



No. 411

To: Clients and Friends

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### Supreme Court Lets Stand an Expansive Ruling on the Scope of the FCPA

The Supreme Court has refused to review the Fifth Circuit's holding in a celebrated FCPA case that the Foreign Corrupt Practices Act's prohibition on making bribes to assist someone in "obtaining or retaining business" applies to bribes paid to customs officials to secure lower import duties. The defendants in that case, David Kay and Douglas Murphy, made payments to Haitian customs officials to get them to accept understatements of the amount of rice being imported into Haiti so as to lower the overall tariff bill on the imports. See International Regulatory Bulletin No. 392.

In their petition for Supreme Court review, the defendants argued that the term "obtaining or retaining business" was too vague to permit it to be construed as applying to bribes paid to secure lower taxes or duties. They also argued that obtaining lower taxes or duties was not the same as obtaining or retaining business in any event. In opposing the petition for review, the Solicitor General argued that the FCPA should be construed to cover bribes paid to secure any action that assists the briber in obtaining or retaining business. Under that contention, a wide range of activities that help someone get or keep business, including activities that make the business more profitable, as do lower import duties, for example, could be covered.

The Supreme Court's refusal to hear the case means that the Fifth Circuit's holding is now the law of the land in the Fifth Circuit at least. Whether it will be followed in other circuits remains to be seen.

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