not provide enough procedural protections or transparency. By increasing the role of the judiciary in the pretrial diversion, potential risk of abuse through process or lack of information can be mitigated. Additionally, this note suggests that funds collected from resolving FCPA enforcement actions should be used to facilitate anti-corruption programing abroad as a means of providing relief for victims and strengthening the international rule of law.

Part II situates this note by providing background information on the topic of international rule of law and serves as a primer on the origins and development of the FCPA. Part III introduces pretrial diversion techniques that are used to resolve FCPA enforcement actions and identifies problems related to accountability and transparency associated with current methods of pretrial

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[1] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, §§ 5001–03, 102 Stat. 1415, *also amended by* International Anti Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2018)) [hereinafter The FCPA], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf.

[2] *See, e.g.*, Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 ILL. L. REV. 1227, 1266 (2019); *See, e.g.*, Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153, 182 (2018); *See also, e.g.*, Renae Merle, *Trump called global anti-bribery law 'horrible.' His administration is pursuing fewer new investigations.*, WASH. POST (Jan. 31, 2020, 2:27 PM), https://www.washingtonpost.com/business/2020/01/31/trump-fcpa/.

diversion. Part IV proposes recommendations to resolve some of the issues associated with current pretrial diversion practices in FCPA enforcement actions. Part V concludes with final takeaways.

I. UNDERSTANDING INTERNATIONAL RULE OF LAW AND THE MODERN FOREIGN CORRUPT PRACTICES ACT

To understand the issues with the modern enforcement of the Foreign Corrupt Practices Act and the position of this note, it is imperative to establish a relevant background in the topic of international rule of law as well as the relevant history and development of the FCPA.

A. International Rule of Law and Scope of International Bribery

Rule of law is an incredibly complex term of art because there is no settled academic definition for the phrase. Traditionally, rule of law definitions have been characterized on a spectrum from "thin" to "thick."[3] A thin definition of rule of law usually focuses on the procedures used to formulate and apply rules and contains little mention of limits to the State and its institutions regarding accountability or human rights protections.[4] This thin rule of law definition is sometimes referred to as "rule by law." At the other end of the spectrum is a thick or comprehensive rule of law definition, where states, leaders, and institutions are held accountable for their decisions.[5] It is important to also note that rule of law and human rights have an interdependent relationship; human rights protections cannot be assured without a robust rule of law and rule of law cannot be assured without actions to protect human rights. One frequently cited thick definition of the international rule of law comes from former United Nations Secretary-General Kofi Annan:

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[6]

International anti-bribery statutes, including the Foreign Corrupt Practices Act, are essential to strengthening the international rule of law, government transparency, and fostering global economic development. In 2018, the World Economic Forum reported that bribes and other corrupt practices steal at least five percent of the world's gross domestic product (GDP) from the global economy each year.[7] That figure was estimated to be over U.S. $2.6 trillion in 2018 and may be over U.S. $4.7 trillion as of 2021.[8] Furthermore, the World Bank estimates that businesses and individuals pay more than U.S. $1 trillion dollars in bribes to public officials every year.[9] The effects of corruption are far-reaching; corruption weakens the public trust in institutions and fair enforcement of laws.[10] Governments and officials who partake in corrupt practices create systems

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[3] Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UN CHRON., Dec. 31 2012, https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices.
[4] *Id.*
[5] *Id.*
[6] U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (Aug. 23, 2004), https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616.
[7] Press Release, Security Council, Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data, U.N. Press Release SC/13493 (Sept. 10, 2018), https://www.un.org/press/en/2018/sc13493.doc.htm.
[8] *Id.; See also* IMF, World Economic and Financial Surveys: World Economic Outlook Database (Oct. 2021), https://www.imf.org/en/Publications/WEO/weo-database/2021/October.
[9] *Id.*
[10] *Id.*

that negatively impact citizens.[11] Corruption diverts public funds from state budgets, which limits the ability for the state to provide public goods like access to education, law enforcement, infrastructure, and healthcare. The diversion of public funds leads to further corrosion of institutions that affects billions of people worldwide. To put this figure into perspective, in 2017, Transparency International reported that nearly one in four people worldwide paid a bribe to access public services during the twelve months before being surveyed.[12] Because of international anti-bribery statutes like the FCPA, many companies conducting business abroad have developed robust compliance programs to assure they are not at odds with government enforcement agencies or international development goals.[13]

B. A Brief History of the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act was enacted during the late-1970s anti-corruption era in response to a Securities and Exchange Commission (SEC) report that found that hundreds of U.S. companies had paid bribes to engage in business abroad on favorable terms.[14] These instances of foreign bribery were largely adverse to numerous U.S. foreign policy objectives, especially goals related to strengthening the rule of law, international security, and government transparency abroad.[15] One of the most influential scandals in shaping the FCPA was that the Lockheed Corporation, the prominent U.S. aerospace and defense contractor, had spent millions of dollars bribing numerous foreign politicians and members of government, including officials in Italy and Japan, to win procurement contracts.[16] The Lockheed scandal was significant enough to bring down the government of Prime Minster Tanaka in Japan, yet there was no legal course of action to penalize Lockheed, prompting Congress to act.[17]

Since its passage, significant pushback remained from groups arguing that the FCPA disadvantaged U.S. businesses seeking to conduct business abroad.[18] Over time, these criticisms led to subsequent amendments revising the FCPA to narrow its scope to instances in which the business entity must have acted "willfully," which has generally been construed by courts to mean an act committed voluntarily, purposefully, and with a bad purpose.[19]

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[11] *Id.*

[12] Transparency Int'l, *People and Corruption: Citizens' Voices from Around the World*, at 7 (Nov. 2017), https://images.transparencycdn.org/images/GCB_Citizens_voices_FINAL.pdf.

[13] *See, e.g.*, *Impact of Foreign Corrupt Practices Act on U.S. Business*, U.S. GOV'T ACCOUNTABILITY OFF., AFMD-81-34, (1981), https://www.gao.gov/assets/afmd-81-34.pdf.

[14] U.S. SEC. EXCH. COMM'N, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (Comm. Print 1976), https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

[15] *See generally Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. Of the S. Comm. On Foreign Relations Part 12*, 94th Cong. 1 (1975).

[16] *See* Sean J. Griffith and Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 ILL. L. REV. 1227, 1237, https://fcpa.stanford.edu/academic-articles/20190820-toward-an-interest-group-theory-of-foreign-anti-corruption-laws.pdf (discussing the origins of the FCPA).

[17] *Id.*

[18] *See e.g.* John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. OF INT'L BUSINESS STUDIES 107 (1984); *See also* Brad Graham & Caleb Stroup, *Does anti-Bribery Enforcement Deter Foreign Investment?*, 23 APPLIED ECON. LETTERS, 63, 67 (2015).

[19] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, at 13 (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download, [Hereinafter FCPA Resource Guide].

In recent years, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have brought enforcement actions under the FCPA with increasing frequency.[20] Between its adoption in 1977 and 1996, forty enforcement actions were brought under the FCPA.[21] Yet, in the period from 1997 through 2020, enforcement agencies brought 626 actions under the FCPA.[22] This dramatic increase in enforcement frequency has been attributed to a wide range of factors.

Perhaps the most notable of these factors has been a shift towards greater focus on rule of law and more significant international consensus that corruption continues to be a barrier to global economic development. Greater international U.S. advocacy initially prompted a few other states to adopt similar international anti-bribery statutes.[23] However, the 1997 Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials (OECD Anti-Bribery Convention) reflected a growing international consensus as member states agreed to establish and enforce criminal penalties for offering, promising, or giving any undue payment to a foreign official for the purpose of gaining favorable business treatment.[24] With the passage of the OECD Anti-Bribery Convention, the FCPA was amended under the International Anti-Bribery and Fair Competition Act of 1998.[25] These amendments to the FCPA made the act truly universal by expanding its application to all U.S. nationals, as well as foreign nationals and entities (including subsidiaries of U.S. businesses), regardless of the instrumentality being used in furtherance of a prohibited payment.[26]

Many recent FCPA enforcement actions have been brought against entities and activities that would, in many other contexts, be considered "foreign" and not subject to U.S. law.[27] Often, the FCPA has had jurisdiction over entities solely because of operations and contacts within the United States.[28]The extraterritorial application of the FCPA has drawn immense criticism from numerous scholars and foreign business leaders because of optics suggesting that the United States imposes FCPA enforcement actions against other states to gain a relative competitive advantage and penalize foreign enterprises. Despite these notable criticisms, the FCPA is consistent with the international norms implied by the 1997 OECD Anti-Bribery Convention. Although there is no mention of extraterritoriality in the convention, Article 4 of the OECD Anti-Bribery Convention implies the potential for jurisdictional overlap when two or more countries' anti-bribery laws assert

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[20] *See DOJ and SEC Enforcement Actions per Year*, STANFORD L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, http://fcpa.stanford.edu/statistics-analytics.html (last visited Sep. 10, 2020).
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (Nov. 21, 1997), https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.
[25] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No.105–366, 112 Stat. 3302, https://www.congress.gov/105/plaws/publ366/PLAW-105publ366.pdf.
[26] *Id*.
[27] *See, e.g.*, DOJ, *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), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.
[28] *See* Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 ILL. L. REV. 1221, 1247 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451446&download=yes.

jurisdiction over the same individual or entity.[29] In such instances, the convention recommends that those countries consult with each other to determine the proper jurisdiction.[30] Thus, rather than suggesting that extraterritoriality should be limited in enforcing anti-bribery laws, the OECD Anti-Bribery Convention provides space for international cooperation between states where there are jurisdictional overlaps.

C. The Foreign Corrupt Practices Act Today

The Foreign Corrupt Practices Act's statutory scheme may be broken down into two distinct categories of application, the anti-bribery provisions and the accounting provisions.[31] While both the DOJ and SEC have the authority to bring enforcement actions under the FCPA, the DOJ has primary responsibility for enforcing the anti-bribery provisions of the act.[32] The SEC tends to focus on enforcing the accounting provisions.[33] The anti-bribery provisions prohibit corrupt payments to a foreign official to obtain or retain business and are structured as three parallel provisions within Title 15 that describe the categories of persons and entities to which the FCPA applies.[34] Section78dd-1 provides that the FCPA applies to all issuers, both foreign and domestic, that have registered securities or are required to file with the SEC. Section 78dd-2 applies to domestic concerns including U.S. citizens, nationals, residents, and business entities formed under U.S. law or have their principal place of business in the United States.[35] Section 78dd-3 reaches other persons or entities who act in furtherance of corrupt payments while within the United States.[36] Each part of the FCPA applies beyond the entities mentioned above, allowing enforcement against officers, directors, employees, and agents acting on behalf of the entity.[37]

Interestingly, the anti-bribery provisions of the FCPA stop short of prohibiting all payments to foreign officials in business dealings. Each of the three anti-bribery provisions contains an "exception for routine governmental action."[38] These exceptions provide that the anti-bribery provisions do not apply for any facilitating or expediting payment to a foreign official to expedite or secure the performance of routine governmental action by that foreign official.[39] For example, a payment made by a business entity to a customs officer at an international port to expedite, but not influence the outcome of, the processing of papers for a larger import of goods would likely fall under the exception for routine governmental action, provided that the officer is in a role that regularly processed the type of papers described. Although these types of payments exist on the edge of what may rise to the level of an FCPA violation, it is important to note that the exception is consistent with Article 1 of the OECD Anti-bribery Convention, which provides that "small

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[29] OECD, *supra* note 24, at 5.
[30] *Id.*
[31] The FCPA, *supra* note 1.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] The FCPA, *supra* note 1.
[38] *Id.*
[39] *Id.*

'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage.'"[40]

The accounting provisions of the FCPA work alongside the anti-bribery provisions to "strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure."[41] These accounting provisions apply to publicly traded companies and ensure transparency by requiring that they "make and keep books and records that accurately and fairly reflect the transactions of the corporation."[42] Furthermore, the companies are required to develop and maintain internal accounting controls.[43] While the accounting provisions are a crucial part of the FCPA and its goals, they are applicable beyond instances of bribery and are frequently the basis for many accounting fraud and issuer disclosure cases.[44]

While the Act is criticized for being a vague prohibition on certain types of payments to foreign officials, there is increasing clarity from enforcement agencies regarding what kind of acts would violate the FCPA. For many years, it was somewhat unclear exactly what level of conduct would rise to the level of a violation. This is especially noteworthy because in many international business operations, it is not uncommon for certain legally permissible facilitation payments to low-level foreign officials to occur in order to expedite certain routine governmental actions.[45] To assist businesses with navigating the FCPA, the DOJ and SEC published "A Resource Guide to the US Foreign Corrupt Practices Act in 2012."[46] The Resource Guide provides a significant amount of information about the FCPA and examples of the types of exchanges with foreign officials that would or would not be considered violations.[47] For example, the guide includes hypothetical scenarios regarding gifts, travel, and entertainment provided to public officials and then explains why the conduct violates the FCPA.[48] While not every type of conduct is discussed within the Resource Guide, its release represents a significant step toward the equitable application of the FCPA. This is because businesses are put on notice and may have greater awareness to take actions to avoid behavior that could result in a violation.

II. PROBLEMATIC BARGAINS: PRETRIAL DIVERSION

Most FCPA enforcement actions are resolved through pretrial diversion, namely through deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), and declinations under the DOJ FCPA Pilot Program. These agreements exist somewhere between choosing not to prosecute and seeking to obtain a conviction.[49] Unlike a plea bargain, these agreements do not require that the accused entity admit guilt or even begin litigation proceedings.[50] Resolutions under

[40] OECD, *supra* note 24, at 12.
[41] S. Rep. No. 95-114, at 7.
[42] 15 U.S.C. § 78m(b)(2)(A).
[43] 15 U.S.C. § 78m(b)(2)(B) (2015).
[44] FCPA Resource Guide, *supra* note 19, at 9.
[45] *See id.* at 40.
[46] *Id.* at 9.
[47] *Id.*
[48] *Id.* at 17.
[49] *See* FCPA Resource Guide, *supra* note 19, at 75-76.
[50] *Id.*

these pretrial diversion agreements often require the implementation of significant reform efforts to resolve the issues created by the payments. They often include substantial monetary fines, but often offer more lenient terms than a conviction.[51] Pretrial diversion is advantageous to the government because it significantly helps to lower costs and increases the efficiency of both enforcement agencies and the courts. In many contexts, pretrial diversion seemingly balances justice and pragmatism; however, current application in FCPA enforcement presents the potential for problematic outcomes.

Given that the FCPA was enacted and revised to help facilitate international anti-corruption efforts and bolster the rule of law, pretrial diversion seems to go against the spirit of the statute's origins. First, the use of pretrial diversion agreements avoids actual criminal convictions.[52] Therefore, these agreements may allow for a company undertaking severely non-compliant activities to resolve its issues without achieving proper deterrence. Additionally, pretrial diversion is administered with essentially no oversight from the judiciary, leaving open the possibility for procedural due process issues. Finally, the fines and disgorgement paid to the U.S. government serve only as a deterrent and are merely allocated to the General Fund of the U.S. Treasury, which has little direct impact on strengthening the rule of law abroad.

A. The Original Shift Toward Pretrial Diversion: DPA and NPA.

The original purpose of pretrial diversion was far removed from the context of the Foreign Corrupt Practices Act and corporate criminal enforcement in general. Initially, pretrial diversion agreements were used in cases involving juvenile offenders as a way of helping to resolve criminal violations while avoiding the developmental problems and societal stigma created by labeling juveniles as criminals.[53] The use of pretrial diversion at the federal level expanded significantly during the 1960s to curtail the significant caseload of federal prosecutions related to drug use.[54]

Before the 2000s, the use of pretrial diversion for matters related to commercial entities was incredibly rare. One of the first notable instances of a government enforcement agency offering something that resembled a pretrial diversion in the corporate context occurred in 1992 during a government treasury securities fraud investigation of Salomon Brothers, a major multinational investment bank.[55] Because Salomon Brothers fully cooperated with the government, paid substantial fines, and undertook significant reforms to ensure that future violations would not occur, the DOJ choose to forgo indictment.[56] This occurrence was highly unusual for the time. It was not until 1994 that the DOJ formally agreed to an official pretrial diversion where the government offered a DPA to Prudential Securities in return for substantial internal compliance program reforms and full cooperation.[57] The Prudential Securities agreement

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[51] *Id.*
[52] *Id.*
[53] Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005).
[54] *Id.*
[55] Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163 (2008).
[56] *Id.*
[57] Leonard Orlando, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 60 (2006).

helped shape the conditions for future deferred prosecution agreements; however, as few as eight more pretrial diversions were used to resolve corporate criminal enforcement actions during the 1990s.[58] Two probable reasons for the low initial number of pretrial diversions is because the office of the U.S. Attorney General had not issued formal guidelines on the use of pretrial diversions in the corporate context as well as the fact that traditionally prosecutorial discretion was perceived as a binary choice, to either prosecute or choose not to prosecute.[59]

Several memoranda and events that occurred at the turn of the century and in the early 2000s dramatically upended the traditional prosecution of business entities. First, in 1999 Deputy Attorney General Eric Holder circulated a memorandum titled *Federal Prosecution of Corporations*, which laid out factors that prosecutors should weigh when considering bringing charges against corporate entities.[60] These factors include: (1) the nature and severity of the offense, (2) the pervasiveness of the wrongdoing, (3) the entity's history of similar conduct, (4) any voluntary disclosure of wrongdoing and ensuing cooperation, (5) the existence of a compliance program, (6) efforts at remediation, (7) potential for collateral consequences that could harm third parties, and (8) the availability of civil or regulatory remedy.[61] While the memorandum did not specifically mention pretrial diversions, the guidelines reflected a similar rationale to situations where pretrial diversion had been utilized and set the stage for future modification.[62]

In the early 2000s, a series of high-profile corporate accounting scandals—publicly traded Enron Corporation, Tyco International, Global Crossing, ImClone, Adelphia, and MCI-WorldCom —led to the passage of the Sarbanes-Oxley Act of 2002, which created more stringent rules and penalties surrounding accounting, public disclosures, and recordkeeping.[63]

Subsequently, the government took intense action against Arthur Andersen, one of the largest accounting firms in the world at the time, and the firm primarily responsible for the accounting fraud that led to the Enron disaster.[64] Arthur Andersen refused to adopt the remedial measures in an attempt to shirk the accusations, and discussions over a deferred prosecution collapsed.[65] As a result, the company was indicted and faced immense scrutiny during the subsequent litigation.[66] The litigation and substantial penalties issued at trial ultimately forced Arthur Andersen out of business, leading to the loss of tens of thousands of jobs despite the fact that only a small number of employees were responsible for the Enron accounting fraud.[67]

The significant losses that resulted from the Arthur Andersen litigation led both corporations and the DOJ to reconsider the costs of failing to comply with government

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[58] *Id.* at 57.
[59] Spivack & Raman, *supra* note 55, at 164.
[60] Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., Federal Prosecution of Corporations, to All Component Heads and U.S. Att'ys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.
[61] *Id.*
[62] *Id.*
[63] Orland, *supra* note 57, at 50-51; *See also* Spivack & Raman, *supra* note 55, at 164-65; *See also* Orlando, *supra* note 57, at 50-51.
[64] Spivack & Raman, *supra* note 51, at 164-65.
[65] *Id.*
[66] *Id.*
[67] *Id.*

enforcement actions. Corporations saw the Arthur Andersen litigation and passage of the Sarbanes-Oxley Act as a warning and began to take more substantial steps to ensure that they complied with federal regulations. The government also saw the fallout as highly problematic because the litigation effectively caused the collapse of a major corporate entity and the loss of many American jobs. In order to avoid some of the negative outcomes associated with corporate criminal prosecutions, Deputy Attorney General Larry D. Thompson issued a memorandum in 2003 that revised the guidance of the earlier Holder memorandum by placing "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[68] Perhaps more importantly, Thompson's new directive strongly suggested federal prosecutors consider using pretrial diversion agreements to address corporate misconduct.[69]

While there have been several more recent memoranda revising guidance of corporate prosecutions, since Thompson's memorandum was released, there has been a significant shift toward the use of DPA and NPA in criminal corporate enforcement actions. Currently, these pretrial diversion tactics are the primary method of resolving corporate criminal violations.[70] The majority of recent FCPA violations are similarly resolved through a DPA, an NPA, or a plea agreement. The remaining minority of FCPA enforcement actions have been resolved through declinations under the FCPA Pilot Program, which is discussed further in section III.B.[71]

1. Non-Prosecution Agreements (NPAs)

Under an NPA, the enforcement agency maintains the right to file charges against the entity but refrains from doing so to allow the company to demonstrate "good conduct" during the term of the NPA.[72] Rather than being filed with the court like a DPA, NPAs are maintained by the parties.[73] Despite not being officially filed with courts, NPAs are made available to the public on enforcement agency webpages.[74] The requirements of an NPA often stipulate payment of a monetary penalty, waiver of the statute of limitations, cooperation with the enforcement agency, and the enactment of compliance and remediation commitments. The primary reason that a company might be offered an NPA rather than a DPA is in the case where a company voluntarily self-discloses possible violations to the government. If the entity complies with the agreement throughout its term, the DOJ does not file criminal charges.[75]

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[68] Memorandum from Larry Thompson, Deputy Att'y Gen.'s Office, Principles of Fed. Prosecution of Bus. Org. (Jan. 20, 2003), https://assets.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Clinical_Practice_Compliance_Conference/2006/Tues/501-%20Handout%201.pdf.
[69] *Id.*
[70] *See* Mike Koehler, *DOJ Prosecution of Individuals - Are Other Factors at Play?*, FCPA PROFESSOR (Sept. 22, 2011), http://www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play.
[71] FCPA RESOURCE GUIDE, *supra* note 19, at 75-8.
[72] *Id.* at 75.
[73] *Id.*
[74] *Id.*
[75] *Id.*

2. Deferred Prosecution Agreements (DPAs)

Under a DPA, the enforcing agency files a charging document with the court and simultaneously requests that the prosecution be postponed to allow the company to demonstrate "good conduct."[76] This demonstration typically involves paying a monetary penalty, waiving the statute of limitations, cooperating with the enforcement agency, and entering into compliance and remediation commitments.[77] These agreements describe the entity's conduct, level of cooperation, necessary remediation, and provide a calculation of the penalty. If the company successfully adheres to the DPA for the duration specified in the agreement, the enforcement agency will then move to dismiss the filed charges.[78] Because a DPA is actually filed with a court, the agreement could theoretically be subjected to judicial scrutiny; however, a 2009 Government Accountability Office (GAO) assessment of the role that the courts play in the DPA process concluded that meaningful judicial scrutiny was essentially nonexistent.[79]

B. The DOJ Foreign Corrupt Practices Act Pilot Program

1. The Pilot Program Generally

In 2016, the DOJ Criminal Division added another pretrial diversion option to Foreign Corrupt Practices Act enforcement actions under the FCPA Pilot Program.[80] The stated goal of the FCPA Pilot Program is to "promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs."[81] Furthermore, the FCPA Pilot Program is designed to "further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations," as well as "increase the [DOJ] Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered."[82]

Under the FCPA Pilot Program, companies would be provided certain "declination" or mitigation credits, which could take the form of a different type of disposition, a reduction in fine, or no requirement of a monitor, in exchange for timely voluntary self-disclosure, full cooperation all FCPA-related matters, and adoption of appropriate remediation measures.[83] Rather than balancing various factors for eligibility, like in the case of a DPA or an NPA negotiation, full cooperation and voluntary disclosure are required to be considered for the program.[84] Since the

[76] *Id.* at 74
[77] *Id.*
[78] *Id.*
[79] U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009), https://www.gao.gov/products/gao-10-110.
[80] U.S. DEPT. OF JUST., CRIM. DIV., Andrew Weissmann, DOJ, CRIMINAL. DIV., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 3-9.
[84] See *id.*

creation of the FCPA Pilot Program, the DOJ has used declinations to resolve fifteen of FCPA enforcement actions.[85]

2. Declinations with Disgorgement

Within the fifteen declinations that have been used to resolve Foreign Corrupt Practices Act enforcement actions, half have required "disgorgement" as a requirement for declination.[86] While most of the declinations under the FCPA Pilot Program have ultimately needed disgorgement, there is a distinction between instances where DOJ declination was contingent upon disgorgement and instances where disgorgement to the SEC occurs under a separate agreement.[87]

The first instance where a declination was seemingly contingent on disgorgement within the same agreement occurred in September 2016, when the DOJ granted "declinations with disgorgement" to two separate and unrelated entities under the FCPA Pilot Program.[88] Because the two businesses were privately held and not issuers they were not subject to the SEC's FCPA jurisdiction.[89] Rather than drafting the agreement such that the disgorgement would occur as a result of the company's actions, the disgorgement was provided as a condition of the declination.[90] The letters sent to counsel of the two companies that were subjected to the first "declinations with disgorgement," specified that the DOJ investigations found that the companies had paid bribes to foreign government officials.[91] Despite these findings, the DOJ provided the companies with declinations because both of the companies' voluntary self-disclosure, full cooperation, comprehensive internal investigation, significant remedial measures, and agreement to disgorge all profits it made from the illegal conduct to the DOJ.[92]

C. Differing Methods, but Common Problems

There are numerous reasons why pretrial diversions are a practical tool for federal enforcement agencies. As a matter of efficiency, it is far less costly to resolve enforcement actions through pretrial diversion than to engage in formal prosecutions.[93] Given the consequences of the Arthur Andersen trial that resulted in the loss of thousands of jobs as well as significant expense

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[85] *See Foreign Corrupt Practices Act, Pilot Program, Declinations*, DEPT. OF JUST., https://www.justice.gov/criminal-fraud/pilot-program/declinations (last updated March 24, 2022).
[86] *Id.*
[87] *Id.*
[88] Letter from Lorinda Laryea, Trial Att'y, Criminal Div., DOJ, to Steven A. Tyrell, Weil, Gotshal & Manges LLP, Counsel for HMT, LLC (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download https:// www.justice.gov/criminal-fraud/file/899116/download; Letter from Lauren N. Perkins, Assistant Chief, Criminal Div., DOJ, to Paul E. Coggins & Kiprian Mendrygal, Locke Lord LLP, Counsel for NCH, Corp. (Sept. 29, 2016), https:// www.justice.gov/criminal-fraud/file/899121/download.
[89] *Id.*
[90] Karen Woody, *"Declinations with Disgorgement" in FCPA Enforcement*, 51 U. MICH. J. L. REFORM 269, 286 (2018).
[91] Letter from Lorinda Laryea, Trial Att'y, Criminal Div., DOJ, to Steven A. Tyrell, Weil, Gotshal & Manges LLP, Counsel for HMT, LLC (Sept. 29, 2016), https://www.justice.gov/criminal-fraud/file/899116/download; Letter from Lauren N. Perkins, Assistant Chief, Criminal Div., DOJ, to Paul E. Coggins & Kiprian Mendrygal, Locke Lord LLP, Counsel for NCH, Corp. (Sept. 29, 2016), https:// www.justice.gov/criminal-fraud/file/899121/download.
[92] *Id.*
[93] *See* Spivack & Raman, *supra* note 51, at 164-65.

for the government enforcement agencies, it is of minimal surprise that there would be a shift toward attempting to resolve or rehabilitate companies through alternative means.[94] Pretrial diversions under DPAs, NPAs, and the DOJ FCPA Pilot Program all promote alternative and efficient means to resolve FCPA violations; however, each of these processes as they are currently structured raises significant concerns about the extent to which rule of law is benefited and limits the potential of the FCPA.

While the original intent of the FCPA was to limit business activities averse to the U.S. foreign policy goals, especially those related to strengthening the international rule of law and countering bribery, the processes used in pretrial diversion seemingly present ironic outcomes. By paying fines or a disgorgement and adopting certain practices to help avoid future violations, businesses are essentially able to pay off the US government for their misconduct. While the substantial fines are typical penalties an entity business that violates federal regulations, the resolution process seemingly misses the mark of providing an equitable result. The far-reaching effects of corrupt payments are not addressed by the resolutions, and businesses entities may escape criminal liability for egregious violations with ease through pretrial diversion, limiting both the strength of the statue as a tool for fighting corruption and its deterrent effect.

To exemplify the issues with the application of pretrial diversion in FCPA enforcement, consider the results from a recent enforcement action against WPP plc. In September 2021, WPP plc, the world's largest advertising group, agreed to pay the SEC and DOJ more than US$19 million to settle allegations that it had violated the FCPA, of which US$8 million was imposed as a penalty by the SEC.[95] This violation of the FCPA's anti-bribery, books and records, and internal accounting controls arose out of an aggressive growth strategy that involved the consolidation of numerous advertising agencies in emerging markets.[96] The company failed respond to repeated warning signs of corruption and control failures at certain subsidiaries.[97] In addition, the company's subsidiaries in China, Brazil, and Peru were also engaged in other schemes and internal accounting control deficiencies.[98] Despite these fairly significant breaches of the FCPA, the company did not have to admit guilt and still generated a U.S. $1.29 billion pre-tax profit margin.[99] While the company did adopt additional compliance programs in order to help prevent future violations, the fines paid to the SEC as a penalty seemingly fail to address the larger issues of corruption in the foreign states where the violations took place. Instead, WPP essentially paid the enforcement agency and continued business as usual.

The lack of accountably for government enforcement agencies in making determinations in FCPA enforcement is also counter to the goals of enhancing the rule of law. Having measures in place to ensure that proper justification in legal decisions and process is axiomatic to the rule of law. Pretrial diversion occurs between the government enforcement agencies and the accused entities with minimal oversight. Furthermore, violations of DPAs and NPAs are solely determined

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[94] *See Id.*
[95] *SEC Charges World's Largest Advertising Group with FCPA Violations*, SEC (Sept. 24, 2021), https://www.sec.gov/news/press-release/2021-191.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Ian Walker, *WPP 2021 Like-for-Like Net Sales Rose 12.1%*, MARKETWATCH (Feb. 24, 2022, 2:20 AM), https://www.marketwatch.com/story/wpp-2021-like-for-like-net-sales-rose-12-1-271645687207.

by the enforcement agency. The DOJ FCPA Pilot Program is perhaps even more restrictive than DPAs and NPAs, as the requirements to gain a declination are fixed and non-negotiable.

Because of the lack of judicial oversight, there are significant questions of ensuring procedural due process in FCPA enforcement. To draw a distinction, plea bargains at the minimum require that a judge confirm a factual basis for the plea, the knowing voluntariness of the defendant's plea, and may retain discretion in dictating the sentence. Although in most U.S. jurisdictions the judiciary plays a passive role in the plea-bargaining process, there is still a requisite level of oversight that facilitates procedural due process. With pretrial diversion, the entire process is removed from the judicial system and the enforcing agencies (which are executive departments) control both the discretion to bring an enforcement as well as the ability to dictate the remedial measures entirely. Thus, under the current processes, pretrial diversion practices fail to minimize the risks that outcomes are coerced, uninformed, or inconsistent with the facts of the case, even with highly sophisticated entities. These risks are even more problematic when considering that the spirit of the FCPA was designed to strengthen the international rule of law.

III. STRENGTHENING THE INTERNATIONAL RULE OF LAW IN FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT

Although there are numerous measures that could be taken to address various shortcomings in the enforcement of the Foreign Corrupt Practices Act, the recommendations provided in this note are grounded in the goal of achieving greater accountability and combating ironic outcomes that stem from lack of oversight. By working to enhance transparency in pretrial diversion during FCPA enforcement actions, the overall effectiveness of the statute as a framework for strengthening international rule of law may be enhanced.

A. Allocating a Portion of Fines and Disgorgements Collected in FCPA Enforcement Actions to Anti-corruption Initiatives

In the context of cooperate prosecutions and enforcement actions, the funds that are paid to the federal government as fines or disgorgement are generally either allocated to a victims relief fund for the particular incident or to the General Fund of the U.S. Treasury.[100] However, when enforcers utilize pretrial diversion, these payments are always allocated to the General Fund.[101] While the fines and disgorgements may serve as a meaningful deterrent for FCPA violations, the funds collected from FCPA enforcement actions could do more to help strengthen and repair the rule of law and damage to the public trust once a violation has occurred. Rather than submitting the funds to the General Fund, as is typical in a corporate enforcement action, funds collected from FCPA enforcement actions ought to be earmarked toward programming for fighting corruption and working to restore the losses of public goods that results from corruption.

In cases where pretrial diversion is utilized and victims are clearly identifiable or recorded, such as in the 2016 Wells Fargo scandal where the bank profited from opening unauthorized accounts and selling unnecessary financial products to unknowing customers, a sizable portion of

[100] 31 U.S.C. § 3302.
[101] *Id.*

the fines collected are siloed for victim relief.[102] Elsewhere, there are examples of pretrial diversion being utilized, but the harm is more general to the public. Like in the case of a violation of an environmental regulation, fines are used both as a deterrent, but also often include an agreement to cover the costs of repairing the damage created by the violation.[103] With FCPA enforcement, no such parallel of accountability for the harm created to the rule of law abroad exists. Prominent FCPA enforcements have required fines and disgorgement exceeding U.S. $1 Billion,[104] but, unlike other types of corporate enforcement actions, it does not appear that any portion of these funds are directly allocated to helping restore the damage to rule of law in areas where companies have actively facilitated corruption.

The U.S. government regularly engages in funding programs that fight against corruption and strengthen the rule of law abroad.[105] Fines collected in FCPA enforcement could still be added to the General Fund and allocated to projects through standard federal budgeting practices, but within a silo that denotes that the funds shall be used to anti-corruption programming abroad. These funds could be allocated more specifically to address issues of corruption in the country where the FCPA violation giving rise to those funds occurred as a means of helping to restore the public goods that have been harmed through a violation of the FCPA. The creation of such a fund silo would be analogous to a victims' relief fund in the case of a corporate fraud or a mandatory clean-up in the case of environmental harm in that it would help to ensure that stakeholders benefit from the FCPA enforcement action.

Although this note strongly advocates for using funds collected in FCPA enforcement actions to help fight corruption, it is important to address the fact that that these efforts can take a variety of forms beyond traditional targeted interventions and instead address root causes of corruption by working with civil society actors, nongovernmental organizations, and government agencies. Targeted anti-corruption efforts have been shown to dramatically reduce corruption where programming has been implemented; however, corruption is highly difficult to overcome

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[102] *See, e.g., Wells Fargo to Pay $500 Million for Misleading Invest. About the Success of Its Largest Bus. Unit*, SE (Feb. 21, 2020), https://www.sec.gov/news/press-release/2020-38.

[103] *See, e.g.*, *Exide Tech. Admits Role In Major Hazardous Waste Case And Agrees To Permanently Close Battery Recycling Facility In Vernon*, DOJ (Mar. 12, 2015), https://www.justice.gov/usao-cdca/pr/exide-technologies-admits-role-major-hazardous-waste-case-and-agrees-permanently-close.; *See also* FirstEnergy Nuclear Operating Co. to Pay $28 Million Relating to Operation of Davis–Besse Nuclear Power Station, DOJ (Jan. 20, 2006), https://www.justice.gov/archive/opa/pr/2006/January/06_enrd_029.html.

[104] *See e.g. Goldman Sachs Resolves Foreign Bribery Case And Agrees To Pay Over $2.9 Billion*, DOJ (Oct. 22, 2020), https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion.; *See also Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case*, DOJ (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (note that only roughly US $500 million was paid to the United States for the FCPA, the rest of the amount would be paid to other countries enforcing parallel antibribery statutes).

[105] *See, e.g., Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America*, DOJ (Oct. 15, 2021), https://www.justice.gov/opa/pr/justice-department-anticorruption-task-force-launches-new-measures-combat-corruption-central; *See also* Combating Corruption and Promoting Good Governance, Department of State Bureau of International Narcotics and Law Enforcement Affairs, https://www.state.gov/combating-corruption-and-promoting-good-governance/.

through targeted intervention once it takes hold.[106] A study of World Bank-funded development aid tenders over twelve years in over 100 developing countries found that corruption decreased in the targeted areas, but that corrupt actors took evasive actions that largely cancelled out the overall efforts of the intervention.[107] Officials receiving corrupt payments often attempt to find new avenues of receiving payments or move into different areas with weaker controls.[108] Therefore, utilizing funds to implement broader reforms and strengthen the rule of law more broadly while building integrity can have greater effect than targeted programming. By utilizing the funds collected from FCPA violations to aid in fighting against the broader issues that lead to corruption more directly, FCPA enforcement actions would further reduce corruption issues internationally.

B. Increasing Judicial Involvement in Pretrial Diversion

Increasing judicial involvement in FCPA enforcement at different stages could help alleviate many of the issues and potentially ironic outcomes associated with using pretrial diversion. In the case of DPA and NPA negotiations Peter Reilly, a professor at Texas A&M University School of Law who has written extensively on the FCPA, has argued that judicial oversight could significantly improve equity in FCPA enforcement.[109] Reilly's reasoning is logical because, unlike representatives from the DOJ or SEC, the judiciary's role is in part to ensure that all parties correctly follow procedures in a neutral manner. The benefits of utilizing the judiciary to ensure proper process and prevent abuses under the more recently developed DOJ FCPA Pilot Program are perhaps even greater because complete cooperation with enforcement agencies is required.

There are numerous ways that the judiciary could reasonably play a greater supervisory role throughout the pretrial diversion process. First, during preliminary negotiations between the entity and the enforcement agencies the judiciary could play a type of supervisory role. As a matter of pragmatism, a member of the judiciary could be available on an as-needed basis for any disputes where concerns over process arise. It would be highly inefficient to suggest an alternative that would require that a member of the judiciary to be present at each negotiation between the enforcement agency and the accused party. However, ensuring that the accused entity can call in an official to ensure that procedural rights are maintained would help improve the inherent power imbalance between the government enforcement agency and entity during negotiations.

Similar benefits have been observed where an active judiciary is involved in plea bargain negotiations. Although Rule 11 of the Federal Rules of Criminal Procedure bars judges from participation in plea negotiations or making comments that might influence the negotiations, there are jurisdictions within the United States where judges play an active role plea bargaining and similar negotiations.[110] In Connecticut, the judiciary is highly involved in plea negotiations and

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[106] Elizabeth Dávid-Barrett and Mihály Fazekas, *Anti-corruption in aid-funded procurement: Is corruption reduced or merely displaced?*, 132 World Development (2020), https://doi.org/10.1016/j.worlddev.2020.105000.
[107] *Id.*
[108] *Id.*
[109] *See* Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 402-05 (2014).; *See* Karen Woody, *supra* note 89, at 310.
[110] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54:1 AMER. J. COMP. L. (2006), 199-267, at 202, https://www.jstor.org/stable/20454489?seq=3; *See also* Fed. R. Crim. P. 11(c).

judges serve as moderator that comments on both the sentence as well as the merits of the case.[111] Parties may negotiate without the presence of a judge; however, the parties often elect to hold negotiations that are judicially moderated.[112] To protect against the potential for judicial coercion, a judge that serves during the plea negotiation process is prohibited from presiding over the trial of the same defendant if the defendant ultimately chooses not to accept the plea agreement.[113] One of the primary advantages to this system is it provides greater certainty and allows the parties to come to a more reasoned decision than would be provided under the federal system; however, there are some concerns that judges in this system have been shown to value efficiency over fairness in moderating negotiations.[114] Although the process would need to be adjusted to fit the context of an FCPA enforcement action and it is unlikely that the federal bench could reasonably be as involved as the Connecticut judiciary. However, this example provides a reasonable framework for fostering greater judicial involvement.

Second, the judiciary should be required to review pretrial diversion agreements. There are numerous analogous circumstances where judicial approval of the settlement is required. Peter Reilly has noted examples of where judicial approval of a negotiated settlement is required including: "(1) bankruptcy claims; (2) class action and shareholder derivative suit settlements; (3) environmental clean-up consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); (4) settlements of actions in which receivers are appointed; (5) consent decrees in civil antitrust suits brought by the United States; (6) settlements of employment claims under the Fair Labor Standards Act ("FLSA"); and (7) settlements in cases involving incompetent persons or minors."[115] Many of these situations reflect the government exerting its regulatory authority similarly to an FCPA enforcement action. Such review could be used to ensure that procedural rights are upheld and provide instances where an entity that has engaged in particularly egregious actions does not get off too lightly. It would not impose a significant burden on the judiciary to offer a review at this stage as FCPA enforcements are relatively rare and would draw greater parallel between the role of the judiciary in reviewing plea agreements in most U.S. jurisdictions.

Third, providing judicial oversight in pretrial diversion could help to provide guidance and information that would help to reduce the power discrepancy created by the limited amount of case law generated under recent FCPA enforcement actions. The release of the FCPA Resource Guide by the DOJ and SEC in 2012 (and updates in 2020) has provided businesses an effective tool that helps serve the purpose of demystifying whether certain types of payments rise to the level of a violation.[116] To continue to shift toward increased transparency in FCPA enforcement actions, enforcement agencies should provide more public information about the procedures used in deciding the terms of a DPA or NPA in lieu of case law. The judiciary could help to fill these gaps between publicly available documents and case law, helping to provide equitable remedies to enforcement actions. In this regard a member of the judiciary would serve in an informational

[111] *Id.*, at 247.
[112] *Id.*, at 248-49.
[113] *Id.*
[114] *Id.*, at 252-54.
[115] Peter Reilly, *supra* note 109, at 405.
[116] *See generally* FCPA RESOURCE GUIDE, *supra* note 19.

capacity that would aid in increasing transparency throughout the process of pretrial diversion negotiations.

In Florida, judges deviate slightly from Rule 11 of the Federal Rules of Criminal Procedure by often serving in an informational capacity to parties in plea negotiations to ensure that parties enter into satisfactory arrangements. Rule 3.171(d) of the Florida Rules of Criminal Procedure "allows judges to advise the parties, prior to the acceptance of a plea, whether factors unknown to the parties at the time may make the judge's concurrence to the plea impossible," meaning that judges can be more greatly involved in informing plea negotiations.[117] In order to mitigate the probability that judicial involvement in plea negotiations would prejudice the outcome of a case, the Supreme Court of Florida held in *State v. Warner* that a judge's preliminary evaluation in plea negotiations is not binding when new material facts emerge before a sentencing hearing.[118] It is worth nothing that, unlike the Connecticut judiciary, Floridian judges are not precluded from presiding over a trial that the judge assisted with in the negotiation phase if the plea is withdrawn.[119] This non-prohibition on hearing trials when the judge aided in plea negotiations seems reasonable given their more limited role of providing information to the parties. Additionally, the court has developed special procedures to mitigate coercion by weighing additional factors on a motion to disqualify a judge where the judge has engaged in the plea negotiation process.[120] These additional factors include whether the judge adhered to procedural regulations: (1) prohibiting judges from initiating plea negotiations, (2) requiring all plea related communications between the parties and judge be entered into record, (3) prohibiting a judges from stating or implying that future sentencing choices hinge on the defendant's procedural choices, and (4) allowing the defendant to challenge a potentially coercive judicial remark that has been entered into the record.[121] While the resolution process differs slightly in the case of a pretrial diversion, a similar role for judges could be envisioned for the pretrial diversion process where judges could review the negotiations and drafts of agreements to assure that the parties are fully informed of their legal standing before they formally enter into an agreement.

Finally, in a situation where an entity appears to have violated the terms of a pretrial diversion agreement, allowing for judicial involvement in reviewing the conduct observed before the company can be found in violation would ensure that the entity is given proper process as well as strengthen institutional accountability in government enforcement actions. Under the current system, the enforcement agency has the absolute authority to determine whether an entity or induvial violated the terms of a pretrial diversion agreement. When an entity has been found to have broken its NPA or DPA agreement, it triggers the potential for great financial and reputational consequences for the business entity. Because of the magnitude of potential harm, providing judicial scrutiny would limit the possibility of improper outcomes.

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[117] Turner, *supra* note 110, at 238
[118] State v. Warner, 762 So. 2d 507, 507 (Fla. 2000).
[119] *Id*.
[120] *Id.*, at 240.
[121] *Id*.

IV. CONCLUSION

Although there are significant issues with the manner that Foreign Corrupt Practices Act enforcement actions are resolved, the FCPA itself provides an essential framework for business accountability on the international stage. By improving transparency and accountability in pretrial diversion, the FCPA could be enforced in a method more consistent with its original goals in strengthening the international rule of law. Departing from the traditional process of merely allocating funds acquired in FCPA enforcement actions through fines and disgorgement to the General Fund and shifting toward a system that silos these funds for the purpose of international development and fighting corruption would do more to help offset the negative effects caused by violations. Additionally, providing greater judicial oversight throughout pretrial diversion would benefit the rule of law by ensuring procedural due process and well-reasoned outcomes in achieving resolutions to FCPA enforcement actions. Throughout the negotiation process, providing access to a member of the judiciary could offer substantial procedural protections and provide review negotiation agreements, creating meaningful oversight and additional accountability for government enforcement agencies. Working to improve the pretrial diversion process in FCPA enforcement actions would facilitate a more transparent and equitable international marketplace while facilitating global development.