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PROTECTING DEFENSE CONTRACTING WITH A PURPOSE: INTERPRETING CIVIL LIABILITY UNDER THE ANTI-KICKBACK ACT

Abstract: The Department of Defense awards over \$600 billion in government defense contracts to private contractors every year. The magnitude of these awards and the structure of defense contracts place the government at serious risk if fraud and misrepresentation are not adequately regulated and prosecuted. The Anti-Kickback Act of 1986 seeks to protect the government from fraud by imposing damages on prime contractors that either accept kickbacks or include the cost of kickbacks in their contract prices. The Act's civil liability provision provides for direct and vicarious liability against prime contractor corporations whose employees or subcontractors engage in kickback activity. Recently, conflicting interpretations have surfaced regarding the extent of vicarious liability damages under the Act's civil liability provision. This Note argues that the textual ambiguity and inconclusive legislative history surrounding the civil liability provision require that the provision be interpreted and applied in light of the Act's purpose and goals. Accordingly, this Note argues that the civil liability provision should be interpreted to limit vicarious liability damages against prime contractor corporations. This interpretation satisfies the Act's purpose and goals and avoids the substantial risks created by expanding vicarious liability damages. Most significantly, limiting vicarious liability damages appropriately protects the government's interest, maintains the role of prime contractor corporations, and preserves the market for government defense contracts.

INTRODUCTION

On September 30, 2014, the Department of Defense awarded over \$2.5 billion in defense contracts to private contractors.¹ Awards of this magnitude occur daily, placing the federal government at serious risk if fraud and misrepresentation are not closely regulated and prosecuted.² The Defense Contract Audit Agency ("DCAA") serves as the entity charged with auditing government de-

¹ See *Contracts for Tuesday, September 30, 2014*, U.S. DEP'T OF DEF. (Sept. 30, 2014), <http://www.defense.gov/Contracts/Contract.aspx?ContractID=5387>, archived at <http://perma.cc/6UD9-QYRX>.

² See *id.* Furthermore, given the cost and efficiency concerns of such extensive regulatory schemes, it is crucial that the government have recourse in the event that fraud and misrepresentation occur. See INSPECTOR GEN., U.S. DEP'T OF DEF., SEMI-ANNUAL REPORT TO THE CONGRESS, at iii, 94 (2014), available at http://www.dodig.mil/pubs/sar/SAR_MAR_2014_FINAL_compliant.pdf, archived at <http://perma.cc/4DQV-AAL2> (disclosing that, between October 1, 2013, and March 31, 2014, the Office of the Inspector General issued 83 reports of misconduct and identified \$23.5 billion in potential monetary losses to the government as a result of that misconduct).

fense contracts and investigating fraud in the contracting and bidding process.³ When the DCAA identifies fraud or misrepresentation on a defense contract, the U.S. Department of Justice (“DOJ”) then has the power to pursue civil and criminal actions against the government contractor.⁴

Fraud in federal defense contracting can occur either when bribes are paid directly to the government or when kickbacks are given to contractors to induce favorable subcontract treatment.⁵ The first form of fraud involves payments made to employees or officials of the government to induce favorable government treatment.⁶ The second form involves bribes given to any prime contractor that has a contractual relationship with the government.⁷ The DOJ prosecutes private contractors involved in this second form of fraud under the Anti-Kickback Act of 1986 (“Anti-Kickback Act”).⁸ The Anti-Kickback Act imposes penalties on prime contractors when they solicit or accept kickbacks on government contracts, or when they include the cost of kickbacks in their contract prices.⁹

³ DEF. CONTRACT AUDIT AGENCY, 2013 YEAR IN REVIEW 13 (2014), available at http://www.dcaa.mil/publications/DCAA_2013_Year_in_Review.pdf, archived at <http://perma.cc/D5M5-G6TB>. The DCAA conducts a range of audits including pre-award contract audits, post-award contract audits, business system audits, and negotiation assistance audits. *Id.* In its 2013 annual report, the DCAA announced that it examined \$160 billion in contract costs, resulting in \$4.4 billion in net savings to the government. *Id.* These net savings correspond to a return on taxpayer investment of approximately \$7.30 per dollar invested. *Id.*

⁴ See 18 U.S.C. § 201 (2012); 31 U.S.C. §§ 3729–3731 (2012); 41 U.S.C. §§ 8701–8706 (2012) (formerly codified at 41 U.S.C. §§ 52–58 (2006)). To prosecute defense contract fraud, the DOJ primarily uses the federal anti-bribery statute, 18 U.S.C. § 201, the False Claims Act (FCA), 31 U.S.C. §§ 3729–3731, and the Anti-Kickback Act, 41 U.S.C. §§ 8701–8706.

⁵ See 18 U.S.C. § 201 (making it unlawful to corruptly give, offer, or promise anything of value to any public official or person who has been selected to be a public official); 31 U.S.C. § 3729 (making it unlawful to present a false or fraudulent claim for payment from the government); 41 U.S.C. § 8702 (making it unlawful to provide, offer, solicit, or accept a kickback or include a kickback in a contract price).

⁶ See 18 U.S.C. § 201; *United States v. Jefferson*, 674 F.3d 332, 341–55 (4th Cir. 2012) (affirming the conviction of a Louisiana congressman for multiple bribery and fraud schemes in violation of 18 U.S.C. § 201); *United States v. Johnson*, 621 F.2d 1073, 1075–77 (10th Cir. 1980) (affirming a conviction under 18 U.S.C. § 201 for bribing a Federal Aviation Administration procurement agent).

⁷ See 41 U.S.C. §§ 8701–8706. Although recent cases sometimes refer to the Anti-Kickback Act under its original codification, 41 U.S.C. §§ 52–58, this Note refers to the current codification under Sections 8701–8706 of Title 41 of the United States Code. See 41 U.S.C. §§ 52–58 (2006); 41 U.S.C. §§ 8701–8706 (2012).

⁸ See 41 U.S.C. §§ 8701–8706; *United States v. Lippert*, 148 F.3d 974, 976–78 (8th Cir. 1998) (using the Anti-Kickback Act to prosecute kickbacks from shipping subcontractors); *United States v. Kruse*, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) (using the Anti-Kickback Act to prosecute kickbacks used to ensure the continued awarding of subcontracts).

⁹ 41 U.S.C. § 8701(4)–(5). The Anti-Kickback Act defines a “prime contractor” as anyone who enters into a contract or contractual action with the federal government to obtain supplies, materials, equipment, or services of any kind. *Id.* Prime contractors are liable for kickbacks under the civil liability provision and the criminal penalties provision of the Act. *Id.* §§ 8706–8707. “Kickbacks” are defined to include compensation of any kind provided “to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.” *Id.* § 8701(2).

Originally enacted in 1946 in response to reports of kickbacks during World War II, the Anti-Kickback Act was amended forty years later to reflect the increasingly large volume of government defense contracts.¹⁰ The amended Anti-Kickback Act expounds three main goals in seeking to protect the government's interest and the role of prime contractors.¹¹ First, the Act aims to deter prime contractors from overcharging the government as a result of kickbacks and to compensate the government in the event of a kickback.¹² Second, the Act attempts to maintain market efficiency by ensuring that prime contractors enter into subcontracts on the basis of expertise and cost-efficiency.¹³ Finally, the Act

¹⁰ See Act of Mar. 8, 1946, ch. 80, 60 Stat. 37 (formerly codified at 41 U.S.C. §§ 52–58 (2006)); Anti-Kickback Act of 1986, Pub. L. 99-634, § 2(a), 100 Stat. 3523 (codified as amended at 41 U.S.C. §§ 8701–8706) (amending the original Act). The Anti-Kickback Act was originally enacted in 1946 in response to reports that a significant number of large defense subcontractors had provided kickbacks to prime contractors to gain valuable military subcontracts during World War II. See 60 Stat. 37; United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc. (*KBR II*), 727 F.3d 343, 346 (5th Cir. 2013) (explaining the influx of kickbacks that led to the original Act's enactment). The Anti-Kickback Act was amended in 1986 to address efficiency concerns in light of the increasingly large volume of government defense contracts. See Pub. L. 99-634, § 2(a), 100 Stat. 3523; H.R. REP. NO. 99-964, at 3–4 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5960–61. In a statement given to the Legislation and National Security Committee, Congressman Bryant described the original statute as being “full of loopholes, limitations and relics of a bygone contracting era that have not kept pace with changes in contracting practices.” *Id.* at 8, 1986 U.S.C.C.A.N. at 5967. Although U.S. defense spending has significantly dropped since the post-WWII era, it still accounted for \$619 billion in 2013. DINAH WALKER, COUNCIL ON FOREIGN RELATIONS, TRENDS IN U.S. MILITARY SPENDING I (2014), available at http://i.cfr.org/content/publications/attachments/Trends%20in%20US%20Military%20Spending%20202014_final.pdf, archived at <http://perma.cc/5SLE-V39V>. Given the level of defense spending in the United States, there is a large incentive for subcontractors to provide kickbacks to obtain these lucrative contracts from prime contractors. See *id.* To account for these perverse incentives, the amended Act includes heightened regulatory requirements and procedures for prime contractors. 41 U.S.C. § 8703(a)–(c). The Anti-Kickback Act imposes (a) requirements included in contracts, (b) full cooperation requirements, and (c) reporting requirements on prime contractors that obtain defense contracts with the United States. See *id.* These requirements apply to all contracts that exceed \$100,000 in value. *Id.* § 8703(d). Specifically, prime contractors must implement internal procedures to monitor and prevent kickbacks and comply with all government kickback investigations. *Id.* § 8703(a)–(b). Furthermore, prime contractors are required to report any suspected kickbacks to the government. *Id.* § 8703(c). Along with these heightened regulatory responsibilities, prime contractors can also be subject to civil liability if their employee, a subcontractor, or a subcontractor's employee offers, solicits, or accepts a kickback on a government defense contract. *Id.* § 8706(a).

¹¹ See H.R. REP. NO. 99-964, at 4–5, 1986 U.S.C.C.A.N. at 5960–62.

¹² See *id.* (explaining that increased deterrence and compensation are necessary to combat the enormous magnitude of kickbacks included in government contract prices); see also United States v. Sperry Corp., 493 U.S. 52, 54–57 (1989) (overcharging the government by applying over-budget costs from one contract to another under-budget contract); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541–43 (1943) (overcharging the government through collusive bidding); United States v. Sys. Architects, Inc., 757 F.2d 373, 374–76 (1st Cir. 1985) (overcharging the government by shifting costs between projects); Allyson Dunn, *Government Contract Fraud*, 24 AM. CRIM. L. REV. 603, 607–08 (1987) (collecting sources).

¹³ See H.R. REP. NO. 99-964, at 4–5, 1986 U.S.C.C.A.N. at 5960–62 (describing how kickbacks and inefficient subcontractor selection can greatly harm the defense contract market).

is designed to create a regulatory structure that will impose appropriate levels of risk on prime contractors.¹⁴

Recent debate concerning civil liability under the Anti-Kickback Act has exposed a challenge to the Act's ability to achieve its intended goals.¹⁵ Despite the longstanding majority view that the Act limits prime contractor vicarious liability, at least one court has recently taken a different approach and substantially broadened vicarious liability for prime contractors.¹⁶ This Note argues that because established methods of statutory interpretation do not uncover a preferred interpretation, the statute should be interpreted in light of its purpose and purported goals.¹⁷ Part I presents the civil liability provision of the Anti-Kickback Act and the conflicting interpretations of prime contractor vicarious liability.¹⁸ Part II examines the text and legislative history of the civil liability provision and concludes that the provision should be interpreted and applied in light of the Act's stated purpose and goals.¹⁹ Finally, Part III investigates the three main goals of the Act and argues that the provision should limit prime contractor vicarious liability to avoid creating substantial risks and undermining the purpose of the statute.²⁰

I. INTERPRETIVE DEBATE: THE ANTI-KICKBACK ACT'S CIVIL LIABILITY PROVISION

The Anti-Kickback Act's amended civil liability provision serves as one of the DOJ's primary sources of recourse against prime contractors.²¹ The civil lia-

¹⁴ See *id.* (discussing the need for a regulatory regime that imposes risks on prime contractors without making government defense contracts unprofitable through the imposition of an excessive risk of increased liability costs).

¹⁵ Compare *KBR II*, 727 F.3d at 347–49 (making available a recovery of damages equal to double the amount of the kickback plus additional penalties for reoccurrence), with H.R. REP. NO. 99-964, at 4–5, 1986 U.S.C.C.A.N. at 5960–62 (explaining that, although the Anti-Kickback Act aims to adequately compensate the government, it is important to avoid placing a disproportionate risk on prime contractors by applying excessive damages).

¹⁶ See *KBR II*, 727 F.3d at 347–49 (overturning the district court and departing from the longstanding tradition of reading Section 8706(a) of the Anti-Kickback Act as providing a limited vicarious liability remedy).

¹⁷ See *infra* notes 97–165 and accompanying text; see also H.R. REP. NO. 99-964, at 4–5 (1986), as reprinted in 1986 U.S.C.C.A.N. at 5960–62 (listing the stated purpose and goals of the Anti-Kickback Act).

¹⁸ See *infra* notes 21–66 and accompanying text.

¹⁹ See *infra* note 67–96 and accompanying text.

²⁰ See *infra* note 97–165 and accompanying text.

²¹ 41 U.S.C. § 8706 (2012). The Anti-Kickback Act's civil liability provision reads as follows:

- (a) Amount.—The Federal Government in a civil action may recover from a person—
- (1) that knowingly engages in conduct prohibited by section 8702 of this title a civil penalty equal to—
 - (A) twice the amount of each kickback involved in the violation; and
 - (B) not more than \$10,000 for each occurrence of prohibited conduct; and

bility provision is a key component in successful defense contract fraud prosecutions because it imposes vicarious liability on prime contractors.²² The extent of available vicarious liability damages now turns on conflicting interpretations of that provision.²³ This Part presents the conflicting interpretations of vicarious liability under the civil liability provision.²⁴ First, Section A presents the expanded coverage and sanctions available under the current version of the civil liability provision.²⁵ Then, Section B presents the conflicting interpretations of vicarious liability damages under the civil liability provision.²⁶

A. Section 8706: The Anti-Kickback Act's Civil Liability Provision

The Anti-Kickback Act's civil liability provision is designed to prevent prime contractors from accepting kickbacks when entering into subcontracts under government defense contracts.²⁷ The original 1946 version of the Anti-Kickback Act provided the government with limited civil remedies, allowing damages only in the amount of the kickback and only from the individual that gave or received the kickback.²⁸ The original Act thus had little impact on dis-

(2) whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.

Id.

²² *Id.* (expanding the coverage of the Anti-Kickback Act of 1946 to allow for vicarious liability damages in civil liability prosecutions).

²³ Compare *KBR II*, 727 F.3d at 347–48 (interpreting the civil liability provision to allow for vicarious liability damages in excess of the amount of the kickback), with *Kruse*, 101 F. Supp. 2d at 414 (limiting vicarious liability under the civil liability provision to the amount of the kickback).

²⁴ See *infra* notes 27–66 and accompanying text.

²⁵ See *infra* notes 27–38 and accompanying text.

²⁶ See *infra* notes 39–66 and accompanying text.

²⁷ See 41 U.S.C. § 8706(a); H.R. REP. NO. 99-964, at 4–7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5960–64 (explaining that kickbacks are made to improperly induce or reward a variety of contract-related actions, including the award of a subcontract, disqualification of other competitive bids, acceptance of inferior products, or the modification of the contract). When a prime contractor enters into a contract with the federal government, that prime contractor is often entitled to enter into subcontracts and include those costs into its contract with the government. See *Guide to DoD Contracting Opportunities: A Step by Step Approach to the DoD Marketplace*, DEF. PROCUREMENT & ACQUISITION POLICY 3–4 (June 2, 2014), [http://www.acq.osd.mil/dpap/cpic/cp/docs/Doing_Business_with_DoD_\(2Jun14\).pdf](http://www.acq.osd.mil/dpap/cpic/cp/docs/Doing_Business_with_DoD_(2Jun14).pdf), archived at <http://perma.cc/KZD2-JS97>. The civil liability provision of the Anti-Kickback Act is aimed at prohibiting the prime contractor, or its employees, from accepting kickbacks in those subcontracts. 41 U.S.C. § 8706.

²⁸ See H.R. REP. NO. 99-964, at 7–9, 1986 U.S.C.C.A.N. 5960–64 (explaining that the original Act was deficient and needed to be amended to expand the coverage, increase sanctions, and allow for vicarious liability). Under the regulatory scheme of the original Act, prime contractors were protected from liability so long as the prime contractor did not accept the kickback in its individual capacity. See W.J. Kelly, *The Administrative Recovery of Kickbacks—A Modest Suggestion*, 6 A.F. L. REV. 35, 36 (1964) (explaining the process of recovering kickbacks prior to the 1986 amendments). As a result, prime contractors and subcontractors began utilizing more elaborate kickback schemes, rendering the

couraging kickbacks and the overpricing of government defense contracts.²⁹ As a result, kickbacks under the original Act increased government contract prices by as much as fifteen percent, costing the government an additional \$10 billion annually.³⁰

In response to the insufficient recoveries available under the original Act, the Anti-Kickback Act's current civil liability provision includes vicarious liability for prime contractors.³¹ Additionally, the current civil liability provision now allows for increased damages in certain circumstances.³² The inclusion of vicarious liability and increased damages aims to protect the government's interest and to further the Act's purported purpose and goals.³³

The Anti-Kickback Act of 1986 functions to accomplish three main goals.³⁴ First, the Act aims to deter prime contractors from overcharging the government as a result of kickbacks and to compensate the government in the event of a kickback.³⁵ Second, the Act attempts to maintain market efficiency by ensuring that prime contractors enter into subcontracts on the basis of expertise and cost-efficiency.³⁶ Finally, the Act is designed to create a regulatory structure that will impose appropriate levels of risk on prime contractors.³⁷ Although an improve-

Act's prosecutorial mechanisms insufficient and antiquated. *See* H.R. REP. NO. 99-964, at 8, 1986 U.S.C.C.A.N. 5965.

²⁹ *See, e.g.*, *United States v. Gemmill*, 160 F. Supp. 792, 794 (E.D. Penn. 1958) (explaining how a subcontractor paid a percentage of all subcontracts directly to prime contractor); *United States v. Davio*, 136 F. Supp. 423, 426-27 (E.D. Mich. 1955) (detailing how the supervisor of a large prime contractor entered into elaborate profit-sharing relationship with a subcontractor while fulfilling a prime contract with the United States Army Air Force).

³⁰ *See* H.R. REP. NO. 99-964, at 19, 1986 U.S.C.C.A.N. at 5976 (summarizing congressional testimony prior to the enactment of the Anti-Kickback Act of 1986).

³¹ 41 U.S.C. § 8706(a); *see* H.R. REP. NO. 99-964, at 9-10, 1986 U.S.C.C.A.N. at 5966-67 (describing the inadequacy and outdated nature of the remedies available under the original Anti-Kickback Act).

³² 41 U.S.C. § 8706(a)(1) (allowing for increased damages against any person that knowingly violates the Act). These increased damages equal double the amount of the kickback plus penalties for multiple violations of the Act. *Id.* The penalty for multiple violations of the Act is currently set at not more than \$11,000 for each occurrence of prohibited conduct. *Id.* The amount of the penalty was originally set at \$10,000 but was subsequently increased by the DOJ under the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990. *See* 28 U.S.C. § 2461 (2012); 28 C.F.R. § 85.3(a)(13) (2014).

³³ *See* H.R. REP. NO. 99-964, at 4-7 (1986), as reprinted in 1986 U.S.C.C.A.N. at 5960-64.

³⁴ *See id.*

³⁵ *See id.* at 4-5, 1986 U.S.C.C.A.N. at 5960-62; *see also Sperry Corp.*, 493 U.S. at 54-57 (applying over-budget costs); *Hess*, 317 U.S. at 541-43 (engaging in collusive bidding); *Sys. Architects, Inc.*, 757 F.2d at 374-76 (shifting costs between projects); *Dunn*, *supra* note 12 at 607-08 (collecting sources).

³⁶ *See* H.R. REP. NO. 99-964, at 4-5, 1986 U.S.C.C.A.N. at 5960-62.

³⁷ *See id.* (exploring the balance of risks of under-compensation against the risks of imposing excessive costs on prime contractors).

ment from the original Act, the current civil liability provision still engenders criticism and controversy.³⁸

B. *Conflicting Interpretations of Prime Contractor Vicarious Liability*

The extent of vicarious liability under the civil liability provision has recently become subject to differing interpretations.³⁹ The two prevailing interpretations conflict as to whether prime contractor corporations can be subject to increased damages under Section 8706(a)(1) when their employees accept kickbacks.⁴⁰ The ultimate interpretation of the provision will have a significant impact on both the government and prime contractors.⁴¹ Defense contracts are often structured on an ongoing basis, resulting in the potential for recurring kickbacks under a single contract.⁴² With the scope of defense contracts exceeding

³⁸ See *KBR II*, 727 F.3d at 347–49 (exploring the application of vicarious liability under the civil liability provision twenty-seven years after the provision’s enactment).

³⁹ Compare *id.* at 348–49 (limiting the liability of prime contractors to the amount of the kickback offered, irrespective of the total loss incurred by the government), with *Morse Diesel Int’l, Inc. v. United States*, 79 Fed. Cl. 116, 122 (2007) (discussing the possibility of increased damages in certain circumstances to compensate the government for the cost of the kickback actually incurred).

⁴⁰ See *KBR II*, 727 F.3d at 343; *Morse Diesel Int’l, Inc.*, 79 Fed. Cl. at 122. The two interpretations do not conflict as to whether Section 8706(a)(1) direct liability can be imposed on a prime contractor when it accepts a kickback in its corporate capacity and retains the value of the kickback in its corporate coffers. See *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) (explaining that prime contractor corporations are subject to greater damages when accepting kickbacks in their corporate capacity).

⁴¹ WALKER, *supra* note 10, at 1. U.S. defense spending accounted for \$619 billion of the federal budget in 2013. See *id.* Given that kickbacks are estimated to raise prices on contracts by between two to fifteen percent, the annual value of those kickbacks, which translates to both the loss to the government and the amount of the liability to contractors, is extreme. See H.R. REP. NO. 99-964, at 19 (1986), as reprinted in 1986 U.S.C.C.A.N. at 5976.

⁴² See U.S. DEP’T OF DEF., *supra* note 1 (providing examples of long-term, recurring defense contract awards). The structure of these contracts can take a variety of forms. See *id.* Under a fixed-price with economic-price-adjustment format, a contract price is set but that price can later be adjusted upon the occurrence of specified contingencies. See *id.* (awarding a \$325 million fixed-price with economic-price-adjustment contract to U.S. Food Raleigh Division). Under a firm-fixed-price indefinite delivery contract, the contract price is set but the government can seek delivery of supplies at minimum intervals. See *id.* (awarding DHS Systems with a \$200 million firm-fixed-price indefinite delivery contract to furnish various types of cold shelters). Under a maximum modification format contract, a firm contract price is set with limits on price increase adjustments based on services rendered. See *id.* (awarding American Water Operations & Management, Inc. with a \$13.4 million maximum-modification format contract to operate and maintain a wastewater system). The ongoing nature of these contracts may result in extensive kickback schemes. See, e.g., *United States v. Purdy*, 144 F.3d 241, 243 (2d Cir. 1998) (explaining how the president and CEO of a company paid tens of thousands of dollars over the course of at least seven purchase orders related to government defense contracts); *Moore v. United States*, 347 F.2d 942, 943 (9th Cir. 1965) (discussing how appellant was convicted of receiving payments to at least two businesses over an extended period of time); *Jensen v. United States*, 326 F.2d 891, 892 (9th Cir. 1964) (describing a kickback scheme involving at least eight individuals).

\$600 billion annually, kickbacks under individual contracts can be substantial.⁴³ Given the magnitude of kickbacks, the measure of available vicarious liability damages has significant implications for the government and prime contractors.⁴⁴

Before evaluating the merits of each interpretation, it is important to understand the formulation and reasoning behind each interpretation.⁴⁵ First, Subsection 1 introduces the interpretation that vicarious liability damages are limited under the civil liability provision.⁴⁶ Next, Subsection 2 introduces the interpretation that increased damages are available in vicarious liability cases.⁴⁷

1. Limited Vicarious Liability Interpretation

The first interpretation states that prime contractors, in their corporate capacity, can be held vicariously liable for the kickbacks received by their employees only under Section 8706(a)(2), and only up to the value of the kickback.⁴⁸ This interpretation claims that the structure of the civil liability provision allows for two distinct and separate causes of action.⁴⁹ The first cause of action, under

⁴³ See, e.g., Carol D. Leonnig, *Murtha-favored Contractors to Plead Guilty to Defrauding Defense Department*, WASH. POST (Apr. 10, 2013), http://www.washingtonpost.com/politics/murtha-favored-contractors-to-plead-guilty-to-defrauding-defense-department/2013/04/10/735c8482-a202-11e2-be47-b44febada3a8_story.html, archived at <http://perma.cc/D8YC-38Q3> (describing a kickback scheme in which Kuchera Defense Systems provided multiple kickbacks ranging in value from \$200,000 to \$650,000 to win U.S. Air Force communication system contracts); Press Release, U.S. Attorney's Office: District of New Mexico, Former Officer of New Mexico-Based Defense Contractor Pleads Guilty to Conspiracy, Kickback and Tax Evasion Charges Related to Rebuilding Efforts in Iraq (July 9, 2013), available at <http://www.dodig.mil/IGInformation/IGInformationReleases/BCPR.pdf>, archived at <http://perma.cc/YPL4-7NC3> (announcing a conviction for a kickback scheme in which the defendant received \$360,000 in monetary kickbacks, two valuable sports cars, and several wrist watches as kickbacks from foreign nationals during rebuilding efforts in Iraq).

⁴⁴ See DEF. CONTRACT AUDIT AGENCY, *supra* note 3, at 13 (announcing that in 2013, the DCAA examined \$160 billion in contract costs, resulting in \$4.4 billion in net savings to the government).

⁴⁵ See *infra* notes 48–66 and accompanying text.

⁴⁶ See *infra* notes 48–55 and accompanying text.

⁴⁷ See *infra* notes 56–66 and accompanying text.

⁴⁸ 41 U.S.C. § 8706(a)(2) (2012) (allowing the government to recover a civil penalty equal to the amount of the kickback from a person whose employee, subcontractor, or subcontractor employee violates Section 8702 by providing, accepting, or charging a kickback); see, e.g., *United States v. Grossman*, 400 F.2d 951, 955 (4th Cir. 1968) (describing a prime contractor employee who received gifts from a subcontractor that admittedly caused him to favor them in the award of purchase orders and subcontracts); *Travers v. United States*, 361 F.2d 753, 755 (1st Cir. 1966) (explaining how an officer of a subcontractor paid a fee or gratuity to the purchasing agent of the prime contractor in order to induce the award of subcontracts); *Howard v. United States*, 345 F.2d 126, 127–28 (1st Cir. 1965) (affirming the conviction of a general manager of a subcontractor who knowingly caused the subcontractor to furnish labor and materials to a prime contractor for use in building his personal home to induce awards of subcontracts and orders).

⁴⁹ See, e.g., *Lippert*, 148 F.3d at 977 (explaining that absolute vicarious liability applies only in a single civil penalty); *Kruse*, 101 F. Supp. 2d at 414 (limiting liability for the corporation to the amount of the kickback).

Section 8706(a)(1), imposes direct liability and prosecutes those persons that actually give or receive kickbacks.⁵⁰ Under this cause of action the government is able to recover increased damages.⁵¹ The second cause of action, under Section 8706(a)(2), imposes no-fault vicarious liability and prosecutes corporations for the acts of their employees, subcontractors, or subcontractor employees.⁵² Under this cause of action the government is able to recover damages only up to the amount of the kickback.⁵³ This interpretation posits that because the second cause of action specifically creates vicarious liability for prime contractors, the first cause of action must not be applied to vicarious liability cases.⁵⁴ Such an application would render the second cause of action superfluous, as the government would always seek increased damages in vicarious liability cases.⁵⁵

2. Increased Vicarious Liability Interpretation

The second interpretation, recently adopted by the Fifth Circuit in a case of first impression, states that the government can seek increased damages in vicarious liability cases.⁵⁶ In 2013, in *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, the U.S. Court of Appeals for the Fifth Circuit held that prime contractors are subject to increased damages for vicarious liability under Section 8706(a)(1).⁵⁷ This interpretation discounts the contention that allowing vicarious liability under Section 8706(a)(1) would render Section 8706(a)(2) superfluous.⁵⁸ Rather, this interpretation argues that the civil liability provision provides

⁵⁰ 41 U.S.C. § 8706(a)(1) (allowing the government to recover increased damages from a person that knowingly engages in prohibited conduct).

⁵¹ *Id.*

⁵² *Id.* § 8706(a)(2).

⁵³ *Id.*

⁵⁴ *See id.* § 8706(a)(1)–(2) (2012); *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.* (*KBR I*), 903 F. Supp. 2d 473, 490–91 (E.D. Tex. 2011), *rev'd and remanded*, *KBR II*, 727 F.3d 343 (5th Cir. 2013) (finding that Congress's attempt to impose vicarious liability under the Anti-Kickback Act was evidenced only by the no-fault vicarious liability created under Section 8706(a)(2)). According to the district court in *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, imposing vicarious liability on contractors under the first cause of action would overreach beyond the intent of Congress. *See id.*

⁵⁵ *See Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 451 (5th Cir. 2008) (explaining that a court may deviate from the literal language of a statute only if the plain language would render the statute illogical and inconsistent with the intent of Congress). Because the statute can be logically applied according to its plain language, the court must not adopt an alternative interpretation. *See KBR I*, 903 F. Supp. 2d at 490–91. Furthermore, adopting an alternative interpretation could be even more inconsistent with the intent of Congress. *See id.*

⁵⁶ *KBR II*, 727 F.3d at 347–48 (rejecting the District Court's interpretation of the statute and holding that the statutory language of Section 8706(a) allows vicarious liability across both subsections of the civil liability provision).

⁵⁷ *See id.*

⁵⁸ *Compare id.* (serving as the first United States Court of Appeals to directly address the issue and holding contrary to the common understanding of the provision), *with KBR I*, 903 F. Supp. 2d at 490–91 (limiting vicarious liability damages to Section 8706(a)(2) of the Anti-Kickback Act).

two distinct causes of action in vicarious liability cases: one for “knowing[]” violations of the Act and one for unknowing violations.⁵⁹ Thus, this interpretation makes increased damages available in vicarious liability cases where the prime contractor knowingly engages in kickback activity.⁶⁰

This interpretation places significant importance on the meaning of a “knowing” violation by a prime contractor.⁶¹ Although the Fifth Circuit avoided exploring the difference between knowing and unknowing violations, understanding the distinction is crucial in determining the most appropriate interpretation of the statute.⁶²

It is well established that because corporations are legal entities incapable of having a mental state, any “knowledge” must be imputed from some natural person.⁶³ Furthermore, the knowledge of *all* individuals working for or on behalf of a corporation is certainly not imputed to the corporation; rather, an individual’s knowledge is only imputed when warranted by the individual’s level of responsibility, authority, or managerial role in the corporation.⁶⁴ Whether an employee’s knowledge can be imputed requires a factual determination about the individual’s level of responsibility and authority based on the particular circumstances of the individual’s employment.⁶⁵ Consequently, this interpretation by

⁵⁹ See *KBR II*, 727 F.3d at 347–48.

⁶⁰ See *id.* Both interpretations correctly recognize that the Anti-Kickback Act defines “person” to include corporations, partnerships, business associations of any kind, trusts, joint-stock companies, and individuals. 41 U.S.C. § 8701(3) (2012).

⁶¹ See 41 U.S.C. § 8706(a)(1)–(2). Recall that this interpretation relies on the knowledge distinction to separate causes of action for increased damages under Section 8706(a)(1) from causes of action for the amount of the kickback under Section 8706(a)(2). See *id.*; *KBR II*, 727 F.3d at 347–48; see also *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (explaining that rules of statutory interpretation require that, when possible, a court should “give each word in a statute operative effect” to ensure that no words are rendered superfluous).

⁶² See *KBR II*, 727 F.3d at 347–48. Although the majority opinion refused to address the issue, as it was not squarely before the court, the concurrence did make an effort to explain the “knowing” distinction. *Id.* at 354–56 (Jolly, J., concurring).

⁶³ See *KBR II*, 727 F.3d at 348; see also *F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 171 (5th Cir. 1992) (explaining that because corporations operate through individuals, the privity and knowledge of the corporation must at some point come from the privity and knowledge of an individual); 10 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4877 (2012 ed.) (summarizing the general principles of vicarious liability).

⁶⁴ See 3 FLETCHER ET AL., *supra* note 63, § 807 (explaining that the knowledge of a mere employee for a corporation ordinarily is not imputed to the company); see also *Kellogg Brown & Root Servs., Inc. v. United States*, 103 Fed. Cl. 714, 773–74 (2012), *aff’d in part, rev’d in part*, 728 F.3d 1348 (Fed. Cir. 2013) (finding that two mid-level managers had insufficient authority to have their knowledge imputed to the corporation); *Ernst & Young*, 967 F.2d at 171 (explaining that although the individual need not necessarily be an officer or director, whether or not knowledge can be imputed to the corporation depends on the individual’s level of responsibility). Courts generally agree that the knowledge of directors or key officers can be imputed to the corporation, but whether an employee’s knowledge can be imputed requires a case-by-case analysis. See *Cont’l Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (explaining that an individual’s level of responsibility within a corporation must be discerned from the circumstances of the particular case).

⁶⁵ See 3 FLETCHER ET AL., *supra* note 63, § 807.

the Fifth Circuit necessarily allows for increased damages in vicarious liability cases when a person with knowledge imputable to the prime contractor corporation gives or receives a kickback.⁶⁶

II. INTERPRETING THE CIVIL LIABILITY PROVISION: TEXT AND LEGISLATIVE HISTORY

An examination of the civil liability provision under the canons of statutory interpretation is required to determine which interpretation of the Anti-Kickback Act of 1986 (“Anti-Kickback Act”) is best.⁶⁷ First, Section A examines the plain text and structure of the provision.⁶⁸ Next, Section B investigates the Anti-Kickback Act’s legislative history.⁶⁹ Section B also concludes that, given the ambiguity of the text and the lack of legislative guidance, the Anti-Kickback Act’s civil liability provision can only be interpreted and applied in light of the Act’s stated purpose and goals.⁷⁰

A. Text and Structure

When the plain language of a statute is clear and unambiguous, courts need not look further when interpreting statutory provisions.⁷¹ Although courts have been consistent in subjecting prime contractors to vicarious liability under the civil liability provision, a question remains as to whether there are instances when increased damages can be imposed in vicarious liability cases.⁷²

⁶⁶ See *KBR II*, 727 F.3d at 354–55 (Jolly, J., concurring). Whether an employee’s knowledge is imputable requires a factual determination based on their authority, responsibility, or managerial role within the corporation. See, e.g., *United States v. Josleyn*, 206 F.3d 144, 159 (1st Cir. 2000) (holding that the individual’s express permission to act on behalf of the corporation rendered his knowledge of evidence should be imputed to the corporation); *St. Paul Fire & Marine Ins. Co. v. F.D.I.C.*, 968 F.2d 695, 701 (8th Cir. 1992) (holding that the officer’s responsibility of handling all of the insurance matters for the bank rendered her knowledge of fraudulent insurance activity imputable to the bank); *Cont’l Oil*, 706 F.2d at 1376 (holding that the individual’s responsibility of maintaining equipment, hiring employees, and chartering trips made his knowledge imputable to the corporation).

⁶⁷ See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 819 (3d. ed. 2001); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (Amy Gutmann ed., 1997).

⁶⁸ See *infra* notes 71–83 and accompanying text.

⁶⁹ See *infra* notes 84–96 and accompanying text.

⁷⁰ See *infra* notes 84–96 and accompanying text.

⁷¹ See ESKRIDGE ET AL., *supra* note 67, at 819 (explaining that it is generally understood that “plain language” does not mean the dictionary definition of each word but rather the meaning that an “ordinary” or “reasonable” person would ascertain); SCALIA, *supra* note 67, at 23 (instructing that textual interpretation should not be confused with strict-construction, and that although the text should not be construed leniently, it should also not be construed strictly).

⁷² See *supra* notes 48–66 and accompanying text (outlining the two conflicting interpretations). Recall that one interpretation suggests that increased damages are available only for direct liability, whereas the alternative interpretation allows for increased damages in vicarious liability cases. Compare *United States ex rel. Vavra v. Kellogg Brown & Root, Inc. (KBR II)*, 727 F.3d 343, 347–48 (5th

The most controversial word in the Anti-Kickback Act's civil liability provision is the word "knowingly" in Section 8706(a)(1).⁷³ The word, present in Section 8706(a)(1), is conspicuously absent from the provision's express vicarious liability subsection.⁷⁴ The increased vicarious liability damages interpretation construes "knowingly" to mean that a prime contractor can be held vicariously liable for knowingly engaging in kickback activity.⁷⁵ This interpretation, it is argued, would not render Section 8706(a)(2) superfluous because Section 8706(a)(2) would still apply to vicarious liability cases where there was no imputable knowledge of the kickback.⁷⁶

The limited vicarious liability interpretation construes the word "knowingly" differently.⁷⁷ This interpretation claims that the word "knowingly" should be

Cir. 2013) (serving as the first United States Court of Appeals to directly address the issue and deciding, contrary to the common understanding of the provision, that a prime contractor may be held vicariously liable for increased damages), *with* United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc. (*KBR I*), 903 F. Supp. 2d 473, 490–91 (E.D. Tex. 2011) (limiting vicarious liability damages to Section 8706(a)(2) of the Anti-Kickback Act). Despite the conflict, both interpretations correctly note that because the statute defines the term "person" to include corporations, partnerships, and business associations of any kind, the word "person" alone does not restrict vicarious liability from being applied under Section 8706(a)(1). 41 U.S.C. §§ 8701(3), 8706(a)(1) (2012); *see* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 782 (2000) (explaining that corporations are presumptively covered by the term "person" in federal statutes).

⁷³ 41 U.S.C. § 8706(a)(1) (providing that the federal government may recover damages equal to double the amount of the kickback plus per-occurrence penalties from a person "that knowingly engages in conduct prohibited by [the Act]").

⁷⁴ *Compare id.* (including the word "knowingly"), *with id.* § 8706(a)(2) (omitting a knowledge requirement). Because every word and clause in a statute must be given effect, the conflicting interpretations of the provision each give different effect to the word "knowingly." *See infra* notes 75–83 and accompanying text (discussing the different interpretations' views on the word "knowingly"); *see also* ESKRIDGE ET AL., *supra* note 67, at 819 (explaining the importance of giving effect to every word in a statute); 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 65A:13 (7th ed., rev. vol. 2014) (emphasizing that in giving each word meaning, one should follow a plain-language interpretation unless otherwise specified by the text).

⁷⁵ *See KBR II*, 727 F.3d at 348 (explaining that Congress's decision to allow vicarious liability under both subsections indicates that increased damages are available for more culpable "knowing" violations of the Act). As discussed previously, a prime contractor corporation knowingly engages in kickback activity only when employees with imputable knowledge—those with requisite authority, responsibility, or managerial role—engage in kickback activity. *See, e.g.*, United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (holding that the individual's express permission to act on behalf of the corporation rendered his knowledge of evidence should be imputed to the corporation); St. Paul Fire & Marine Ins. Co. v. F.D.I.C., 968 F.2d 695, 701 (8th Cir. 1992) (holding that the officer's responsibility of handling all of the insurance matters for the bank rendered her knowledge of fraudulent insurance activity imputable to the bank); Cont'l Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1376 (5th Cir. 1983) (holding that the individual's responsibility of maintaining equipment, hiring employees, and chartering trips made his knowledge imputable to the corporation); *supra* notes 63–65 and accompanying text.

⁷⁶ *KBR II*, 727 F.3d at 348 (explaining that Congress decided to allow vicarious liability across the civil liability provision and maintained the effect of each subsection through a knowledge distinction).

⁷⁷ *See, e.g.*, United States v. Purdy, 144 F.3d 241, 243 (2d Cir. 1998) (applying vicarious liability under Section 8706(a)(2) without any reference to a knowledge requirement); Moore v. United States,

interpreted in light of the fact that Section 8706(a)(2) already expressly allows for vicarious liability.⁷⁸ Accordingly, in light of the structure of the statute, the word “knowingly” is designed to address persons that engage in kickback activity in their individual capacity, not as a business entity.⁷⁹ In the context of a prime contractor, this would apply either to an individual who functions as a prime contractor or to the representative of a prime contractor business that actually enters into the contract.⁸⁰ Under this interpretation, Section 8706(a)(1) is specifically designed to punish intentional wrongdoers, not to hold prime contractors vicariously liable for kickbacks that were committed without their consent and outside their control.⁸¹ The conflicting interpretations of the civil liability provision reveal that the plain language of the provision is ambiguous and lacks interpretive guidance.⁸² Therefore, the canons of statutory interpretation next require turning to the Anti-Kickback Act’s legislative history.⁸³

B. Legislative History

When the plain language of a statute is ambiguous, legislative history can often provide useful guidance for determining the scope of the law.⁸⁴ The House

347 F.2d 942, 943 (9th Cir. 1965) (limiting vicarious liability to Section 8706(a)(2) and the amount of the kickback); *KBR I*, 903 F. Supp. 2d at 490–91 (finding that applying increased vicarious liability damages under Section 8706(a)(1) would render Section 8706(a)(2) superfluous).

⁷⁸ 41 U.S.C. § 8706(a) (2012). The canons of statutory interpretation require that each statutory provision be read in accordance with the whole act. *Smith v. United States*, 508 U.S. 223, 233–34 (1993). The limited vicarious liability damages interpretation applies the whole act rule and posits that the express presence of vicarious liability in Section 8706(a)(2) highlights its absence in Section 8706(a)(1). See *KBR I*, 903 F. Supp. 2d at 490–91; see also *Smith*, 508 U.S. at 233.

⁷⁹ 41 U.S.C. § 8706(a)(2) (expressly imposing vicarious liability on prime contractors); *KBR I*, 903 F. Supp. 2d at 490–91 (limiting increased damages to direct liability cases and restricting vicarious liability to Section 8706(a)(2)).

⁸⁰ 41 U.S.C. § 8706(a); *Purdy*, 144 F.3d at 243.

⁸¹ 41 U.S.C. § 8706(a); see *KBR I*, 903 F. Supp. 2d at 490–91; see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 655 n.134 (1990) (paraphrasing Justice Antonin Scalia’s pronouncement that the text of a statute should be interpreted to maintain consistency and coherency in the law).

⁸² Compare *KBR II*, 727 F.3d at 348 (interpreting the civil liability provision to allow for increased damages in vicarious liability cases), with *KBR I*, 903 F. Supp. 2d at 490–91 (limiting vicarious liability damages to the amount of the kickback).

⁸³ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1835–36 (2010) (explaining that a proper textualist approach considers legislative history surrounding enactment).

⁸⁴ See Cheryl Boudreau et al., *Statutory Interpretation and the Intentional(ist) Stance*, 38 LOY. L.A. L. REV. 2131, 2133–36 (2005) (describing the intentionalist theory of statutory interpretation and explaining the value in discerning legislative intent when interpreting the text and structure of a statute); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 714–15 (1992) (explaining that legislatures should be treated as rational actors, giving due weight to their motivations and intentions); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1651 (2014) (emphasizing the difference between legislative history and mere statutory history).

Report preceding the enactment of the Anti-Kickback Act of 1986 is the most salient indicator of legislative intent behind the civil liability provision.⁸⁵ Unfortunately, although Congress went to great lengths to discuss the purpose and goals of the Act, it offered little guidance into the appropriate interpretation of the civil liability provision's language.⁸⁶

Just as the plain language of the statute left open strong arguments for multiple interpretations, Congress's explanation of the amended provision's mechanics also invites conflicting understandings.⁸⁷ On one hand, Congress's discussion of the provision supports limiting vicarious liability damages because Congress explained that vicarious liability is fixed to the amount of the kickback.⁸⁸ Furthermore, Congress made no reference to vicarious liability in its explanation of increased damages.⁸⁹ Since Congress specifically mentioned vicarious liability in one subsection and not the other, and subsequently limited that liability, one could argue that it is improper to read vicarious liability into Section 8706(a)(1).⁹⁰ Additionally, given that one of the express purposes of the amended Act was to expand its coverage to include vicarious liability, the lack of explicit vicarious liability language in Section 8706(a)(1) is strong evidence that Congress intended vicarious liability to be limited.⁹¹

On the other hand, it can be argued that Congress's specific emphasis on knowing violations supports the increased vicarious liability damages interpreta-

⁸⁵ H.R. REP. NO. 99-964, at 11 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5968. (providing a section-by-section analysis of the 1986 amendments to the Anti-Kickback Act, specifically referencing pertinent language and its meaning within the context of kickback prosecution).

⁸⁶ *Id.* at 10, 1986 U.S.C.C.A.N. at 5967. The only notable mention of the actual text and structure of Section 8706(a) was as follows: "It raises the civil penalties, for knowing violations, to twice the amount of the kickback involved and up to \$10,000 in fines. Further, it fixes vicarious liability, without regard to fault, on the Federal prime contractor . . . This vicarious no fault liability is limited to the amount of the kickback." *Id.*

⁸⁷ *See id.*; *see also* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (explaining that when statutory language is deemed "ambiguous," conflicting arguments arise as to which meaning of the statutory language is "compatible with the rest of the law").

⁸⁸ *See* H.R. REP. NO. 99-964, at 10, 1986 U.S.C.C.A.N. 5960, 5967; *see also* United States v. Kruse, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) (finding that Section 8706(a)(2) creates a distinct and exclusive cause of action in prime contractor vicarious liability cases).

⁸⁹ *See* H.R. REP. NO. 99-964, at 10, 1986 U.S.C.C.A.N. at 5967.

⁹⁰ *See* Burns v. United States, 501 U.S. 129, 136 (1991) (explaining that legislative silence should only be considered significant in statutory interpretation if the legislature was specifically vocal in a related portion of the statute), *abrogated on other grounds by* United States v. Booker, 543 U.S. 220 (2005); *see also* Meyer v. Holley, 537 U.S. 280, 280-81 (2003) (holding that the statutory and legislative silence as to vicarious liability in tort actions under the Fair Housing Act was only significant because of the explicit departures from vicarious liability in other areas of the law).

⁹¹ *See* Gluck, *supra* note 83, at 1835-36 (explaining that legislative silence as to statutory interpretation requires that the interpreter give the statute the meaning that is most consistent with the legislature's express intentions and the legislature's interpretive guidance in other provisions of the statute).

tion.⁹² Specifically, given that a “knowing[]” violation by a “person” already encompasses prime contractor corporations, explicitly including vicarious liability language is redundant and unnecessary.⁹³ This interpretation of the provision relies heavily on the lack of legislative guidance, emphasizing an ambiguous textual interpretation.⁹⁴

Despite the robust congressional history regarding the purpose and intent of the Anti-Kickback Act, it does not lead to a clear reading of the ambiguous civil liability provision.⁹⁵ Because the text of the civil liability provision is ambiguous on its face, and the legislative history is inconclusive with respect to interpretive guidance, courts must instead interpret the provision in light of its stated purpose and goals.⁹⁶

III. LIMITING VICARIOUS LIABILITY: PROMOTING THE ANTI-KICKBACK ACT’S PURPOSE THROUGH STATUTORY INTERPRETATION

The lack of interpretive guidance provided by the Anti-Kickback Act of 1986’s (“Anti-Kickback Act”) text and legislative history requires that courts interpret the Act’s civil liability provision in light of the Act’s stated purpose and

⁹² See H.R. REP. NO. 99-964, at 10 (1986), as reprinted in 1986 U.S.C.C.A.N. at 5967; see also *KBR II*, 727 F.3d at 347–48 (finding vicarious liability available under both Section 8706(a)(1) and (2) and explaining that the knowledge distinction is what separates causes of action under each subsection).

⁹³ H.R. REP. NO. 99-964, at 10, 1986 U.S.C.C.A.N. at 5967. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (advocating a practical, dynamic approach to using legislative history in statutory interpretation, namely focusing on what was said and not reading into what was omitted).

⁹⁴ See H.R. REP. NO. 99-964, at 10, 1986 U.S.C.C.A.N. at 5967.

⁹⁵ *Id.* (offering a brief introduction to the structure of the statute but giving no further guidance as to the preferred interpretation of the Anti-Kickback Act’s civil liability provision); see also *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 371 (explaining that ambiguous statutes should be interpreted to be compatible with the accompanying law); Cheryl Boudreau et al., *supra* note 84, at 2133–36 (explaining the value in discerning legislative intent when interpreting statutes).

⁹⁶ See Brest, *supra* note 93, at 209–11 (advocating using legislative history in statutory interpretation); Gluck, *supra* note 83, at 1835–36 (explaining the importance of interpretation aligning with Congress’s express intentions). It is necessary for courts to adopt and endorse an interpretation of the civil liability provisions that not only complies with the purpose and intent of the statute, but that promotes and furthers that purpose. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 285 (1975) (describing that the intent of the legislature is “immediate” and purpose of the legislature is “ulterior”); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 92 (explaining the importance of interpreting a statute in light of its purpose because purposivism is grounded in legislative preference and is a “form of faithful agency”); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 815 (1994) (stating that “purposivism calls on judges to identify the statute’s broader purposes and to resolve the interpretive question in light of those purposes”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 429 (1989) (describing the goal of purposivist interpretation as seeking to decipher how the enacting legislature would have resolved the question of interpretation had it been presented to them).

goals.⁹⁷ This Part analyzes the Act's three main goals and argues that courts should interpret the civil liability provision to limit vicarious liability to the amount of the kickback involved.⁹⁸ First, Section A argues that the Act's deterrence and compensation goals are best achieved by limiting prime contractor vicarious liability damages.⁹⁹ Second, Section B posits that the Act's goal of maintaining market efficiency through efficient subcontractor selection is best accomplished by limiting vicarious liability damages.¹⁰⁰ Finally, Section C contends that limiting vicarious liability damages imposes appropriate levels of risk on prime contractors while simultaneously protecting their role in government defense contracting.¹⁰¹

A. Deterrence and Compensation

The Anti-Kickback Act's primary goal is to deter prime contractors from overcharging on government defense contracts and to compensate the government in the event kickbacks occur.¹⁰² The civil liability provision's allowance for increased damages¹⁰³ is pivotal to the Act's deterrence and compensation

⁹⁷ See *supra* notes 67–96 and accompanying text (explaining the lack of interpretive guidance for the Act). The Anti-Kickback Act functions to accomplish three main goals. See H.R. REP. NO. 99-964, at 4–5, 10–11, 19, 1986 U.S.C.C.A.N. at 5960–62, 5967–68, 5976. First, the Act aims to deter prime contractors from overcharging the government as a result of kickbacks and to compensate the government in the event of a kickback. See *id.* Second, the Act seeks to maintain market efficiency by ensuring that prime contractors enter into subcontracts on the basis of expertise and cost-efficiency, not kickbacks. See *id.* Finally, the Act creates a regulatory structure that will impose appropriate levels of risk on prime contractors. See *id.*; *supra* notes 71–96 and accompanying text.

⁹⁸ See *infra* notes 102–165 and accompanying text.

⁹⁹ See *infra* notes 102–127 and accompanying text.

¹⁰⁰ See *infra* notes 128–140 and accompanying text.

¹⁰¹ See *infra* notes 141–165 and accompanying text.

¹⁰² H.R. REP. NO. 99-964, at 5 (1986), as reprinted in 1986 U.S.C.C.A.N. at 5962. The House Report explains that regardless of the form of the bribe, all kickbacks undermine federal procurement. *Id.* In 1985 alone, the United States spent approximately \$147 billion on defense procurements, \$46 billion of which was paid to subcontractors. *Id.* With the stated value of kickbacks ranging from two to fifteen percent of contract prices, the magnitude of the loss to the government is extreme. *Id.* As such, one of the stated goals of the 1986 amendments is to deter kickback activity to the greatest extent possible and to recover adequate compensation in the event of a kickback. *Id.* The purpose of reducing overcharging on government defense contracts is further evidenced by the established conclusive presumption that the amount of the kickback is always included in the price of a subcontract and is ultimately borne by the government. See *Travers v. United States*, 361 F.2d 753, 755 (1st Cir. 1966) (explaining that the conclusive presumption that any payment is included in the price of a subcontract and borne by the government is the “keystone of the civil liability created by the statute”); *Jensen v. United States*, 326 F.2d 891, 895 (9th Cir. 1964) (explaining that there is a conclusive presumption that the cost of a kickback is borne by the government, and that such a conclusive presumption is not offensive to due process because “it is based on a logical and probable connection with the antecedent facts”).

¹⁰³ Recall that Section 8706(a)(1) allows for increased damages equal to double the amount of the kickback, plus an additional \$11,000 penalty for each violation of the Act. 41 U.S.C. § 8706(a)(1) (2012); 28 C.F.R. § 85.3(a)(13) (2014) (adjusting the penalty from its original value of \$10,000).

goals.¹⁰⁴ Despite the importance of increased damages in direct liability cases, this Section argues that allowing increased damages in vicarious liability cases has no impact on deterrence and creates a substantial risk of government over-compensation.¹⁰⁵ Subsection 1 first establishes that increased vicarious liability damages have no impact on deterrence.¹⁰⁶ Subsection 2 then determines that increased vicarious liability damages are unnecessary to properly compensate the government.¹⁰⁷

1. Increased Vicarious Liability Damages Have No Impact on Deterrence

Increasing direct liability damages substantially deters misconduct by imposing liability costs that outweigh the potential benefits of misconduct.¹⁰⁸ The

¹⁰⁴ See generally H.R. REP. NO. 99-964, 1986 U.S.C.C.A.N. (outlining the Act's purpose and goals). In order to consider the deterrence and compensation effects of increased damages, it is important to understand the procedure and contractual obligations of the government, prime contractors, and subcontractors in defense contracting. See U.S. DEP'T OF DEF., *supra* note 1. In the majority of defense contracts, once the government has selected a prime contractor, the prime contractor is entitled to select its own subcontractors. See, e.g., See United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc. (*KBR II*), 727 F.3d 343, 344–46 (5th Cir. 2013) (allowing the prime contractor to select subcontractors to fulfill the government defense contract); United States v. Purdy, 144 F.3d 241, 243 (2d Cir. 1998) (same); United States v. Perry, 431 F.2d 1020, 1021–22 (9th Cir. 1970) (same); Howard v. United States, 345 F.2d 126, 128 (1st Cir. 1965) (same). From there, prime contractors will charge the government for both its services and the subcontractor's services. See, e.g., United States v. Grossman, 400 F.2d 951, 953–54 (4th Cir. 1968); *Travers*, 361 F.2d at 755; Moore v. United States, 347 F.2d 942, 943–44 (9th Cir. 1965). The contract between the government and the prime contractor can take many forms, but ultimately the prime contractor will charge the government in one of two ways. See DEF. CONTRACT AUDIT AGENCY, DCAAM 7641.90, INFORMATION FOR CONTRACTORS 68–70 (2012), available at http://www.dcaa.mil/dcaap_7641.90.pdf, archived at <http://perma.cc/PWP5-LKZD>. Defense contracts are regularly performed over a long period of time. See U.S. DEP'T OF DEF., *supra* note 1 (providing examples of fixed-price with economic-price-adjustment contracts, firm-fixed-price and indefinite-delivery contracts, and maximum modification contracts); *supra* note 42 and accompanying text. The prime contractor can either pay subcontractors directly and include those costs in its prime contract with the government, or it can periodically bill the government for the subcontracts it incurs, charging a small additional fee each time. See DEF. CONTRACT AUDIT AGENCY, *supra* at 68–70 (providing detailed procedures by which prime contractors can select subcontractors and recover subcontractor costs from the federal government). Regardless of the method selected, the inclusion of kickbacks will increase the cost of subcontracts, resulting in the prime contractor overcharging the government. See H.R. REP. NO. 99-964, at 5, 1986 U.S.C.C.A.N. at 5962. In response to this increased subcontract price, the prime contractor will either bill the government for the inflated subcontract price or include the inflated price in its own prime contract. See *id.* The Act's civil liability provision is specifically aimed at reducing this overcharging of the government. See *id.*

¹⁰⁵ See *infra* notes 108–127 and accompanying text.

¹⁰⁶ See *infra* notes 108–115 and accompanying text.

¹⁰⁷ See *infra* notes 116–127 and accompanying text.

¹⁰⁸ See Anthony A. Braga & David L. Weisburd, *The Effects of Focused Deterrence Strategies on Crime: A Systematic Review and Meta-Analysis of the Empirical Evidence*, 49 J. RES. CRIME & DELINQ. 323, 324 (2012) (arguing that where the costs of liability directly relate to the misconduct committed, actors will refrain from the misconduct when the liability costs exceed the expected benefit); see also Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 626–27 (1997) (explaining that punitive damages are most appropriate where they are focused on

imposition of increased vicarious liability damages under the civil liability provision, however, would not have the same deterrence effect.¹⁰⁹ Increased vicarious liability damages would not deter kickbacks because the increased liability costs are misdirected and prime contractor cost-benefit analysis is limited under defense contracts.¹¹⁰

Increasing vicarious liability damages will not deter kickbacks because such an approach falsely presumes that prime contractors have actual knowledge of kickbacks.¹¹¹ Kickbacks on defense contracts are primarily given and received at the individual level, resulting in prime contractors unknowingly billing the government for kickbacks.¹¹² Subjecting prime contractors to increased dam-

wrongdoers and designed to correlate with the level of compensation); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 7 (1982) (discussing the importance of balanced deterrence regimes). Increasing the liability costs increases the likelihood that those costs will outweigh the potential benefits, thus increasing deterrence. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 472–74 (2008) (explaining that punitive damages in criminal law advance the interests of deterrence); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252–53 (1981) (imposing punitive damages against municipalities that violated the Civil Rights Act of 1871 as a means of deterring future violations); *see also* Braga & Weisburd, *supra* at 324. This deterrence factor is even more prominent given the extensive liability burden already imposed under defense contracts. *See* DEF. CONTRACT AUDIT AGENCY, *supra* note 104, at 68–70 (illuminating the extreme burden of increased damages by providing examples of the substantial monetary value of both prime contracts and subcontracts).

¹⁰⁹ *See* Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1094 (1993) (explaining that efficient deterrence must include targeted risk and impose appropriate levels of compensation). Although deterrence is strong in direct liability cases, in vicarious liability cases the party being prosecuted usually has not played any role in the giving or receiving of the kickback. *See* H.R. REP. NO. 99-964, at 4–5 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5960–62 (explaining that the purpose of the Anti-Kickback Act is to deter the giving and receiving of kickbacks). Deterrence is therefore less targeted, or negligible, where the prime contractor lacks actual knowledge of the misconduct. *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 695 (explaining that in the majority of corporate vicarious liability cases, the corporation has satisfied good faith standards and is only liable as a result of the actions of its agent).

¹¹⁰ *See* H.R. REP. NO. 99-964, at 4–5, 1986 U.S.C.C.A.N. at 5960–62 (describing the structure of defense contracts and stating the purpose of the statute as deterring the kickbacks themselves).

¹¹¹ 41 U.S.C. § 8706(a)(1) (2012) (applying increased damages for “knowing” violations). Therefore, if Section 8706(a)(1) were interpreted to include vicarious liability, prime contractors would be subject to increased damages when knowledge of a kickback was imputed. *See, e.g.*, F.D.I.C. v. Ernst & Young, 967 F.2d 166, 171 (5th Cir. 1992) (explaining that whether knowledge is imputed to the corporation depends on the knowing individual’s level of responsibility); Cont’l Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1376 (5th Cir. 1983) (explaining that the question of whether knowledge can be imputed depends on an individual’s level of responsibility within a corporation); *see supra* notes 63–65 and accompanying text (discussing how employee knowledge can be imputed to a prime contractor corporation).

¹¹² *See, e.g.*, Purdy, 144 F.3d at 243 (discussing kickbacks given and received by individuals that had not even contemplated the relationship with the government); United States v. Gemmill, 160 F. Supp. 792, 794 (E.D. Penn. 1958) (providing kickbacks to the prime contractor’s agent without the actual knowledge of the prime contractor); United States v. Davio, 136 F. Supp. 423, 426–27 (E.D. Mich. 1955) (showing how sharing profits with prime contractor’s agent could take place without a prime contractor’s actual knowledge); *cf.* Deanna N. Conn, *When Contract Should Preempt Tort*

ages when they only have imputed knowledge of kickbacks fails to deter the parties actually giving or receiving the kickbacks.¹¹³ Furthermore, because imputed knowledge is determined on a case-by-case basis, prime contractors are unable to engage in the meaningful cost-benefit analysis necessary to avoid future kickbacks.¹¹⁴ Prime contractors are unable to accurately predict their future costs of liability or quantify the benefits of the kickbacks, rendering the oversight decisions necessary for deterrence impossible.¹¹⁵

Remedies: Limits on Vicarious Liability for Acts of Independent Contractors, 15 FORDHAM J. CORP. & FIN. L. 179, 186–187 (2009) (explaining that vicarious liability is unpredictable because a threshold determination of employees' status is difficult). For example, imagine that a prime contractor instructs its employee to hire foreign subcontractors to aid in completing a prime contract to deliver supplies to troops overseas. See *supra* notes 63–65 and accompanying text. If the employee picks a subcontractor based on a kickback, the prime contract price will become inflated and the prime contractor would likely submit the contract price to the government without ever knowing the price included the value of a kickback. See *supra* notes 63–65 and accompanying text. Notice that if increased vicarious liability damages were available, the prime contractor would have just subjected itself to these increased damages. See *supra* notes 63–65 and accompanying text. The likelihood that the prime contractor did not know about a kickback is even further amplified by the fact that the Anti-Kickback Act now includes reporting requirements when a prime contractor has reasonable grounds to believe a kickback has occurred. See 41 U.S.C. § 8703(c).

¹¹³ See 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 4:12 (2d ed. 2014) (explaining that in many jurisdictions that impose damages aimed at deterrence, the hope for deterrence can never be satisfied because the statutes in question only have the practical effect of deterring someone other than the actual defendant); see also *Lawrence v. Va. Ins. Reciprocal*, 979 F.2d 1053, 1056–57 (5th Cir. 1992) (attempting to promote deterrence through punitive damages in tort cases but failing to meet that goal because the party being prosecuted lacks knowledge).

¹¹⁴ See *Ernst & Young*, 967 F.2d at 171; *Cont'l Oil*, 706 F.2d at 1376; *supra* notes 63–65 and accompanying text (describing imputation of employee knowledge to a prime contractor corporation). For deterrence to work, the increased costs imposed must force actors to engage in a cost-benefit analysis between the potential liability costs and the benefits received from engaging in the misconduct. See E.J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS 87–90, 99–103 (Routledge 5th ed., 2007) (1976) (providing an introduction to the cost-benefit analysis forced upon parties that become subject to increased risks of liability); Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 338–40 (2011) (suggesting the concept of net-benefit maximization as a plausible public goal of cost-benefit analysis).

¹¹⁵ See H. David Robison & Rudy Santore, *Managerial Incentives, Fraud, and Monitoring*, 46 FIN. REV. 281, 282 (2011) (arguing that, for increased liability to deter activity, the actor needs to be able to quantify the costs of that liability and the benefits of the misconduct, and ultimately determine that the costs outweigh the benefits). Calculating the potential costs of the liability involves determining the amount of potential liability and the likelihood of liability. See MISHAN & QUAH, *supra* note 114, at 87–90, 99–103 (providing an introduction to the cost-benefit analysis forced upon parties that become subject to increased risks of liability). If increased vicarious liability damages are imposed here, prime contractors will have difficulty measuring these factors. See *id.* Since prime contractors may not know which employees have imputable knowledge until after the fact, prime contractors will have a difficult time determining their overall exposure to liability and measuring the amount of that liability. See Robison & Santore, *supra* at 302 (discussing liability exposure risks). Prime contractors will also have difficulty measuring the expected benefits of kickbacks because most kickbacks occur without the prime contractor's knowledge. See *id.* If prime contractors cannot accurately engage in cost-benefit analysis, they cannot seek to minimize their exposure to extensive liability. See *id.* Therefore, there will be no deterrence as a result of increased damages. See Arlen, *supra* note 109, at 1094.

2. Increased Vicarious Liability Damages Are Unnecessary to Adequately Compensate the Government

Another goal of the amended Anti-Kickback Act is to adequately compensate the government in the event kickbacks occur.¹¹⁶ Due to the concern of inadequate recoveries under the original Act, the current civil liability provision allows for increased damages for knowing violations of the Act.¹¹⁷ This inclusion of increased damages, however, should be appropriately limited to direct liability cases.¹¹⁸ A more expansive interpretation allowing increased damages for vicarious liability is unnecessary to adequately compensate the government and creates a substantial risk of overcompensation.¹¹⁹

Indeed, the goal of the Anti-Kickback Act is to “adequately” compensate the government, not to compensate the government to the greatest extent possible.¹²⁰ Allowing increased damages for vicarious liability is likely to overcom-

Indeed, there is a great deal of scholarship suggesting that increasing liability has no deterrence effect on business entities, even when they are aware of their own wrongdoing. *See, e.g.*, John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 401–02 (1981) (arguing that if the increased penalties are not severe enough to actually threaten the solvency of the corporation, then a typical response is not to decrease the likelihood of misconduct, but rather to reduce costs elsewhere to account for the potential increased costs of liability); E. Donald Elliott, *Why Punitive Damages Don’t Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1056–57 (1989) (explaining that increasing liability and imposing punitive damages on corporations may inadvertently decrease economic incentives for compliance, undermine individual responsibility, and encourage “business-as-usual” activity by corporation).

¹¹⁶ H.R. REP. NO. 99-964, at 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5964. The House Report accompanying the amended Act explains that limiting civil penalties to the amount of the kickback is an inadequate recovery. *See id.* (explaining that the original version of the Anti-Kickback Act was outdated and antiquated because it only recognized the harm of the value of the kickback, which the House Report calls “the tip of the iceberg” in the realities of the extreme costs incurred by the government when kickbacks occur). Further, damages in the amount of the kickback do not reflect the true costs and harms that the government may have suffered as a result of the kickback. *Id.* The House Report reasons that the cost of a kickback may exceed the actual amount of the kickback because the government also faces the risks of entering into non-competitive contracts as a result of kickbacks, receiving substandard equipment because of contract modification, and incurring substantial costs investigating and prosecuting the misconduct. *Id.*

¹¹⁷ 41 U.S.C. § 8706(a)(1) (2012); *see* H.R. REP. NO. 99-964, at 7, 1986 U.S.C.C.A.N. at 5964.

¹¹⁸ *See* H.R. REP. NO. 99-964, at 7, 1986 U.S.C.C.A.N. at 5964. Although an empirical study measuring the government’s direct and indirect costs in all kickback related investigation would prove useful in determining adequate government compensation, a theoretical and policy driven analysis can also shed light on the subject. *See id.* Furthermore, given the extensive nature and costs associated with defense contracts, it is increasingly difficult, if not impossible, to calculate the government’s direct and indirect costs associated with kickbacks. *See Auditor Fraud Resources*, OFFICE OF INSPECTOR GEN.: U.S. DEP’T OF DEF., <http://www.dodig.mil/resources/Fraud/index.html>, archived at <http://perma.cc/25DH-CX6Q> (last visited Nov. 16, 2014) (providing a database of fraud resources utilized to calculate and recover the extensive costs to the government of kickbacks and inflated subcontract costs).

¹¹⁹ *See* H.R. REP. NO. 99-964, at 7, 1986 U.S.C.C.A.N. at 5964.

¹²⁰ *See id.*; *see also* Valerie P. Hans & Valeria F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 121 (2011)

pensate the government because the civil liability provision already allows for an extensive recovery.¹²¹ Namely, the government can already receive damages from any party involved in the kickback, many of whom are undeniably subject to increased direct liability damages.¹²² Additionally, the government's recovery is not limited to the civil liability provision or the Anti-Kickback Act generally.¹²³ The government can seek damages for kickbacks under both the civil and criminal provisions of the Anti-Kickback Act, and can also seek damages under other statutes.¹²⁴ For example, seeking damages under the Anti-Kickback Act does not inhibit the government from also seeking damages under the False Claims Act.¹²⁵ In such circumstances where the government prosecutes multiple parties and utilizes multiple statutes, the addition of increased vicarious liability damages is likely to drastically overcompensate the government.¹²⁶ Accordingly, courts should interpret the Act's civil liability provision to limit vicarious liability to the amount of the kickback involved.¹²⁷

B. Maintaining Defense Contract Market Efficiency

The Anti-Kickback Act's second goal is to maintain market efficiency by ensuring that prime contractors enter into subcontracts on the basis of expertise and cost-efficiency, not based on kickbacks.¹²⁸ Although the government's selec-

(explaining that damage awards often overcompensate plaintiffs and are hostile to large businesses and corporations).

¹²¹ See 41 U.S.C. § 8706(a)(1)–(2); see also Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV 1181, 1197–98 (2011) (evaluating the risks of overcompensation in contract fraud by awarding one party more than the benefits of its bargain).

¹²² 41 U.S.C. § 8706(a)(1) (imposing civil damages equal to double the amount of the kickback plus additional penalties for multiple violations against any person that knowingly violates Act); *id.* § 8706(a)(2) (imposing civil damages equal to the amount of the kickback against a person whose employee, subcontractor, or subcontractor employee violates the Act); see *United States v. Kruse*, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) (recovering damages from both the prime contractor and an officer of the prime contractor); *Jensen*, 326 F.2d at 892 (awarding damages against both the individual that accepted the kickback and the corporation).

¹²³ See *Morse Diesel Int'l, Inc., v. United States*, 79 Fed. Cl. 116, 128–29 (2007) (holding that a contractor may be liable under both the Anti-Kickback Act and the False Claims Act for the same acts without being duplicative).

¹²⁴ See 41 U.S.C. § 8706 (2012) (allowing civil remedies for violations of the Anti-Kickback Act); *id.* § 8707 (allowing fines for criminal violations of the Anti-Kickback Act); False Claims Act, 31 U.S.C. § 3729(a) (2012) (providing damages under the False Claims Act).

¹²⁵ See 31 U.S.C. § 3729(a). The False Claims Act prohibits knowingly presenting a false or fraudulent claim for payment or approval to the United States government. See *id.* §§ 3729(a), 3729(a)(1). In addition, the False Claims Act prohibits knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim. *Id.* § 3729(a)(2).

¹²⁶ See *id.* § 3729(a); 41 U.S.C. §§ 8706–8707; see also Thel & Siegelman, *supra* note 121, at 1197–98 (2011) (discussing risks of overcompensation in contract fraud).

¹²⁷ *But see KBR II*, 727 F.3d at 348 (expanding vicarious liability under the Act's civil liability provision).

¹²⁸ H.R. REP. NO. 99-964, at 6–7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5963–64.

tion of prime contractors impacts defense contract market efficiency, the selection of subcontractors is arguably even more influential in dictating the level of market efficiency.¹²⁹ This Section posits that the Act's goal of maintaining market efficiency through efficient subcontractor selection is best accomplished by limiting vicarious liability damages.¹³⁰

The market for government defense contracts involves operations on a global scale with billions of dollars in government expenses.¹³¹ This market becomes inefficient when prime contractors select subcontractors on the basis of kickbacks rather than cost-efficiency and expertise.¹³² In practice, subcontractors provide kickbacks to prime contractors to either win the bid for a subcontract or to induce the prime contractor to transmit an otherwise inflated subcontract price to the government.¹³³ In either form, kickbacks distort market efficiency because they create a substantial risk of defense contracts being fulfilled at inflated prices and by inefficient, non-expert subcontractors.¹³⁴ Interpreting the Act's civil liability provision questions whether subjecting prime contractors to the risk of increased vicarious liability damages will encourage them to make more efficient subcontractor decisions.¹³⁵

¹²⁹ See DEP'T OF DEF., OFFICE OF SMALL BUS. PROGRAMS, TIPS FOR DOD CONTRACTORS SUBMITTING SUBCONTRACTING REPORTS 1, http://www.acq.osd.mil/osbp/docs/tips_for_contractors_subcontracting.pdf, archived at <http://perma.cc/AG45-BAQ7> (last revised Mar. 2012) (explaining the process and criteria by which prime contractors select subcontractors and the method through which subcontract reports are submitted to the federal government). Furthermore, after the prime contractor selects a subcontractor, the prime contractor is responsible for transmitting the subcontractor costs to the government. See *id.* Subcontractor selection is important for efficiency, quality, and accountability of defense contracts. See Chong Wang & Joseph G. San Miguel, *Are Cost-Plus Defense Contracts (Justifiably) out of Favor?*, 2 J. GOVERNMENTAL & NONPROFIT ACCT. 1, 6–7 (2013) (describing the role of subcontractors in the completion of prime contracts).

¹³⁰ But see *KBR II*, 727 F.3d at 348 (expanding vicarious liability under the Act's civil liability provision).

¹³¹ MOSHE SCHWARTZ & WENDY GINSBERG, CONG. RESEARCH SERV., R41820, DEPARTMENT OF DEFENSE TRENDS IN OVERSEAS CONTRACT OBLIGATIONS 5 (2013) (calculating that in fiscal year 2012, \$44 billion of the Department of Defense's total contract obligations were performed outside of the United States).

¹³² See Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 87 (1999) (describing the contract inefficiencies that arise in the event of fraud); cf. Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2178–81 (2010) (explaining that in securities fraud liability, the social costs and inefficiencies created by fraud must outweigh the enforcement costs).

¹³³ See DEF. CONTRACT AUDIT AGENCY, *supra* note 104, at 68–70 (providing detailed procedures by which prime contractors can select subcontractors and recover subcontractor costs from the federal government). Regardless of the method selected, the inclusion of kickbacks will increase the cost of subcontracts, resulting in the prime contractor overcharging the government. See H.R. REP. NO. 99-964, at 5, 1986 U.S.C.C.A.N. 5960, 5962.

¹³⁴ See Ayres & Madison, *supra* note 132, at 87–88; cf. Rose, *supra* note 132, at 2178–81 (describing similar inefficiencies in securities fraud).

¹³⁵ See 41 U.S.C. § 8706(a) (2012); *KBR II*, 727 F.3d at 348–49 (expanding the application of the Act's civil liability provision to include increased damages in vicarious liability cases); H.R. REP. NO. 99-964, at 5 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5962.

The analysis of this question mirrors that of deterrence, and courts should similarly conclude that the goals of the Act are best satisfied by limiting vicarious liability damages.¹³⁶ Namely, if the Act's purpose is to avoid prime contractors making inefficient subcontractor decisions, then allowing increased vicarious liability damages does nothing to further that goal.¹³⁷ Where prime contractors have no actual knowledge of kickbacks, their selection of subcontractors will not be influenced by kickbacks.¹³⁸ Furthermore, direct liability and increased damages are already imposed on the individuals that actually select subcontractors, thus promoting efficient subcontractor selection.¹³⁹ Because applying increased vicarious liability damages on prime contractors is misguided and does not impact subcontractor selection, the Act's civil liability provision should be interpreted to limit vicarious liability damages to the amount of the kickback involved.¹⁴⁰

C. *Imposition of Risk in Continued Defense Contracting*

The Anti-Kickback Act's third goal is to create a regulatory structure that imposes appropriate levels of risk on prime contractors, while simultaneously protecting their role in government defense contracting.¹⁴¹ The amended Act increases prime contractor self-regulation by requiring that they adhere to con-

¹³⁶ See Arlen, *supra* note 109, at 1094 (explaining the importance of targeted risk and compensation levels in efficient deterrence); *supra* notes 108–115 and accompanying text (arguing that increasing vicarious liability damages would not deter kickbacks because the increased liability costs are misdirected and prime contractor cost-benefit analysis is limited under defense contracts).

¹³⁷ See 41 U.S.C. § 8706; H.R. REP. NO. 99-964, at 5, 1986 U.S.C.C.A.N. 5960, 5962.

¹³⁸ See *Cont'l Oil*, 706 F.2d at 1376 (discussing imputed knowledge). Prime contractors will have no direct knowledge of kickbacks if vicarious liability is applied to Section 8706(a)(1) because the knowledge requirement will only be satisfied through imputed knowledge. See, e.g., *United States v. Josleyn*, 206 F.3d 144, 159 (1st Cir. 2000) (holding that the individual's express permission to act on behalf of the corporation rendered his knowledge of evidence should be imputed to the corporation); *St. Paul Fire & Marine Ins. Co. v. F.D.I.C.*, 968 F.2d 695, 701 (8th Cir. 1992) (holding that the officer's responsibility of handling all of the insurance matters for the bank rendered her knowledge of fraudulent insurance activity imputable to the bank); *Cont'l Oil*, 706 F.2d at 1376 (holding that the individual's responsibility of maintaining equipment, hiring employees, and chartering trips made his knowledge imputable to the corporation).

¹³⁹ See 41 U.S.C. § 8706(a)(1) (imposing increased damages on any person that knowingly violates the Act); H.R. REP. NO. 99-964, at 6, 1986 U.S.C.C.A.N. 5960, 5963 (explaining that the amended Act is designed to discourage the selection of subcontractors on the basis of kickbacks).

¹⁴⁰ See 41 U.S.C. § 8706(a)(1); H.R. REP. NO. 99-964, at 6, 1986 U.S.C.C.A.N. 5960, 5963.

¹⁴¹ See H.R. REP. NO. 99-964, at 6 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5963. This goal is often overlooked or minimized in light of the focus on deterrence and compensation. See *KBR II*, 727 F.3d at 348–49 (expressing the importance of deterrence in light of the risk that the government could respond to increased costs by raising taxes, ultimately extending the harm of kickbacks to taxpayers); *Purdy*, 144 F.3d at 244 (explaining the most important goal of the amended Anti-Kickback Act as the assurance of compensation and the extension of deterrence). The successful function of the government defense contracting system, however, depends as much on this goal as any other. See H.R. REP. NO. 99-964, at 6, 1986 U.S.C.C.A.N. 5960, 5963.

tractual and reporting requirements.¹⁴² Given these enhanced self-regulatory measures, courts should interpret the Act's civil liability provision to limit vicarious liability damages.¹⁴³

The Act's civil liability provision should be interpreted to limit vicarious liability damages because prime contractors may be unable to bear the risk of more extensive liability.¹⁴⁴ Large government defense contracts impose significant variable and unpredictable costs on prime contractors, and those costs already make it difficult for prime contractors to bear the risk of liability.¹⁴⁵ The imposition of increased vicarious liability damages could very likely exacerbate prime contractors' risk of liability to an unmanageable level.¹⁴⁶ When prime con-

¹⁴² 41 U.S.C. § 8703(a) (2012) (requiring that defense contracts between a contractor and the government specify that the prime contractor will "have in place and follow reasonable procedures designed to prevent and detect violations of [the Act] in its own operations and direct business relationships"); *id.* § 8703(c) (requiring that a prime contractor "that has reasonable grounds to believe that a violation of [the Act] may have occurred shall promptly report the possible violation" to the government).

¹⁴³ *See id.* § 8706; H.R. REP. NO. 99-964, at 6, 1986 U.S.C.C.A.N. 5960, 5963; *see also* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277-78 (2008) (explaining that corporate liability, when expanded too greatly, can serve as a "corporate death penalty"). Vicarious liability should be carefully tailored to impose appropriate levels of risk without inflicting the "corporate death penalty." *See* Hamdani & Klement, *supra* at 277-78.

¹⁴⁴ 41 U.S.C. § 8706; *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984) (describing vicarious liability as adhering to a policy of deliberately allocating risk of losses to the party most capable of bearing those risks); Hamdani & Klement, *supra* note 143, at 290-91 (providing that firms must determine how much capital to invest in compliance with regulations based on their expected ability to bear liability costs); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1296 (2000) (explaining that corporations by their nature accept some risk of vicarious liability).

¹⁴⁵ *See* Bruce D. Page, Jr., *When Reliance is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government*, 61 A.F. L. REV. 1, 14-16 (2008) (describing that costs of government contracts exceed that of similar private contracts based on uncertainty in performance and efficiency). Corporate costs include the costs of uncertain business cycles, the fluctuating costs of raw materials and investment capital, and the risk that contractors will not fulfill their contracts in a productive, cost efficient manner. *See* Laufer & Strudler, *supra* note 144, at 1298-1301.

¹⁴⁶ *See* Press Release, U.S. Attorney's Office: D.C., Former Business Executive Pleas Guilty to Federal Charges in Alleged \$28 Million Bribery and Kickback Scheme (Mar. 13, 2012), available at <http://www.justice.gov/usao/dc/news/2012/mar/12-095.html>, archived at <http://perma.cc/4PT3-4WSG> (recounting the conviction for a \$28 million kickback scheme). Aside from the sheer magnitude of increased damages, such damages also include an element of unpredictability stemming from the fact that prime contractors will not definitively know which employees have knowledge that can be imputed to the prime contractor and trigger increased damages until after the fact. *See Cont'l Oil*, 706 F.2d at 1376 (explaining that imputable knowledge is based on the responsibility and authority of the employee); 3 FLETCHER ET AL., *supra* note 63, § 807 (discussing the ability of employee knowledge to be imputed to the corporation).

tractors are unable to bear the risk of liability, they will stop seeking government contracts to the detriment of government defense contracting generally.¹⁴⁷

Furthermore, even if prime contractors could financially bear the risk of increased liability, vicarious liability should be limited because more extensive liability will substantially hinder the role of prime contractors in defense contracting.¹⁴⁸ Specifically, faced with the risk of increased liability, prime contractors will make corresponding business decisions that could disrupt the dynamics of defense contracting or even challenge the stability of defense contracting as a whole.¹⁴⁹ Vicarious liability under the Act's civil liability provision should be limited to avoid these instability risks in a defense contract system that exceeds \$600 billion annually.¹⁵⁰

First, in response to the risk of increased liability, prime contractors could allocate more resources towards oversight in an effort to reduce the probability of liability.¹⁵¹ Given that defense contracts are already extremely expensive to perform, the cost of additional oversight will likely have to be externalized.¹⁵²

¹⁴⁷ See Hamdani & Klement, *supra* note 143, at 291 (explaining that one of the biggest drawbacks to corporate vicarious liability is that it imposes the harshest sanctions even against corporations that make an adequate effort to police the conduct of their employees).

¹⁴⁸ See Conn, *supra* note 112, at 207–10 (explaining the interplay of contract law and vicarious liability). Parties contract based on their expected liability and the amount of liability they can financially bear. See *id.* Therefore, imposing greater liability than the parties accounted for in contracting can hinder their ability to perform the contract and pursue future contracts. See *id.*; Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 102–05 (2003) (discussing the appropriate levels of liability in vicarious liability).

¹⁴⁹ See, e.g., Press Release, Raytheon Company, Raytheon Consolidates Businesses and Announces Key Executive Roles (Mar. 25, 2013), available at <http://raytheon.mediaroom.com/index.php?s=43&item=2300>, archived at <http://perma.cc/VP8U-EDSX> (announcing the consolidation of the business operations of one of the largest domestic government contractors); *Consolidated Afloat Networks and Enterprise Services (CANES)*, NORTHROP GRUMMAN, <http://www.northropgrumman.com/capabilities/canes/Pages/default.aspx>, archived at <http://perma.cc/QG35-2DHP> (last visited Nov. 16, 2014) (describing the consolidation of a contractor's business to "increase capability and affordability"); cf. Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 31–33 (2008) (discussing that in the face of increased securities liability and regulation, each corporation has to determine how it will respond). Prime contractors could essentially decide between three courses of action when faced with increased vicarious liability. See Conn, *supra* note 112, at 207–10 (investigating corporate decision making in the face of corporate liability). They could allocate more resources towards oversight of their employees and subcontractors, continue to operate as they did without the risk of increased liability, or determine that the increased liability risk is too great and refrain from seeking future defense contracts. See *id.*

¹⁵⁰ 41 U.S.C. § 8706 (2012); see WALKER, *supra* note 10, at 1 (providing that U.S. defense spending totaled \$619 billion in 2013); U.S. DEP'T OF DEF., *supra* note 1 (showing the magnitude of daily defense contracts);

¹⁵¹ See Conn, *supra* note 112, at 207–10; Hamdani, *supra* note 148, at 17.

¹⁵² See Shawn J. Bayern, *False Efficiency and Missed Opportunities in Law and Economics*, 86 TUL. L. REV. 135, 174–76 (2011) (discussing the externalization of corporate costs). The global scale and continuous nature of defense contracts already makes the cost of performing those contracts substantial. See, e.g., *KBR II*, 727 F.3d at 344–45 (characterizing a government defense contract structured as an "indefinite delivery/indefinite quantity contract," meaning that the Army would periodical-

The most plausible way for prime contractors to externalize that cost will be to incorporate the oversight costs into their government contracts.¹⁵³ Additionally, where a prime contractor can externalize the costs of increased oversight, that oversight is likely to be performed more inefficiently than if the prime contractor had internalized the cost.¹⁵⁴ As a result, in its efforts to avoid being overcharged on defense contracts, the government will have created a regime where it is now paying higher contract prices for inefficient prime contractor oversight.¹⁵⁵

Second, in response to the risk of increased liability, prime contractors could elect not to account for the risk and continue to operate in the same manner.¹⁵⁶ Indeed, this renders the government no more protected from kickback activity than it is without increased vicarious liability damages.¹⁵⁷ Therefore, forcing prime contractors into insolvency as a result of excessive vicarious liability would be the only result of increasing damages.¹⁵⁸ This leaves all parties in a vulnerable position and makes the market for government defense contracting unworkable.¹⁵⁹

Finally, in response to the risk of increased liability, prime contractors could determine that the liability risk and oversight costs necessary to compensate for that risk are too great.¹⁶⁰ As discussed previously, if prime contractor risk is unbearable, prime contractors will stop seeking government contracts.¹⁶¹ The likelihood of this prime contractor response is amplified by the expansive nature of government defense contracts and the sheer impracticality of overseeing such

ly issue discrete task orders that the prime contractor could either complete directly or through sub-contractors); SCHWARTZ & GINSBERG, *supra* note 131, at 5 (reporting \$44 billion in defense contract obligations being performed overseas).

¹⁵³ See Laufer & Strudler, *supra* note 144, at 1296 (discussing risk shifting in corporate vicarious liability).

¹⁵⁴ See Barak Atiram, *Market Dynamics in Corporate Tort Externalization: The Hidden Assumption of Corporate Social Efficiency*, 86 U. DET. MERCY L. REV. 347, 359–60 (2009) (discussing corporate liability and cost externalization).

¹⁵⁵ See Laufer & Strudler, *supra* note 144, at 1296; Atiram, *supra* note 154, at 359–60.

¹⁵⁶ See Conn, *supra* note 112, at 207–10; Hamdani, *supra* note 148, at 17.

¹⁵⁷ See INSPECTOR GEN., U.S. DEP'T OF DEF., *supra* note 2, at iii, 94 (disclosing that from October 1, 2013, through March 31, 2014, \$23.5 billion in potential monetary losses to the government were identified as a result of misconduct); U.S. DEP'T OF DEF., *supra* note 1 (providing reference to the magnitude of government defense contracts and potential vulnerability of the government in the event of fraud).

¹⁵⁸ See *Ernst & Young*, 967 F.2d at 171 (explaining whether or not knowledge can be imputed to the corporation depends on the individuals level or responsibility); *Cont'l Oil*, 706 F.2d at 1376 (explaining that an individual's level of responsibility must be discerned from the circumstances of the particular case).

¹⁵⁹ See Eisenberg et al., *supra* note 108, at 626–27 (explaining the appropriate function of damages designed to penalize a defendant); see also Ellis, Jr., *supra* note 108, at 7 (discussing the importance of balanced deterrence and the unworkable nature of excessive liability).

¹⁶⁰ See Hamdani & Klement, *supra* note 143, at 291 (explaining that corporate vicarious liability imposes the harshest sanctions irrespective of the policing efforts of the corporation, thus skewing corporate incentives in contracting and compliance).

¹⁶¹ See *id.*

grand operations.¹⁶² Where contractors implement oversight measures and incur huge costs, yet are still subject to crippling vicarious liability risk, the market for government defense contracts becomes particularly unappealing.¹⁶³ To avoid these negative consequences of excessive vicarious liability risk, the Act's civil liability provision should be interpreted to limit prime contractor vicarious liability.¹⁶⁴ Such an interpretation is the only way to ensure that risk is appropriately apportioned and stability is maintained in government defense contracting.¹⁶⁵

CONCLUSION

The textual ambiguity and inconclusive legislative history of the Anti-Kickback Act's civil liability provision requires that the provision be interpreted and applied in light of the Act's stated purpose and goals. Analysis of the Act's three main goals reveals that courts should interpret the civil liability provision to limit vicarious liability damages to the amount of the kickback involved. This interpretation best promotes the Act's goals by appropriately deterring kickbacks, adequately compensating the government, maintaining efficiency through subcontractor selection, and imposing manageable levels of risk on prime contractors and the government. A differing interpretation of the civil liability provision—expanding vicarious liability—would create substantial risks and seriously undermine the strength and purpose of the statute. Therefore, prime contractor vicarious liability should be limited under the Anti-Kickback Act to protect the government's interest and preserve the market for government defense contracts.

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¹⁶² See WALKER, *supra* note 10, at 1 (valuing Department of Defense spending at \$619 billion in 2013); U.S. DEP'T OF DEF., *supra* note 1 (exemplifying the ongoing nature of defense contracts).

¹⁶³ See *KBR II*, 727 F.3d at 348 (applying increased vicarious liability measures irrespective of any oversight or compliance measures implemented by the prime contractor); see also Press Release, U.S. Attorney's Office: D.C., *supra* note 146 (announcing a conviction without mitigating the punishment based on corporate regulatory and self-policing measures).

¹⁶⁴ 41 U.S.C. § 8706 (2012); see Laufer & Strudler, *supra* note 144, at 1296 (explaining corporations and the acceptance of limited vicarious liability risk); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73–74 (2007). Because corporations are already subject to costly market pressures, they often cannot survive a conviction for excessively high damages. See Bharara, *supra* at 73–74. Furthermore, even if a corporate defendant is not convicted, the costs of litigating in the face of possibly excessively high damages drains the corporation of its resources. See *id.*

¹⁶⁵ See 41 U.S.C. § 8706(a)(1); H.R. REP. NO. 99-964, at 6 (1986), as reprinted in 1986 U.S.C.C.A.N. 5960, 5963.

