UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20588

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DAVID KAY;
DOUGLAS MURPHY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL OF THE DISTRICT COURT'S DECISION

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission is the federal agency principally responsible for the civil enforcement of the federal securities laws. One of the provisions of those laws, Section 30A of the Securities Exchange Act, 15 U.S.C. 78dd-1, is one of the two anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA") involved in this criminal proceeding. The Commission is concerned that the district court's decision, dismissing the indictment for failure to state an offense, rests on an improperly narrow interpretation of the FCPA's anti-

bribery provisions – one that will hamper the Commission's and the Justice Department's efforts to enforce the anti-bribery provisions. Therefore, under Federal Rule of Appellate Procedure 29(a), the Commission submits this brief as *amicus curiae* to urge this Court to reject that interpretation.

The FCPA prohibits publicly held companies and others from making payments to foreign officials "for purposes of" inducing them to misuse their office [1] "in order to assist such [company] in obtaining or retaining business for or with, or directing business to, any person . . . ." Section 30A(a)(1) of the Exchange Act, 15 U.S.C. 78dd-1(a)(1). [2] In this case, the district court (Hittner, J.)

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[1] More precisely, the "quid pro quo" element of the FCPA's anti-bribery prohibitions encompasses payments "for purposes of": (a) "influencing any act or decision of such foreign official in his official capacity," (b) inducing such official "to do or omit to do any act in violation of [the official's] lawful duty," (c) "securing any improper advantage" or (d) inducing such official "to use his influence with a foreign government . . . to affect or influence any act or decision of such government." *See, e.g.*, Section 30A(a)(1) of the Exchange Act, 15 U.S.C. 78dd-1(a)(1). Throughout this brief, however, the quo conferred in response to an improper payment is referred to as official action or inaction or misuse of office.

[2] The FCPA includes three distinct but mostly parallel anti-bribery prohibitions: 15 U.S.C. 78dd-1(a), 15 U.S.C. 78dd-2(a), and 15 U.S.C. 78dd-3(a). In general, each provision, using (as relevant) identical language, prohibits improper payments (to foreign officials, political parties, party officials, or political candidates), but subjects different classes of payors to liability. Section 30A(a) of the Exchange Act, 15 U.S.C. 78dd-1(a), proscribes bribes by "issuers" (companies that register securities with the Commission in accordance with Section 12 of the Exchange Act, 15 U.S.C. 78l, or are required to file reports

(continued...)

ruled that the prohibition's " 'obtain or retain business' language" was not broad enough to encompass payments that the defendants, Douglas Murphy and David Kay, former officers of American Rice, Inc. ("ARI"), allegedly authorized to be made to Haitian government officials to reduce customs duties and sales taxes owed by ARI to the Haitian government. [3]

The district court arrived at this decision after characterizing the " 'obtain or retain business' " language as ambiguous -- without examining that language. Instead, the court focused on legislative history. In the court's view, that history demonstrated that "Congress has considered and rejected statutory language that would . . . cover the conduct in question here." 200 F. Supp. 2d 681, 686 (S.D.

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[2] (...continued)
under Exchange Act Section 15(d), 15 U.S.C. 78o(d)) and their officers, directors, employees, agents, and stockholders. The section is subject to civil enforcement by the Commission (criminal prosecutions under the section are brought by the Justice Department) in the same manner as other provisions of the Exchange Act. The other anti-bribery prohibitions, however, are enforced exclusively by the Justice Department, which may bring either civil or criminal proceedings to redress violative conduct. While this brief focuses on Section 30A(a) (and, specifically, on Section 30A(a)(1)), any interpretation of Section 30A(a)'s language should, as a general matter, be equally applicable to the parallel provisions, including, of course, 15 U.S.C. 78dd-2(a), the other prohibition alleged to have been violated in this case.

[3] Recently, the Commission filed a civil law enforcement action against Kay, Murphy and another person, alleging violations of, *inter alia*, Exchange Act 30A (*SEC v. Murphy*, Civ. No. H-02-2908 (Hughes) (S.D. Tex.)). The action concerns the same course of conduct as does this criminal proceeding. The action has been stayed pending this Court's decision in this appeal.

Tex. 2002) (R.E. 29-30). From that, the court concluded that the allegations in the indictment did not fall within the scope of the FCPA. The court erred and in doing so unduly limited the scope of the Act.

First, the court ignored fundamental canons of statutory construction requiring it to begin its inquiry with the text of the FCPA and to give effect to every word Congress used. Therefore, before the court turned to legislative history, it should at least have attempted to construe relevant statutory text. The court failed to do so.

Indeed, the court neglected even to *mention*, much less *interpret*, the majority of the statutory text actually at issue in this case. That language -- "in order to assist such issuer in obtaining or retaining business . . . with . . . any person" (the so-called "business purpose" element of the FCPA's anti-bribery prohibitions) – by its terms covers all cases in which a payor's objective is to *assist* an issuer in obtaining or retaining business. Therefore, prohibited bribes are not limited -- as defendants argued below and as the court apparently agreed – to those seeking official action that, *in itself, directly* results in an issuer's obtaining or retaining business (such as a governmental approval of a private contract or an award of a government contract), but also include bribes seeking official action

(such as tax reduction) which, *in turn*, will *assist* an issuer in obtaining or retaining business.

Ignoring the statutory text in favor of legislative history, the court referred to the business purpose element simply as the " 'obtain or retain business' language " (*e.g.*, R.E. 22). Had it considered the words preceding that language, "in order to assist such issuer in . . . . " (and particularly the word "assist"), the court would have concluded that bribes seeking official action favorable to an issuer's carrying on its business enterprise (such as payments to circumvent quotas, bypass licensing systems, obtain concessions, or reduce taxes) run afoul of the plain language of the anti-bribery prohibitions. A person paying such a bribe seeks to "assist" the issuer (by, for example, increasing the amount of a product available for sale or reducing an issuer's expenses of sale) in "obtaining or retaining business" (including, for example, in increasing or maintaining the quantity or dollar volume of its sales or other economic dealings). Indeed, in this case, the business purpose is clear: Kay and Murphy sought reductions in duties and taxes to reduce ARI's cost of doing of business and thereby assist ARI in getting and keeping business.

Second, the court's rationale for its holding -- one that focused on what Congress did not do (*e.g.*, it did not amend the statute to include language that

would have further emphasized the breadth of the business purpose element) – rests on a flawed understanding of the uses of legislative history as an interpretive tool and fails to appreciate the significance of what Congress did do. Thus, even had it been appropriate for the court to look beyond the language of the business purpose element in determining its breadth, legislative history confirms, rather than undermines, Congress' intent that the element is to be read, in a manner consistent with common understanding and basic economic principles, to encompass the bribes alleged in this case.

STATEMENT OF THE ISSUE

Whether payments to foreign officials to reduce customs duties and sales taxes a company owes to a foreign government "assist" the company in "obtaining or retaining business" within the meaning of the FCPA's anti-bribery prohibitions.

ARGUMENT

I. THE LANGUAGE OF THE BUSINESS PURPOSE ELEMENT PLAINLY COVERS BRIBES TO SECURE LOWER DUTIES AND TAXES.

In interpreting a statute, a court must begin and end with the text if its meaning is plain and does not lead to an absurd result. *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (citations omitted). Furthermore, unless otherwise defined, words in statutes are interpreted as having their ordinary

meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Finally, in construing statutes, courts are obliged to "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also United States v. Cyprian*, 197 F.3d 736, 739 (5th Cir. 1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)) (courts " 'assume that Congress intended each of its terms to have meaning' "). Here, the district court failed even to attempt a common sense interpretation of relevant statutory text. Indeed, the court neglected even to mention important portions of that text.

The anti-bribery provisions prohibit public companies and others from making payments to foreign officials for purposes of inducing official action or inaction "in order to assist such [company] in obtaining or retaining business . . . with . . . any person . . . ." [4] It is this quoted language, in its entirety (the "business

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[4] For example, Section 30A(a)(1) of the Exchange Act, 15 U.S.C. 78dd-1(a)(1), reads, in pertinent part:

> It shall be unlawful for any issuer . . . [or for certain persons associated with such issuer] to make use of . . . any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money . . . to--
>
> (1) any foreign official for purposes of--
>
> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(continued...)

purpose element" of the anti-bribery provision), that is at issue in this case. This language should have been – but was not – taken into account by the district court. When this language is interpreted according to its ordinary meaning, it covers all cases in which

a payor's objective is to help [5] an issuer get [6] or keep [7] business with any person.

The term "business" ordinarily is defined to mean commercial, industrial or

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4 (...continued)

> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person . . . .

5 "Assist" means to "give help or support to" (*The American Heritage Dictionary of the English Language* 109 (4th ed. 2000)). It means "to contribute to the fulfillment of a need, the furtherance of an effort, or the achievement of a purpose or end" (*id.* at 816 (synonyms at "help")). "Assist" usually implies "making a secondary contribution or acting as a subordinate" (*id.*).

6 "Obtain" is ordinarily defined to mean"to gain or attain possession or disposal of" (*Webster's Third New International Dictionary* 1559 (1993)).

7 The word "retain" is ordinarily defined to mean "to hold or continue to hold in possession or use: continue to have, use, recognize or accept: maintain in one's keeping" (*Webster's Third New International Dictionary* 1938 (1993)).

professional transactions, dealings, or intercourse [8] (which would include, of course, maintaining or increasing sales volume (quantity or dollar amount)).

In an argument apparently endorsed by the district court, however, the defendants advanced a different interpretation of the business purpose element. According to the defendants, the FCPA proscribes bribes only if they are made to secure new business or renew existing business (R. 95-96). By that narrow interpretation, defendants appeared to argue that the FCPA covers only bribes seeking official action that, *in itself, directly* results in an issuer's obtaining or retaining business (such as a governmental approval of a private contract or an award of a governmental contract).

Congress' use of the phrase "in order to assist such issuer in . . ." (and, particularly, the word "assist"), however, precludes such an interpretation. As indicated, *supra* n.5, the common sense of "assist" is "secondary contribution" and actions can assist a particular goal simply by making the eventual realization of that goal easier. Thus, when a payor seeks official action which, *in turn*, will

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[8] "Business" means "[c]ommercial, industrial, or professional dealings" (*The American Heritage Dictionary of the English Language* 252 (4th ed. 2000)); "the activity of buying and selling goods and services . . ." (*Cambridge International Dictionary of English* 178 (1995)); "transactions, dealings, or intercourse of any nature . . . but now esp. economic (as buying and selling)" (*Webster's Third New International Dictionary* 302 (1993)).

assist an issuer in getting or keeping business, its payments fall within the anti-bribery prohibitions.

In its opinion, the district court erred in failing even to mention, much less take into account, the words "in order to assist such issuer in . . .", referring instead to the business purpose element simply as the " 'obtain or retain business' language" (*e.g.*, R.E. 26). Had the court not isolated the "obtain or retain business" phrase, it would have had to conclude, consistent with common understanding, that bribes seeking official action favorable to an issuer's carrying on its business enterprise (such as payments to circumvent quotas, bypass licensing systems, obtain concessions, or reduce taxes) satisfy the business purpose element because such action makes it easier for the issuer to do more business. Thus, a person paying such a bribe seeks to "assist" the issuer (by, for example, increasing the amount of a product available for sale or reducing an issuer's expenses of sale) in "obtaining or retaining business" (including, for example, in increasing or maintaining the quantity or dollar volume of its sales or other economic dealings).

In this case, the business purpose is clear. According to allegations in the superseding indictment, in exchange for numerous bribes in a nearly two-year period, Haitian officials accepted bills of lading and other documents which

intentionally understated the amount of rice ARI imported into Haiti, thus significantly reducing ARI's sales taxes and customs duties. These reductions in taxes and duties in turn allowed ARI to reduce its cost of doing business and thereby enabled it to do more business. In sum, by seeking official action favorable to the carrying on of ARI's business enterprise, defendants sought to assist ARI in obtaining or retaining business. [9]

Basic economics and common sense demonstrate that bribes that result in reduced taxes or induce other actions favorable to an issuer's carrying on its business enterprise will satisfy the business purpose element. From an economic standpoint, bribery can reduce a firm's cost of doing business (for example, reduced taxes) or can provide other benefits (for example, obtaining a government concession). To the extent that the amount of the bribe is less than the benefit it provides, a firm paying a bribe has an advantage over firms that do not pay the bribe. *See generally*, *e.g.*, Dennis C. Mueller, *Public choice II*, 230 (1989). This

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[9] Indeed, according to anticipated testimony, defendants believed that ARI could not do business profitably in Haiti if it had to pay the full duties and taxes (R. 205, 207-08). Thus, as the Justice Department contended below (an assertion the court recited in its opinion (R.E. 20)): "Defendants' payments to reduce customs duties and sales taxes were essential to ARI to be able to conduct business in Haiti." Without the "assistance" of the reductions, then, ARI would not have "obtained or retained" *any* business in Haiti.

translates into either a cost advantage or increased business opportunities and both assist a firm in obtaining or retaining economic dealings.

Thus, for example, a bribe that improves business opportunities by reducing the barriers to enter a market allows a firm to enter a market it might not have otherwise. *See generally, e.g.,* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization*, 107-109 (1990). For firms contemplating leaving a market (for example, because of low margins), bribes that provide cost advantages (for example, lower taxes or duties) allow them to remain in markets they otherwise might leave (and thus retain business). For other firms, their sales will increase to the extent that they pass on any of the cost advantage to consumers in the form of lower prices. *See generally, e.g.,* Walter Nicholson, *Microeconomic Theory: Basic Principles and Extensions*, 413 (4th ed. 1989). In sum, under basic economic principles, bribes seeking official action favorable to a business enterprise assist the firm in obtaining or retaining business. [10]

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[10] This common sense interpretation of the business purpose element – that would hold that the element is satisfied by bribes seeking official action favorable to an issuer's business enterprise -- does not disregard the statutory language by covering any official action that merely *relates* to a company's business. For example, there may be cases in which a defendant will be able to present unrefuted evidence that its objective in seeking a tax reduction (or some other favorable official action) had nothing to do with obtaining or retaining business in the short or long run (such as when a payor's goal is to

(continued...)

Further demonstrating that the business purpose element should be read to cover the bribes alleged in this case is the element's statutory context. *See United States v. Lowe*, 118 F.3d 399, 402-03 (5th Cir. 1997) (in determining whether the meaning of statutory language is plain, inquiry is not limited to discerning the meaning of individual terms; instead meaning is drawn from context and a term is not considered ambiguous -- even though it may be susceptible to different interpretations -- when the context eliminates all but one of the meanings). As the Justice Department correctly urges (Br. 9), the defendants' interpretation of the business purpose element renders another aspect of the anti-bribery prohibitions superfluous. As a consequence, that interpretation should be rejected.

As is apparent from the anti-bribery prohibition of Section 30A(a)(1), for example, it actually has two "purpose" elements. The first -- the quid pro quo element -- requires that the payment be made "for purposes of" influencing "any act or decision of [a] foreign official in his official capacity," inducing a foreign

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[10] (...continued)
issue dividends as it winds down its business operations). In such cases, a trier of fact might not find violations since the trier would have to find that the bribe was paid to help the issuer get or keep business. But the Commission or the criminal prosecutor should not have to negate the possibility of such a rare situation in pleadings (the civil complaint or the indictment) or at trial. Established principles concerning the sufficiency of pleadings and the availability of evidentiary inferences and presumptions should satisfy the pleading or evidentiary burden.

official "to do or omit to do any act in violation of the lawful duty of such official," securing "any improper advantage," or "inducing such foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government . . . ." The second "purpose" element -- the business purpose element -- requires that the ultimate objective of the payment must be to assist the issuer in obtaining or retaining business.

The defendants' (and, presumably, the court's) reading of the business purpose element renders the first purpose element superfluous because it limits the FCPA's anti-bribery coverage to payments for official actions (or inaction) that directly or proximately result in the award or renewal of contracts or other pieces of business. Had Congress intended this type of direct link, it could have simply omitted the quid pro quo element and prohibited payments to foreign officials "for purposes of obtaining or retaining business . . . ." Congress, however, described the conduct to be performed by the official in response to the bribe (the quid pro quo element) separately from the payor's ultimate objective of obtaining or retaining business (the business purpose element). In addition, Congress linked the quid pro quo element to "obtaining or retaining business" through use of the words "in order to assist." The context thus makes clear that the statutory

language prohibits bribes seeking official action that indirectly enables an issuer to obtain or retain business.

The Commission also agrees with the Justice Department when it argues (Br. 10-11) that the presence of another provision of the FCPA provides further support for a reading of the business purpose element that covers the bribes alleged in this case. That provision, set out at, *e.g.*, 15 U.S.C. 78dd-1(b), excepts from the coverage of the anti-bribery prohibitions "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . . ." [11] Congress further defined "routine governmental action" to mean:

> only an action which is ordinarily and commonly performed by a foreign official in–

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[11] Facilitating payments are given to secure or accelerate performance of a non-discretionary act an official is already obligated to perform without the payment. *See* H.R. Rep. No. 100-40, pt. 2, at 76 (1987) (describing "grease" payments as "small payments . . . demanded by relatively low-level foreign government employees before they will even properly perform the duties for which they are responsible, such as processing applications"). Congress always intended that such payments -- for example, those that were made with the goal of expediting shipments through customs -- would be excepted from the FCPA's anti-bribery prohibitions. *See, e.g.*, H.R. Rep. No. 95-640, at 8 (1977). As we explain below at pp. 21-22, however, Congress failed to implement its intent in 1977, when it enacted the FCPA. Not until 1988, when it enacted this "routine governmental action" exception to the anti-bribery prohibitions, did Congress implement its intent.

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> (v) actions of a similar nature.

e.g., 15 U.S.C. 78dd-1(f)(3)(A).

The facilitating payments identified in the statute are thus payments for official actions, many of which (*e.g.*, providing police protection, phone service) could not, and all of which likely would not, directly result in the acquisition or renewal of a specific piece of business. Therefore, because the exception would be unnecessary under defendants' reading of the business purpose element, basic canons of statutory construction rule out that reading (*see, e.g.*, *United States v. Cyprian*, 197 F.3d at 739 (courts assume statutory terms have meaning)).

II. THE LEGISLATIVE HISTORY OF THE FCPA CONFIRMS THAT THE BUSINESS PURPOSE ELEMENT COVERS BRIBES TO SECURE LOWER DUTIES AND TAXES.

In the Commission's view, this Court need not look beyond the language of the business purpose element in determining that the element encompasses the payments alleged in this case. If, however, any uncertainty remains after

examining the statutory text, it is dispelled by the legislative history of the FCPA and the policies the Act advances. The Act's history and goals confirm that Congress intended the element to be read, in a manner consistent with common understanding and basic economic principles, to encompass bribes made to secure official action favorable to an issuer's carrying on its business enterprise.

A. *Enactment of the FCPA.* The FCPA has been labeled a creature of "post-Watergate morality." Laura Longobardi, *Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act?* 20 Vand. J. Transnat'l L. 431, 433 (1987). Following up on the findings of the Watergate special prosecutor concerning illegal campaign contributions, the Commission undertook to investigate questionable and illegal payments by corporations. *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, reprinted in* Sec. Reg. & L. Rep. (BNA) (Special Supp. May 19, 1976). The investigation and a voluntary disclosure program revealed a widespread incidence of questionable corporate payments to foreign officials running the "gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments

that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties." H.R. Rep. No. 95-640, at 4 (1977). [12]

Congress was gravely concerned about bribes to foreign officials, viewing the payments as immoral, unethical, unwise from a business standpoint, inimical to the principles of free and fair competition, and a threat to the conduct of the nation's foreign policy. S. Rep. No. 95-114, at 3-4 (1977); H.R. Rep. No. 95-640, at 4-5. Based on these findings, Congress enacted the FCPA to bring "corrupt practices to a halt and to restore public confidence in the integrity of the American business system." S. Rep. No. 95-114, at 4. In sum, as the Ninth Circuit has recognized, the FCPA represents "a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983).

As it emerged from the Conference Committee, the substitute bill that ultimately became the FCPA included anti-bribery prohibitions substantially

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[12] One particularly high-profile instance of bribery involved payments by United Brands to government officials in Honduras to reduce taxes on banana exports. The notoriety of the United Brands scandal was heightened by the suicide of the company's CEO Eli Black (who had authorized the bribery) on the eve of its public disclosure. In 1976, the Commission brought an injunctive action against United Brands alleging, among other things, violations of the antifraud and reporting requirements of the Exchange Act. *SEC v. United Brands Co.*, [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420 (D.D.C. Jan. 27, 1976) (consent judgment).

similar to the current versions – that is, they proscribed payments to foreign officials (and others) to induce official action or inaction (the quid pro quo element), in order to assist issuers in obtaining or retaining business (the business purpose element). *See* H.R. Conf. Rep. No. 95-831, at 12 (1977) (stating that "the conferees clarified the scope of the [anti-bribery] prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) . . . so as to assist an issuer in obtaining, retaining or directing business to any person"). The bill incorporated some but not all aspects of both House (H.R. 3815) and Senate (S. 305) precursors.

The House bill (H.R. 3815, 95th Cong., § 2(a) (1977)) had included, as relevant, quid pro quo language that required that the payment be made "for purposes of . . . influencing any act or decision of such foreign official in his official capacity" but had not included the business purpose element. That element was included in the Senate's version. Its version proscribed payments made "for the purpose of inducing [the foreign official] . . . to use his influence with a foreign government or instrumentality, or . . . to fail to perform his official functions, to assist such issuer in obtaining or retaining business for or with, or directing business to, any person *or* influencing legislation or regulations of that

government or instrumentality." S. 305, 95th Cong., § 103 (1977) (emphasis added).

In enacting the anti-bribery prohibitions, Congress passed "[t]he House version which provided that the corrupt purpose must be to influence any official act or decision . . . with the modification [from the Senate version] that the bribe must also be to retain or obtain business." 123 Cong. Rec. H12824 (daily ed. Dec. 7, 1977) (remarks of Rep. Staggers). The conclusion that the district court drew from this legislative history -- that the Conference Committee's drafting choices weigh against a broad reading of the anti-bribery prohibitions (R.E. 24) – is in error.

First, as a matter of fact, the district court inaccurately recited those choices. The substitute bill did not, as the district court stated, reject the House proposal to prohibit payments to influence "any act or decision of such foreign official in his official capacity." Instead, the substitute bill included this *very broad language* in its entirety in the quid pro quo element and limited it only by the business purpose element. Second, although the substitute bill did not include the Senate's proposal to prohibit payments for the purpose of inducing official action "to assist such issuer in . . . influencing legislation or regulations of that government," this does not mean that Congress intended the "obtaining or retaining business" language to

have a narrow, extraordinary meaning. At most, rejection of the "influencing legislation or regulations" language signalled Congress' intent that only business-linked bribes would be prohibited by the FCPA: that rejection in no way defined how close that link needs to be – the issue here.

B. *1988 Amendments.* The district court also erred in concluding (*see* R.E. 25-29) that Congress' 1988 rejection of a proposal to amend the business purpose element cuts against giving the element its ordinary meaning. Rather than focusing on Congress' inaction, the court should have considered Congress' contemporaneous action in crafting the "routine governmental action" exception, which confirmed the broad reach of the business purpose element. Indeed, in light of this action, commentary in a House Committee Report emphasizing the breadth of the business purpose element provides significant support for an interpretation of the FCPA that reaches the payments alleged in this case.

In proposing to amend the FCPA in 1988, the Conference Committee determined not to include an amendment, proposed by the House, that would expressly have stated that proscribed payments were those made for purposes of influencing official action in order "to assist such issuer in obtaining or retaining business . . ., including the procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government." H.R. 3,

100th Cong., §701(a). Because the Conference Committee rejected this proposal, the court declined to give any deference to the conferees' contemporaneous statement that

> the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment . . . .

H.R. Conf. Rep. No. 100-576, at 918 (1988). The court reasoned that Congress' rejection of the House proposal did not involve an "enactment[] of a subsequent Congress that would serve as guidance for the FCPA's original 'obtain or retain business' language." R.E. 27. Accordingly, the court held to be inapposite precedent holding that subsequent enactments of Congress are entitled to great weight in construing prior acts. *Id.* [13]

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[13] Indeed, it appears that the court did more than just decline to give deference to the conferees' statement -- it also attributed interpretive significance to what it viewed as a failed legislative proposal (*see* R.E. 29 (the court "finds that the 1988 Congress considered and rejected expansion" of the business purpose element)). The court erred. Even if Congress had not acted in a way that necessarily reflected its understanding of the breadth of the business purpose element, its non-action could not support the court's decision. As the Supreme Court has stated, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute' . . . [in] (continued...)

But Congress did act in 1988 and did so in a way that was necessarily based, at least in part, on its understanding of the breadth of the anti-bribery prohibitions in general and the business purpose element in particular. It enacted the "routine governmental action" exception, discussed above at pp. 14-15, against a backdrop of criticism that it had failed, in 1977, to effectuate its intent to exclude facilitating or "grease" payments from FCPA coverage. *See* n.11 *supra*; *see also* H.R. Rep. No. 100-40, pt. 2, at 76 (1987) (describing Congress' intent in 1977 to exclude petty corruption from FCPA coverage); *id*. at 77 ("there has been some criticism that the current statutory language does not clearly reflect Congressional intent and the boundaries of prohibited conduct"). [14] The history of this amendment thus

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[13] (...continued)
that ' "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" " *United States v. Craft*, 122 S.Ct. 1414, 1425 (2002) (quotation omitted).

[14] In 1977, Congress sought to except grease payments primarily by defining the term "foreign official" to exclude persons with "essentially ministerial or clerical" duties. *See* Pub. L. No. 95-213, § 103(a); *see also* H.R. Rep. No. 100-40, pt. 2, at 76 (1987). In practice, however, this approach proved problematic because issuers had difficulty determining, among other things, whether a foreign official's duties were "essentially" ministerial or clerical and, perhaps more fundamentally, because the approach delimited excluded payments by reference to the recipient rather than the purpose. H.R. Rep. No. 100-40, pt. 2, at 77*; see* Arthur Aronoff, *Antibribery Provisions of the Foreign Corrupt Practices Act*, 863 PLI/Corp. 47, 53 (1994). As a consequence, in 1988, in an effort to
(continued...)

shows that Congress recognized that the anti-bribery prohibitions had been read to cover the listed grease payments and, therefore, that it was necessary to include a specific exception for these sorts of payments.

Under these circumstances, the conferees' articulation of the meaning of the anti-bribery prohibitions' business purpose element is entitled to deference. As the Supreme Court has recognized, "the views of a Congress engaged in the amendment of existing law as to the intent behind that law are 'entitled to significant weight.' " *Bufferd v. Commissioner of Internal Revenue*, 506 U.S. 523, 530 n.10 (1993) (quoting *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980)). *See Bell v. New Jersey*, 461 U.S. 773, 785 n.12 (1983) (quoting *Mount Sinai Hospital v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975)) (Congress is " 'at its most authoritative, [when it is] adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely

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[14] (...continued)
effectuate its intent that "petty corruption" be excepted from the anti-bribery prohibitions, Congress amended the law to describe "the type of conduct that is outside the scope of the FCPA." H.R. Rep. No. 100-40, pt. 2, at 77; *see id.* at 53 (describing proposed amendments that ultimately ripened into legislation as an attempt to make "clear that certain kinds of payments are not intended to be within the scope of the general prohibitions under the FCPA" including those for "certain kinds of routine actions, such as processing work orders and loading and unloading cargoes").

expressing an opinion . . . but is acting on what it understands its own prior acts to mean.' ").

C. *1998 Amendments.* Finally, the court erred in concluding that Congress' actions in 1998 also support a narrow reading of the business purpose element. The 1998 amendments to the FCPA responded to the call of the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention") for all parties to make it a criminal offense "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." OECD Convention, art. 1(1), *reprinted in* 37 I.L.M. 1, 4 (1998). In implementing this article of the convention, Congress chose to insert the "improper advantage" language into the quid pro quo element of the anti-bribery prohibitions rather than to make it part of the business purpose element (*see* nn.1, 4 *supra*).

As the legislative history makes clear, however, the drafters of this amendment believed that it implemented the OECD Convention and, indeed, that

it "expand[ed] the FCPA's scope to include payments made to secure 'any improper advantage,' the language used in the OECD Convention." S. Rep. No. 105-277, at 2 (1998). In any event, at least insofar as the business purpose element is concerned, the court erred in according interpretive significance to Congress' failure to amend the element in response to the OECD Convention (*see* R.E. 29). This is so because at least one inference to be drawn from that inaction -- that the element already incorporated bribes made to secure "any improper advantage in the conduct of international business" -- is equally as reasonable as any other inference (*see* n.13 *supra*).

CONCLUSION

For the foregoing reasons, the Commission urges the Court to reverse the district court's decision. The Court should reject the district court's unduly narrow construction of the FCPA – supported by neither the language of the statute nor its legislative history -- and hold that the bribes alleged in this case fall within the scope of the FCPA's business purpose element.

Respectfully submitted,

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September 2002

CERTIFICATE OF SERVICE

I, Rada Potts, hereby certify that on September 10, 2002, I caused to be dispatched via overnight courier to the Clerk of the United States Court of Appeals for the Fifth Circuit the original and seven copies of the Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Appellant and Urging Reversal of the District Court's Decision, together with one computer readable disk copy of the brief and my notice of appearance. I also certify that on September 10, 2002, I caused to be served two copies of the Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Appellant and Urging Reversal of the District Court's Decision, together with one computer readable disk copy of the brief and my notice of appearance upon counsel for each of the following parties as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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