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Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure under the Foreign Corrupt Practices Act

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INCENTIVIZING CORPORATE AMERICA TO ERADICATE
TRANSNATIONAL BRIBERY WORLDWIDE: FEDERAL
TRANSPARENCY AND VOLUNTARY DISCLOSURE UNDER
THE FOREIGN CORRUPT PRACTICES ACT

*Peter R. Reilly**

Abstract

In 1977, the U.S. Securities and Exchange Commission (SEC) discovered that hundreds of U.S. companies had spent hundreds of millions of dollars in bribes to improve business overseas. In response, Congress passed the Foreign Corrupt Practices Act (FCPA), thereby making it illegal to bribe foreign officials to obtain a business advantage. A major tension has emerged between the federal agencies charged with enforcing the FCPA (i.e., the U.S. Department of Justice (DOJ) and the SEC), and the corporate entities trying to stay within the legal and regulatory bounds of the statute. Specifically, while the government appears to be trying to maximize discretion and flexibility in carrying out its enforcement duties, companies are calling for more transparency and guidance. Unfortunately, the government's FCPA Resource Guide, published in 2012 to provide the public with more direction, fails to shed enough light on how to successfully conform to this complicated statute.

This Article focuses on the difficult and strategic decision of whether a company should self-report to the government a potential FCPA violation. After reviewing the advantages and disadvantages of self-reporting, this Article argues that the government needs to be more transparent and forthcoming regarding the potential benefits of doing so; it argues that the government must provide greater transparency regarding *specific* and *calculable* benefits that can be achieved through self-reporting and cooperation in the face of possible FCPA violations. Finally, this Article concludes that companies will be more likely to self-report such violations—and thereby assist in eradicating the scourge of transnational bribery worldwide—only if there is more certainty that the benefits achieved from self-reporting will outweigh the risks and costs involved.

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INTRODUCTION

For nearly four decades, the Foreign Corrupt Practices Act (FCPA)¹ has worked to help eradicate the bribing² of foreign officials to obtain business advantages. When is it strategically wise for companies to self-report violations of the FCPA to the U.S. Department of Justice (DOJ) or the U.S. Securities and Exchange Commission (SEC)? Top DOJ officials state that voluntary disclosure is an important factor in deciding whether and how to prosecute a company, and the agency “has and will continue to provide meaningful credit”³ for companies that self-report.⁴ The director of the SEC’s Enforcement Division answers the question even more forcefully: “[A]ny company that does the calculus will realize that self-reporting [FCPA misconduct] is *always* in the company’s best interest.”⁵

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78q(b)(2)–(3), 78dd-1 to -3 (2012) (amended 1988 and 1998).

2. See BLACK’S LAW DICTIONARY 186 (7th ed. 1999) (defining bribery as “[t]he corrupt payment, receipt, or solicitation of a private favor for official action”).

3. Mike Koehler, *World Bribery & Corruption Compliance Forum—Comments by U.S. Officials*, FCPA PROFESSOR (Sept. 16, 2010), <http://www.fcpaprofessor.com/world-bribery-corruption-compliance-forum-comments-by-u-s-officials> [hereinafter Koehler, *World Bribery*] (quoting Charles Duross, then-Deputy Chief of the DOJ’s Criminal–Fraud Section); see also Leslie R. Caldwell, Assistant Attorney General, Speech at the American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st> (“[W]e still encourage and reward self-disclosure and cooperation.”); Alice S. Fisher, Assistant Attorney General, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), available at <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf> (“[I]f you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit.”).

4. Rachel Louise Ensign, *Why Companies Might Opt to Self-Report Potential Bribery Issues*, WALL ST. J. (Nov. 2, 2014), <http://www.wsj.com/articles/why-companies-might-opt-to-self-report-potential-bribery-issues-1414974824> (quoting James Koukios, Senior Deputy Chief of the DOJ’s Criminal–Fraud Section).

5. Andrew Ceresney, Director, Enforcement Division, SEC, Remarks at 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014) [hereinafter Ceresney, Conference Remarks] (emphasis added), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#.VLyNb71OWM8>; see also Andrew Ceresney, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2103), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284#.UrUvXJqA2M8> (“Some lawyers sometimes ask me what is the incentive to notify us promptly about wrongdoing that you uncover? The answer is simple—if we find the violations on our own, the consequences will surely be worse than if you had self-reported the conduct . . . We have a wide range of tools available to us to facilitate and reward meaningful cooperation—from reduced charges and penalties, to taking no action at all.”).

However, academics, attorneys, and consultants who research, practice, and advise in the area of the FCPA suggest that the answer to this pivotal question is a bit more nuanced and complicated. As a partner in a leading national law firm puts it: “Voluntary disclosure is a business decision What are the costs and benefits? Right now it’s a guessing game.”⁶ Despite exhortations from the federal government for businesses to self-report FCPA violations and obtain the attendant benefits, this Article suggests that there are times when it might *not* be a good idea, from a business perspective, for corporate entities to do so. In other words, this Article suggests that under current DOJ and SEC policy, a company’s ability and willingness to self-report is not always strategically wise in the context of FCPA enforcement. This Article explores, through the lens of a number of significant FCPA cases, the many factors companies must consider when making this difficult decision. This Article also investigates the policies and programs used by the federal government to persuade corporate entities to self-report and cooperate, including the kinds of results that might be achieved from doing so. This Article demonstrates that although the risks associated with voluntary disclosure tend to be concrete and predictable, the rewards have been largely uncertain—a calculus that oftentimes militates against disclosure.

This Article is divided into five Parts: Part I discusses the extent of the transnational bribery problem and provides a brief history of the FCPA. Part II discusses how corporate entities can cooperate with the DOJ and SEC in the context of a potential FCPA violation, including how the DOJ’s Principles of Federal Prosecution of Business Organizations (Principles of Prosecution) and the SEC’s so-called “Seaboard Report” and “Penalties Statement” play a role in evaluating cooperation. Part II also discusses how the DOJ and SEC might use various tools, such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), to reward the cooperating entities. This Part underscores the enormous amount of discretion both agencies have in deciding whether, and to what degree, they will bestow benefits upon corporate entities for self-reporting and other cooperative behavior.

Part III discusses Chapter Eight of the U.S. Sentencing Guidelines (Sentencing Guidelines), which governs the sentencing of organizations and provides incentives for the voluntary disclosure of potential FCPA violations. To provide a sense of how various factors influence the final outcome of FCPA cases, this Part reviews the plea agreements and DPAs of seven well-known FCPA matters. All seven cases involve

6. Ensign, *supra* note 4 (emphasis added) (quoting Laurence Urgenson, Partner at Mayer Brown LLP).

some of the largest FCPA fines paid in U.S. history.⁷ In three of the cases, the defendant elected to self-report the matter to the federal government, and in four of the cases, the defendant failed to self-report. This Part concludes, based on the seven cases reviewed and additional scholarship in the area, that (1) voluntary disclosure does not appear to correlate with reduced monetary penalties in FCPA matters, and (2) the ultimate outcome of a government FCPA investigation appears to depend more on the seriousness of a company's transgression than on whether the company self-reported that transgression to the government.

Part IV reviews the Ralph Lauren Corporation FCPA matter, a widely reported case in the legal press that stands for the proposition that self-reporting is strategically the best course of action for a company due to the potential benefits. This Part challenges that proposition and, furthermore, questions the fairness of using DPAs and NPAs as vehicles for disposing of FCPA matters instead of following the more traditional routes of plea bargains or trials.⁸ Part V attempts to develop an FCPA self-reporting calculus by setting forth both the advantages and disadvantages of self-reporting.

Finally, this Article links together observations from Parts I through V and concludes that (1) it could sometimes be reasonable for a corporate entity, when faced with the discovery of an FCPA violation, to decide *not* to voluntarily disclose the wrongdoing; and (2) to increase the likelihood that companies will consistently self-report FCPA violations, and thereby assist in eradicating the scourge of transnational bribery worldwide, the DOJ and SEC must be far more transparent. Their policies, pronouncements, rules, and regulations must provide more certain, specific, and *calculable* incentives to companies for volunteering to come forward.

7. See Richard L. Cassin, *With Alstom, Three French Companies Are Now in the FCPA Top Ten*, FCPA BLOG (Dec. 23, 2014, 9:45 AM), <http://www.fcpablog.com/blog/2014/12/23/with-alstom-three-french-companies-are-now-in-the-fcpa-top-t.html#>.

8. In a plea bargain, defendants negotiate for a lesser charge, penalty, or sentence, but in general they ultimately accept both guilt and conviction. See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869 (2005) ("A guilty plea [in a plea bargain] results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial."). Of course, an *Alford* plea would involve a no-contest plea where the defendant accepts a conviction but does not admit guilt. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1362, 1372 (2003).

I. THE TRANSNATIONAL BRIBERY PROBLEM AND THE FCPA

Corporations have engaged in transnational bribery for almost four hundred years. This Part discusses the pervasiveness of the practice and provides a brief history of the FCPA, which represents Congress's attempt to combat the problem of corporate transnational bribery.

A. *Extent of the Bribery Problem*

The first reported case of corporate foreign bribery occurred in the seventeenth century, when the British East India Company bribed Mogul rulers with rare and exotic treasures in return for a tax break on exports.⁹ Today, the World Bank Institute estimates that the total amount of bribes paid per year worldwide is approximately \$1 trillion.¹⁰ Alexandra Wrage, President of TRACE International, a nonprofit business association whose mission is to raise international standards of anti-bribery compliance, states that bribery is not only “wrong” but also “uneconomical, inefficient, costly, distorting of proper incentives and outcomes, risky, and generally unprofitable.”¹¹ A leading FCPA scholar concludes that “[b]ribery blights lives, undermines democracy, and distorts markets.”¹² Other scholars have demonstrated its dramatically negative impact on economies throughout the world, including the “power to reduce private foreign investment into countries that host bribery, lower a host country’s tax base, and positively correlate with reduced economic development.”¹³ In short, bribery “harms governments, commercial entities, global markets, and the public at large.”¹⁴

Nevertheless, bribery and corruption appear to be both relentless and pervasive. Ernst & Young’s 13th Global Fraud Survey, which included 2719 interviews of senior decision makers in a sample of the largest companies throughout fifty-nine countries and territories, found that a majority of respondents in 40% of those countries felt there was

9. Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES MAG., Oct. 5, 1975, at 19.

10. *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, WORLD BANK, <http://go.worldbank.org/KQH743GKF1> (last visited July 22, 2015).

11. ALEXANDRA ADDISON WRAGE, *BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS, AND SECURITY* 124 (2007).

12. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 783 (2011).

13. Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT’L L. 673, 679–80 (2014).

14. *Id.* at 680. For an overview of the harms that flow from transnational bribery, see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 274–79 (1999).

widespread corruption.¹⁵ In Egypt, Kenya, and Nigeria, 80% of the respondents perceived widespread corruption.¹⁶ Moreover, Transparency International's 2014 Progress Report on global enforcement of the Organization for Economic Cooperation and Development's (OECD) Anti-Bribery Convention concludes that global trade is a long way from being corruption-free.¹⁷ The report declares specifically that "the performance of the majority of the 40 countries that agree to combat foreign bribery in international business transactions is far from satisfactory."¹⁸

Interestingly, the report found that in a majority of cases, high-level management is involved in the bribery. In 41% of cases, corporate managers sanctioned the wrongdoing, and in an additional 12% of cases, the CEO permitted the bribes.¹⁹ Additionally, two other researchers sum up the pervasiveness of foreign bribery: "[Corruption] stretches from multinational firms in the United States, to manufacturers in China, to farmers in Latin America. It has led to water scarcity in Spain, child labor in China, illegal logging in Indonesia, unsafe medicine in Nigeria and poorly constructed buildings in Turkey, where collapses have killed people."²⁰

15. ERNST & YOUNG, 13TH GLOBAL FRAUD SURVEY 12, 22 (2014), *available at* [http://www.ey.com/Publication/vwLUAssets/EY-13th-Global-Fraud-Survey/\\$FILE/EY-13th-Global-Fraud-Survey.pdf](http://www.ey.com/Publication/vwLUAssets/EY-13th-Global-Fraud-Survey/$FILE/EY-13th-Global-Fraud-Survey.pdf).

16. *Id.* at 12.

17. Fritz Heimann et al., *Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, TRANSPARENCY INT'L 2 (2014), *available at* http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd. Note that forty-one nations have signed the 1997 OECD Anti-Bribery Convention: thirty-four OECD member countries and seven non-member countries, including Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa. Press Release, OECD, Latvia to Join OECD Anti-Bribery Convention (July 4, 2014), *available at* <http://www.oecd.org/newsroom/latvia-to-join-oecd-anti-bribery-convention.htm>; *see also* Organisation for Economic Co-Operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), S. Treaty Doc. No. 105-43, *reprinted in* 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

18. Heimann et al., *supra* note 17, at 4. Only four of the forty countries that subscribe to the Anti-Bribery Convention engage in active enforcement: Germany, Switzerland, the United Kingdom, and the United States. *Id.* at 4. Twenty-two countries have little enforcement or no enforcement whatsoever, including Belgium, Brazil, Bulgaria, Chile, Columbia, the Czech Republic, Denmark, Estonia, Greece, Ireland, Israel, Japan, Luxembourg, Mexico, the Netherlands, Poland, Russia, the Slovak Republic, Slovenia, South Korea, Spain, and Turkey. *Id.* at 4–5.

19. ORG. FOR ECON. CO-OPERATION & DEV., OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 22 (2014).

20. Francis X. Donnelly & Sarah Kellogg, *Understanding Corruption*, GEO. WASH. BUS., Fall 2011, at 9.

SEC Chairperson Mary Jo White stated that FCPA enforcement is “among the most prominent concerns” facing the agency in the international arena.²¹ She also acknowledged that transgression of the statute “not only undermines international markets and governments but also simultaneously undermines the reporting and disclosure integrity of our own markets.”²² This helps explain why the SEC, DOJ, and the U.S. Federal Bureau of Investigation (FBI) have collaborated in conducting a foreign bribery training program for 130 investigators and prosecutors from thirty different countries around the world.²³ It also helps explain why the FBI recently created three squads to specifically target FCPA violations originating abroad and reaching the United States.²⁴ The FBI will assign approximately thirty agents to the squads in Los Angeles, New York, and Washington, D.C.²⁵ Jeffrey Sallet, the FBI’s Public Corruption Chief, stated in an interview: “Corruption leads to lack of confidence in government. Lack of confidence in government leads to failed states. Failed states lead to terror and national security issues.”²⁶

B. *Brief History of the FCPA*

In 1977, the SEC discovered that hundreds of U.S. companies had invested hundreds of millions of dollars in foreign bribery to improve business overseas.²⁷ Recognizing that such corruption “imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest business,” Congress passed the FCPA.²⁸ The law criminalizes bribing foreign officials to obtain a business advantage and also requires companies registered with the SEC to keep accurate books and records.²⁹ Thus, two sets of provisions make up the statute:

21. Mary Jo White, U.S. Securities and Exchange Commission Chairperson, Speech to the Investment Company Institute: Regulation in a Global Financial System (May 1, 2013).

22. *Id.*; Donnelly & Kellogg, *supra* note 20, at 9.

23. White, *supra* note 21.

24. Eric Tucker, *New FBI Squads Put Foreign Crime in Crosshairs*, HOUS. CHRON., Jan. 14, 2015, <http://www.houstonchronicle.com/business/economy/article/New-FBI-squads-put-foreign-crime-in-crosshairs-6016628.php>.

25. *Id.*

26. *Id.*

27. U.S. DEP’T OF JUSTICE, CRIM. DIV. & SEC. & EXCH. COMM’N, ENFORCEMENT DIV., DOJ-12-1354, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

28. *Id.*; see also Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 360 (2010) (describing Lockheed Martin’s earlier foreign bribery controversy).

29. See 15 U.S.C. §§ 78dd-1 to -3, § 78m (2012).

the anti-bribery provisions,³⁰ and the books and records and internal control provisions.³¹ The *anti-bribery provisions* make it illegal for companies to bribe foreign officials to obtain or retain business, therefore making it a crime to give money, gifts, promises, or “anything of value” to any foreign official for the purpose of

(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person³²

The *books and records and internal control provisions* require companies registered with the SEC to maintain accurate books and records and to implement an effective system of internal accounting controls.³³ The DOJ and SEC together enforce the statute,³⁴ generally with the DOJ enforcing the bribery provisions and the SEC enforcing the accounting provisions.³⁵ In 1988, Congress amended the FCPA to allow for affirmative defenses,³⁶ and in 1998, Congress further expanded the law’s territorial jurisdiction and authority.³⁷

30. *See id.* §§ 78dd-1 to -3.

31. *See id.* § 78m(b).

32. *Id.* §§ 78dd-1 to -3. Note that the brief excerpt appearing in the text attempts to capture the essence of a far more detailed and intricate statute.

33. Mike Koehler, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 136–37 (2014).

34. Stuart H. Deming, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 75 (2d ed. 2010).

35. Lillian V. Blageff, 1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:1 (2d ed.); *see also* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 444 n.27 (2010) (discussing the history of the FCPA).

36. Mike Koehler, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA 120–21 (2014). Koehler discusses both affirmative defenses: The first is for payments that are considered to be acceptable pursuant to the laws and regulations within a given foreign nation; the second is for reasonable and legitimate payments related to particular products, services, or contracts.

37. FCPA RESOURCE GUIDE, *supra* note 2727, at 4 (noting that Congress amended the FCPA to comport with the newly-created Anti-Bribery Convention, of which the United States was a founding party). The “amendments expanded the FCPA’s scope to: (1) include payments made to secure ‘any improper advantage’; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of ‘foreign official’; (4) add an alternative basis for jurisdiction

During the first two decades after its passage, enforcement of the FCPA was somewhat limited: Between 1977 and 1997, prosecutors only charged seventeen companies and thirty-three individuals under the Act.³⁸ Starting in the early 2000s, however, enforcement of the FCPA began to surge. From 2007 through 2014, there were 309 enforcement actions by the SEC and DOJ combined.³⁹ In that same time period, the average total value of monetary resolutions in corporate FCPA enforcement actions increased dramatically from \$7.3 million in 2007 to \$156.6 million in 2014.⁴⁰ Indeed, the *Alstom S.A.* case settled in December 2014 for a total resolution of \$772.3 million—just short of the record-holding \$800 million resolution of the *Siemens AG* matter in 2008.⁴¹

II. COOPERATION WITH UNCLE SAM: NEGOTIATIONS, CARROTS, AND STICKS

In his seminal article, *Corporate Prosecution, Cooperation, and the Trading of Favors*, Professor William S. Laufer suggests that law enforcement within the corporate context oftentimes translates into “a brand of negotiated compliance” involving “reciprocal promises,” where companies cooperate and accept responsibility “in exchange for mitigation, exculpation, or absolution.”⁴² Professor Laufer uses language of negotiation theory as he refers to this “bargained-for exchange or trading of favors, with an arsenal of sanctions in the background.”⁴³ Professor Laufer states:

With the threat of significant . . . fines, corporations have little choice but to trade favors with authorities. The importance of and need for these reciprocal promises is rarely challenged. Given extremely limited resources, the complex nature of the corporate form, and the accompanying evidentiary challenges facing prosecutors, it is little wonder that the government often exchanges

based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.” *Id.*

38. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 94 (2007).

39. See GIBSON, DUNN & CRUTCHER LLP, 2014 YEAR-END FCPA UPDATE 2 (2015), available at <http://www.gibsondunn.com/publications/Documents/2014-Year-End-FCPA-Update.pdf>.

40. *See id.* at 3.

41. *Id.* at 4.

42. William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 645–47 (2002).

43. *Id.* at 646.

leniency for conciliatory post-offense behavior.⁴⁴

Other scholars have described the interaction between prosecutors and corporate defendants not as a negotiation involving a “bargained-for exchange,” but rather as the unfolding of a “carrot and stick” situation. As an article published by *The Economist* stated in 1946: “The human donkey requires either a carrot in front or a stick behind to goad it into activity. . . .”⁴⁵ Indeed, implicit in the organizational sentencing guidelines of the U.S. Sentencing Commission (Sentencing Commission) is a “carrot and stick” structure. Winthrop M. Swenson, formerly the Sentencing Commission’s Deputy General Counsel, described first the “stick” and then the “carrot” at a Sentencing Commission conference on corporate crime in America:

[C]ompanies that (1) fail to take certain actions (e.g., establish strong compliance programs, voluntarily disclose misconduct, fully cooperate in the investigation of the misconduct) and (2) have attributes indicating greater institutional culpability for misconduct (e.g., had senior corporate officials involved in the offense, or had employees obstruct justice) *face stiff penalties* in the event of a violation. Companies that take the prescribed steps, and do not evince attributes of greater institutional culpability, *will avoid onerous penalties* should a violation happen to occur.⁴⁶

One scholar argues, however, that the Sentencing Commission’s approach may have exhibited more stick than carrot, stating: “If a company adopted a compliance program and self-reported violations, it received no guarantee of leniency. On the other hand, the failure to pursue the carrot ‘voluntarily’ virtually guaranteed being hit with the stick in the event of a corporate conviction.”⁴⁷ To what extent, then, does the current cooperation dynamic between prosecutors and defendant corporations represent a “negotiation” or “trading of favors,” and to what extent does it represent more of a “carrot and stick” situation, where the “carrot in front” or the “stick behind” effectively

44. *Id.*

45. *The Carrot and the Stick*, THE ECONOMIST, June 29, 1946, reprinted in 8 AM. AFF. 282, 282 (1946).

46. U.S. SENTENCING COMM’N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION at 24 (1995) (emphasis added), available at <http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/special-reports/wcsympo.pdf>.

47. John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 317 (2004) (footnote omitted).

prods companies into self-reporting and exhibiting other cooperating behaviors toward the government? Or does the interplay between prosecutors and defendant companies effectively encompass elements of all three—negotiations, carrots, and sticks? A closer look at the policies and regulations surrounding corporate cooperation with the DOJ and SEC can begin to shed light on these questions.

A. *Cooperating with the DOJ*

The Filip Memo,⁴⁸ officially entitled “Principles of Federal Prosecution of Business Organizations” (Principles of Prosecution), was codified⁴⁹ in the U.S. Attorneys’ Manual on August 28, 2008.⁵⁰ The Principles of Prosecution instruct federal prosecutors to consider the following nine factors when determining whether or not to charge a corporation or business entity:

- (1) [T]he nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- (2) [T]he pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- (3) [T]he corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- (4) [T]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- (5) [T]he existence and effectiveness of the corporation’s pre-existing compliance program;
- (6) [T]he corporation’s remedial actions, including any efforts to implement an effective corporate compliance

48. Memorandum from Mark Filip, Deputy Attorney Gen., to Heads of Department Components and U.S. Attorneys (Aug. 28, 2008) [hereinafter Filip Memo], *available at* <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

49. Leslie R. Caldwell, Assistant Attorney Gen., Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (Apr. 17, 2015).

50. *See Principles of Federal Prosecution of Business Organization*, in U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-28.000 (2008) [hereinafter UNITED STATES ATTORNEYS’ MANUAL], *available at* <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

- (7) [C]ollateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution;
- (8) [T]he adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- (9) [T]he adequacy of remedies such as civil or regulatory enforcement actions.⁵¹

The fourth and sixth factors involve voluntary disclosure and cooperation with the government.⁵² It is important to note, however, that the U.S. Attorneys' Manual makes it clear that the Principles of Prosecution do not create specific legal rights for the parties involved, stating: "The Manual provides only *internal Department of Justice guidance*. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."⁵³

Moreover, the U.S. Attorneys' Manual makes it clear that, despite the nine factors set forth in the Principles of Prosecution, prosecutors retain significant charging discretion regarding violations of federal criminal law.⁵⁴ Indeed, the last sentence of the Filip Memo reemphasizes the wide discretion given to prosecutors in carrying out their charging duties, stating: "Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice."⁵⁵

B. Cooperating with the SEC

The SEC issued its so-called Seaboard Report in October 2001.⁵⁶ The Seaboard Report attempted to reveal how the agency decided what

51. UNITED STATES ATTORNEYS' MANUAL, *supra* note 50, at 9-28.300.

52. *Id.*

53. *Id.* at 1-1.100 (emphasis added).

54. *See* Filip Memo, *supra* note 48, at 4 ("In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.").

55. *Id.* at 21.

56. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969, 76 SEC Docket 220 (Oct. 23, 2001)

penalties to impose on companies that violated the federal securities laws.⁵⁷ The Seaboard Report recognized four measures of a company's cooperation:

Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;

Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulators, and to self-regulators;

Remediation, including dismissing or appropriately disciplining wrongdoers, modifying, and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and

Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.⁵⁸

The Seaboard Report also sets forth various criteria the SEC considers in determining whether (and to what extent) it will give a company credit for self-reporting, self-policing, remediation, and cooperation—“from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.”⁵⁹ On January 4, 2006, the SEC issued a statement

[hereinafter Seaboard Report].

57. *See id.*

58. Press Release, Sec. & Exch. Comm'n, SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2001), *available at* <http://www.sec.gov/news/headlines/prosdiscretion.htm>.

59. Seaboard Report, *supra* note 56. The following questions assist in guiding the SEC investigations:

1. What is the nature of the misconduct involved? . . .
2. How did the misconduct arise? . . .
3. Where in the organization did the misconduct occur? . . .
4. How long did the misconduct last? . . .

to elaborate further on the role that cooperation plays in the agency's determination of whether to impose monetary penalties on corporations.⁶⁰ The statement, which has come to be known as the "Penalties Statement,"⁶¹ announced that the two primary factors that the SEC considers are "[t]he presence or absence of a direct benefit to the corporation as a result of the violation"⁶² and "[t]he degree to which the penalty will recompense or further harm the injured shareholders."⁶³

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5. How much harm has the misconduct inflicted upon investors and other corporate constituencies? Did the share price of the company's stock drop significantly upon its discovery and disclosure?
 6. How was the misconduct detected and who uncovered it?
 7. How long after discovery of the misconduct did it take to implement an effective response?
 8. What steps did the company take upon learning of the misconduct? . . .
 9. What processes did the company follow to resolve many of these issues and ferret out necessary information? . . .
 10. Did the company commit to learn the truth, fully and expeditiously? . . .
 11. Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? . . .
 12. What assurances are there that the conduct is unlikely to recur? . . .
 13. Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?

Id. (footnote omitted).

60. Press Release, Sec. & Exch. Comm'n, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), *available at* www.sec.gov/news/press/2006-4.htm.

61. *See, e.g.*, Barry W. Rashkover & Laurin Blumenthal Kleiman, *SEC Enforcement and Examinations Concerning Hedge Funds*, 52 N.Y.L. SCH. L. REV. 599, 632 (2008); Annette L. Nazareth, Comm'r, Sec. & Exch. Comm'n, Remarks Before the American Bar Association National Institute on Securities Fraud (Sept. 28, 2006), *available at* <https://www.sec.gov/news/speech/2006/spch092806aln.htm>.

62. *See id.* ("The fact that a corporation itself has received a direct and material benefit from the offense, for example through reduced expenses or increased revenues, weighs in support of the imposition of a corporate penalty. If the corporation is in any other way unjustly enriched, this similarly weighs in support of the imposition of a corporate penalty. Within this parameter, the strongest case for the imposition of a corporate penalty is one in which the shareholders of the corporation have received an improper benefit as a result of the violation; the weakest case is one in which the current shareholders of the corporation are the principal victims of the securities law violation.").

63. *See id.* ("Because the protection of innocent investors is a principal objective of the securities laws, the imposition of a penalty on the corporation itself carries with it the risk that shareholders who are innocent of the violation will nonetheless bear the burden of the penalty. In some cases, however, the penalty itself may be used as a source of funds to recompense the injury suffered by victims of the securities law violations. The presence of an opportunity to use the penalty as a meaningful source of compensation to injured shareholders is a factor in support of its imposition. The likelihood a corporate penalty will unfairly injure investors, the corporation, or third parties weighs against its use as a sanction.").

Other factors include the need for deterrence; any injury caused to third parties; the difficulty in detecting the offense; and the company's level of intent, effort in taking remedial action, and cooperation with the government and law enforcement.⁶⁴

On January 13, 2010, Robert Khuzami, then-Director of the SEC's Division of Enforcement, announced new cooperation practices that would be a "potential game-changer."⁶⁵ The new policies set forth a framework for evaluating cooperation between individuals and the SEC.⁶⁶ The SEC also formally adopted the Seaboard Report as part of its Enforcement Manual⁶⁷ and provided the agency with important cooperation tools, including proffer agreements,⁶⁸ cooperation agreements,⁶⁹ DPAs,⁷⁰ and NPAs.⁷¹ These new policies provided the

64. *Id.*

65. Press Release, Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-6.htm>.

66. Specifically, the SEC staff would consider the following four broad factors: (1) "[t]he assistance provided by the cooperating individual;" (2) "[t]he importance of the underlying matter in which the individual cooperated;" (3) "[t]he societal interest in ensuring the individual is held accountable for his or her misconduct;" and (4) "[t]he appropriateness of cooperation credit based upon the risk profile of the cooperating individual." *Id.*; SEC. & EXCH. COMM'N, DIV. OF ENFORCEMENT, OFFICE OF CHIEF COUNSEL, ENFORCEMENT MANUAL § 6.1.1 (Oct. 9, 2013) [hereinafter ENFORCEMENT MANUAL], *available at* <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. Ultimately, the critical inquiry is "whether the public interest in facilitating and rewarding an individual's cooperation in order to advance the Commission's law enforcement interests justifies the credit awarded to the individual for his or her cooperation." *Id.*

67. ENFORCEMENT MANUAL, *supra* note 66, § 6.1.2.

68. *Id.* § 6.2.1 ("A proffer agreement is a written agreement providing that any statements made by a person, on a specific date, may not be used against that individual in subsequent proceedings, except that the Commission may use statements made during the proffer session as a source of leads to discover additional evidence and for impeachment or rebuttal purposes if the person testifies or argues inconsistently in a subsequent proceeding.")

69. *Id.* § 6.2.2 ("A cooperation agreement is a written agreement between the Division of Enforcement and a potential cooperating individual or company prepared to provide substantial assistance to the Commission's investigation and related enforcement actions. Specifically, in a cooperation agreement, the Division agrees to recommend to the Commission that the individual or company receive credit for cooperating in its investigation and related enforcement actions and, under certain circumstances, to make specific enforcement recommendations if, among other things: 1) the Division concludes that the individual or company has provided or is likely to provide substantial assistance to the Commission; 2) the individual or company agrees to cooperate truthfully and fully in the Commission's investigation and related enforcement actions and waive the applicable statute of limitations; and 3) the individual or company satisfies his/her/its obligations under the agreement. If the agreement is violated, the staff may recommend an enforcement action to the Commission against the individual or company without any limitation.")

70. *Id.* § 6.2.3 ("A deferred prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company in which the Commission

SEC with a tremendous amount of discretion, along with a substantial array of options, in deciding whether, when, and how to recognize or reward cooperative behavior while carrying out its FCPA enforcement actions and proceedings. Indeed, the “Fostering Cooperation” section of the SEC Enforcement Manual states explicitly that the agency will analyze the “unique facts and circumstances”⁷² of a given case and that the principles applied thereto “are not listed in order of importance; they are not intended to be all-inclusive; and . . . facts and circumstances of a particular case may render some of the principles inapplicable or worthy of lesser or greater weight.”⁷³

The end result of these various policies, pronouncements, rules, and regulations driving DOJ and SEC decision-making in the realm of cooperation is that both agencies have tremendous discretion in how they will deal with corporate entities choosing to cooperate with them. Not only do both agencies have a substantial array of principles that

agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: 1) cooperate truthfully and fully in the Commission’s investigation and related enforcement actions; 2) enter into a long-term tolling agreement; 3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and 4) under certain circumstances, agree either to admit or not to contest underlying facts that the Commission could assert to establish a violation of the federal securities laws.”).

71. *Id.* § 6.2.4 (“A non-prosecution agreement is a written agreement between the Commission and a potential cooperating individual or company, entered in limited and appropriate circumstances, that provides that the Commission will not pursue an enforcement action against the individual or company if the individual or company agrees to, among other things: 1) cooperate truthfully and fully in the Commission’s investigation and related enforcement actions; and 2) comply, under certain circumstances, with express undertakings. If the agreement is violated, the staff retains its ability to recommend an enforcement action to the Commission against the individual or company without limitation.”).

72. *Id.* § 6.1.2.

73. *Id.* § 6.1.1. This statement appears under Section 6.1.1 of the Enforcement Manual, addressing cooperation with respect to *individuals*. *Id.* While the same statement is not reprinted in full under Section 6.1.2 of the Manual, which addresses cooperation with respect to *companies*, one could argue that the statement nonetheless applies to both individuals and companies alike. *See id.* § 6.1.2. Moreover, Section 6.1.2 of the Manual includes the following statement, which is similar but nonetheless slightly less detailed and explicit than the statement appearing under Section 6.1.1:

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit the Commission’s broad discretion to evaluate every case individually, on its own unique facts and circumstances. Similar to the Commission’s treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions.

Id.

they can apply and options through which to operationalize and implement those principles, but they can (1) *add* principles and options that do not yet exist, (2) emphasize any principle to whatever degree they see fit, and (3) even *ignore* principles altogether.

The tension between the government and corporations, then, is a fundamental one. On the one hand, government agencies such as the DOJ and SEC are motivated to maximize discretion, autonomy, and flexibility as they carry out their respective missions, including enforcing statutes such as the FCPA.⁷⁴ On the other hand, corporate entities working to comply with the FCPA need specific and detailed guidance and direction on how to effectively stay within legal and regulatory bounds. This Article argues that the balance currently tilts too heavily in favor of providing the agencies with discretion and flexibility, thereby leaving corporate entities flailing as they try to figure out how to best conform to the statute. This Article also attempts to flesh out and advocate for changes necessary to even out the balance, concluding that the DOJ and SEC will have to give up some of their discretion and flexibility to ensure that companies have the necessary guidance and information to make reasonable and strategic FCPA self-reporting decisions from a cost–benefit perspective.

III. THE CORPORATE SENTENCING CALCULUS

Chapter Eight of the Sentencing Guidelines, which governs the sentencing of organizations,⁷⁵ provides incentives for the voluntary disclosure of potential FCPA violations.⁷⁶ Specifically, courts assess the culpability of a corporation in a given matter (determined as part of calculating the “fine range” under the Sentencing Guidelines) by adding up the corporation’s “Culpability Score”—a computation that starts with a score of five.⁷⁷ As a given entity’s Culpability Score increases, so does the corresponding fine range. Courts can add points depending upon the finding of one or more of the following: (1) “Involvement in or Tolerance of Criminal Activity,”⁷⁸ meaning that “an individual within

74. See Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 900 (2009) (summarizing various theories of bureaucratic motivation and noting that agencies “seek to maximize one or some of the following: their budget, neutral expertise, discretion, bureaucratic autonomy, or leisure”).

75. U.S. SENTENCING COMM’N, GUIDELINES MANUAL ch. 8 (2014) [hereinafter GUIDELINES MANUAL], available at <http://www.ussc.gov/guidelines-manual/2014/2014-individual-chapters-pdf>.

76. *Id.*

77. *Id.* § 8C2.5.

78. *Id.* § 8C2.5 (b).

high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense;⁷⁹ (2) “Prior History,” meaning that the company engaged in similar conduct in the past;⁸⁰ (3) “Violation of an Order,”⁸¹ meaning that the offense violated a judicial order⁸² or violated a condition of probation;⁸³ and/or (4) “Obstruction of Justice,”⁸⁴ meaning that the company willfully obstructed justice “during the investigation, prosecution, or sentencing of the instant offense.”⁸⁵

Courts can also deduct points from the Culpability Score. There can be a three-point deduction if the organization’s employees or agents violated the FCPA “even though the organization had in place at the time of the offense an effective compliance and ethics program.”⁸⁶ However, this downward departure is not available if the organization delayed reporting the offense.⁸⁷ In addition, one, two, or five points can be taken off the Culpability Score of corporations that self-report, that cooperate fully, and that accept responsibility for their wrongdoing.⁸⁸ If the corporation does all three, there is a five-point deduction. If it cooperates and accepts responsibility, there is a two-point deduction. If it merely accepts responsibility, there is a one-point deduction.⁸⁹ Thus, the “value” of self-reporting is a three-point deduction from the corporation’s Culpability Score.

To determine the corporate fine, however, courts use a five-step process involving factors in addition to the Culpability Score. First, they compute the seriousness of the offense, which represents the “base

79. *Id.* § 8C2.5 (b) (1) (A) (i).

80. *Id.* § 8C2.5 (c).

81. *Id.* § 8C2.5 (d).

82. *Id.* § 8C2.5 (d) (1).

83. *Id.* § 8C2.5 (d) (2).

84. *Id.* § 8C2.5 (e).

85. *Id.*

86. *Id.* § 8C2.5(f)(1). Some commentators have argued that the Sentencing Guidelines have bolstered the creation and expansion of an FCPA compliance industry. *See, e.g.,* Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 993–99 (2009).

87. GUIDELINES MANUAL, *supra* note 75, § 8C2.5(f)(2).

88. *Id.* § 8C2.5(g)(1)–(3); *see also* § 8C2.5(g) cmt. 13 (“[C]ooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”).

89. *Id.* § 8C2.5(g)(3).

fine.”⁹⁰ Second, courts assess the company’s culpability by adding up the Culpability Score.⁹¹

Third, the court assigns the Culpability Score a minimum and a maximum “multiplier.”⁹² The court then determines the fine range “by multiplying the ‘base fine’ calculated under § 8C2.4 by both the minimum multiplier calculated under § 8C2.6, which yields the minimum of the ‘fine range,’ and by the maximum multiplier calculated under § 8C2.6, which yields the maximum of the ‘fine range.’”⁹³

Fourth, the court may consider a number of other factors, including whether the company failed to have an effective compliance program, whether there was any non-pecuniary loss caused by the transgression, or whether there was any prior corporate misconduct by high-level personnel that had not yet been considered.⁹⁴ The court may also differentiate between cases with offenses of varying seriousness and with aggravating factors of varying intensity.⁹⁵ Fifth, the court may consider other factors that might lead to an upward or downward departure, such as a corporation’s substantial assistance to the government in conducting its investigation or in the investigation and prosecution of another organization that has potentially committed a crime.⁹⁶

Reviewing the plea agreements and DPAs of several well-known FCPA matters can provide a sense of how these various factors influence the final outcomes of the cases, especially with respect to the corporate fines. The following seven cases involve some of the largest FCPA fines paid in U.S. history—four of the seven cases rank among the “top ten” fines ever paid.⁹⁷ They were all settled in the last ten years, and for the sake of space, the discussion will only include the DOJ’s

90. *Id.* § 8C2.4.

91. *Id.* § 8C2.5.

92. *Id.* § 8C2.6.

93. GUIDELINES MANUAL, *supra* note 75, § 8C2.7(a)–(b); *see also* U.S. SENTENCING COMM’N, OFFICE OF GEN. COUNSEL, CHAPTER EIGHT FINE PRIMER: DETERMINING THE APPROPRIATE FINE UNDER THE ORGANIZATIONAL GUIDELINES 5 (2013) [hereinafter CHAPTER EIGHT FINE PRIMER], *available at* http://www.uscourts.gov/sites/default/files/pdf/training/primers/Primer_Organizational_Fines.pdf. As an example, the Chapter Eight primer states: “[A] Culpability Score of ten or more results in a minimum multiplier of 2.00 and a maximum multiplier of 4.00, while a lower Culpability Score of three results in a minimum multiplier of 0.60 and a maximum multiplier of 1.20. . . . If the base fine is \$85,000 and the Culpability Score is five, the ‘base fine’ is multiplied by 1.00 to determine the minimum fine and by 2.00 to determine the maximum fine, resulting in a ‘fine range’ of \$85,000 to \$170,000.” *Id.* at 5–6.

94. GUIDELINES MANUAL, *supra* note 75, § 8C2.8(a).

95. CHAPTER EIGHT FINE PRIMER, *supra* note 93, at 6; *see also* GUIDELINES MANUAL, *supra* note 75, § 8C2.8(b).

96. GUIDELINES MANUAL, *supra* note 75, § 8C4.1(a).

97. *See* Cassin, *supra* note 7.

handling of the case even in those instances where the SEC may also have arrived at a disposition of the matter.⁹⁸ In the first three cases reviewed, the defendant elected to self-report, while in the next four cases, the defendant failed to self-report.

A. *Three FCPA Cases with Self-Reporting*

This Section discusses the disposition of three cases involving FCPA violations in which the defendant self-reported the violation. As these cases illustrate, self-reporting does not guarantee a reduction in the monetary penalty owed for the transgression.

1. *United States v. Titan Corp.*

In *United States v. Titan Corp.*,⁹⁹ Titan pled guilty to violating anti-bribery provisions of the FCPA,¹⁰⁰ to violating the books and records provisions of the FCPA,¹⁰¹ and to aiding or assisting in the filing of a fraudulent tax return.¹⁰² Titan agreed to pay a criminal fine of \$13,000,000, which is nearly the maximum of the Sentencing Guidelines fine range calculated to be between \$6,825,000 and \$13,650,000.¹⁰³

The plea agreement provides very little information regarding how the parties decided upon the amount Titan paid as a fine, stating only that the fine reflected a consideration of the corporation's conduct and cooperation.¹⁰⁴ The agreement also states that in calculating the Culpability Score for Titan, the court deducted five points from the score in accordance with Section 8C2.5(g)(1) of the Sentencing Guidelines for Titan's self-reporting, cooperation, and acceptance of responsibility.¹⁰⁵

2. *United States v. ABB Ltd.*

In *United States v. ABB Ltd.*,¹⁰⁶ the defendant, ABB Ltd., entered into a DPA with the DOJ. The government had charged ABB Inc. (a

98. *See id.*

99. *See* Plea Agreement, *United States v. Titan Corp.* (S.D. Cal. Mar. 1, 2005) (No. 05-CR-314-BEN), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/03-01-05titan-plea.pdf>.

100. Specifically, with violating 15 U.S.C. § 78dd-1. *Id.* at 2.

101. Specifically, with violating 15 U.S.C. §§ 78m(b)(2)(A) and 78m(b)(5). *Id.*

102. Specifically, with violating 26 U.S.C. § 7206(2). *Id.*

103. *Id.* at 23, 25.

104. *Id.* at 25.

105. *Id.*

106. *See* Deferred Prosecution Agreement, *United States v. ABB Ltd.* (S.D. Tex. Sept. 29, 2010) (No. 410-cr-00665), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbjordan-dpa.pdf>.

subsidiary of ABB Ltd.) with violating the anti-bribery provisions of the FCPA,¹⁰⁷ and had charged ABB Ltd.-Jordan (another subsidiary of ABB Ltd.) with both wire fraud and violation of the books and records provisions of the FCPA.¹⁰⁸ As part of the DPA, ABB Ltd. agreed to pay a total monetary penalty of \$30,420,000, which is the very bottom of the combined Sentencing Guidelines fine range calculated to be between \$30,420,000 and \$60,200,000.¹⁰⁹

The DPA provides very little information regarding how the parties decided upon the monetary penalty, stating only that the amount was proper due to ABB Ltd.'s "extraordinary cooperation" in the matter, including sharing information with the DOJ "regarding evidence obtained as a result of ABB Ltd.'s extensive investigation of corrupt payments made by ABB subsidiaries in various countries around the world."¹¹⁰

3. Johnson & Johnson

In the matter of Johnson & Johnson (J&J),¹¹¹ J&J entered into a DPA with the DOJ. The government had charged DePuy, Inc. (a subsidiary of J&J) with violating the anti-bribery provisions of the FCPA.¹¹² As part of the DPA, J&J agreed to pay a total monetary penalty of \$21,400,000, which is a 25% reduction off the bottom of the Sentencing Guidelines fine range calculated to be between \$28,500,000 and \$57,000,000.¹¹³

The DPA provides very little information regarding how the parties decided upon the monetary penalty, stating only that the amount was appropriate given J&J's "voluntary and thorough disclosure of the misconduct at issue, the nature and extent of J&J's cooperation in [the] matter, penalties related to the same conduct in Greece and the United Kingdom, J&J's cooperation in the Justice Department's investigation of other companies, and J&J's extraordinary remediation."¹¹⁴

107. Specifically, with violating 15 U.S.C. § 78dd-2(a) and 18 U.S.C. § 2. *Id.* at 1–2.

108. Specifically, with violating 18 U.S.C. § 1343 and 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a). *Id.*

109. *See id.* at 9–12.

110. *Id.* at 12.

111. Deferred Prosecution Agreement Between Johnson & Johnson, et al. and U.S. Dept. of Justice, Criminal Division, Jan. 14, 2011, *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/depu-04-08-11depu-dpa.pdf>.

112. Specifically, with violating 15 U.S.C. §§ 78dd-2 and 18 U.S.C. § 2. *Id.*

113. *Id.* at 5.

114. *Id.*

B. *Four FCPA Cases Without Self-Reporting*

This Section discusses four cases involving FCPA violations in which the defendant failed to self-report. These cases illustrate that failing to self-report does not necessarily mean that there will be no reduction in the monetary penalty owed for the offense.

1. *United States v. Alstom S.A.*

In *United States v. Alstom S.A.*,¹¹⁵ the defendant pled guilty to one count of violating the books and records provisions of the FCPA and one count of violating the internal controls provisions of the FCPA.¹¹⁶ The defendant agreed to pay a criminal fine of \$772,290,000, which is quite close to the middle of the Sentencing Guidelines fine range calculated to be between \$532,800,000 and \$1,065,600,000.¹¹⁷

With respect to “failure to self-report,” the plea agreement stated that the defendant failed to voluntarily disclose its conduct “even though it was aware of related misconduct at Alstom Power, Inc., a U.S. subsidiary, which entered into a resolution for corrupt conduct in connection with a power project in Italy several years prior to the [Justice] Department reaching out to Alstom regarding its investigation.”¹¹⁸

The DOJ, in accordance with the agency’s Principles of Prosecution, considered several factors in determining the outcome of the case, including (1) Alstom’s cooperation with the investigation; (2) the nature and seriousness of Alstom’s offense; (3) Alstom’s compliance and remediation; and (4) Alstom’s prior criminal misconduct.

With respect to “cooperation,” the defendant objected to cooperating with the DOJ’s investigation for the first full year. The defendant then started cooperating to a certain extent, but nonetheless impeded the investigation by not cooperating fully.¹¹⁹ The defendant eventually began to provide “thorough cooperation,” including assisting the DOJ in investigating and prosecuting individuals and companies involved with the defendant.¹²⁰ However, this kind of cooperation did not begin until after the DOJ charged several Alstom employees and executives.¹²¹

115. See Plea Agreement, *United States v. Alstom S.A.*, (D. Conn. Dec. 22, 2014) (No. 3:14-cr-00246-JBA), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/22/alstom_sa_plea_agreement.pdf.

116. *Id.* at 1–2.

117. *Id.* at 12.

118. *Id.* at 13.

119. *Id.*

120. *Id.*

121. *Id.* at 13–14.

With respect to the “nature and seriousness of the offense,” the transgression took place over multiple years and involved bribing high-level government officials.¹²² It also involved falsifying books and records and failing to maintain adequate controls to prevent bribe payments.¹²³

With respect to “compliance and remediation,” Alstom did not have an effective compliance program at the time of the transgression but later made major efforts to improve its program and remediate problems, thereby “substantially increasing its compliance staff, improving its alert procedures, increasing training and auditing/testing, and ceasing the use of external success fee-based consultants.”¹²⁴ With respect to “prior criminal misconduct,” the plea agreement states that the corporation, through its subsidiaries, “entered into resolutions with various other governments and the World Bank relating to similar misconduct.”¹²⁵

2. *United States v. Siemens*

In *United States v. Siemens Aktiengesellschaft*,¹²⁶ Siemens AG and its subsidiaries Siemens, S.A. (Argentina), Siemens Bangladesh Ltd., and Siemens, S.A. (Venezuela) pled guilty to violating the FCPA’s internal controls provisions as well as the FCPA’s books and records provisions.¹²⁷ Siemens Argentina pled guilty to violating the books and records provisions of the FCPA, and Siemens Bangladesh and Siemens Venezuela each pled guilty to violating both the FCPA’s anti-bribery provisions as well as the books and records provisions.¹²⁸

The defendants agreed to pay a criminal fine of \$450,000,000, which is substantially below the minimum of the Sentencing Guidelines fine range calculated to be between \$1.35 billion and \$2.70 billion.¹²⁹

The DOJ, in accordance with the agency’s Principles of Prosecution,¹³⁰ considered various factors in the overall disposition of the case, including (1) Siemens’ cooperation and remediation efforts; (2) the potential disproportionate harm to the shareholders, pension

122. *Id.* at 14.

123. *Id.*

124. *Id.*

125. *Id.*

126. See Department’s Sentencing Memorandum, *United States v. Siemens Aktiengesellschaft*, (D.D.C. Dec. 12, 2008) (No. 1:08-cr-00367-RJL), available at <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/19/siemens-sentencing-memo.pdf>.

127. Specifically, with violating 15 U.S.C. §§ 78m (b)(2)(B), 78m(b)(5), and 78ff(a). *Id.* at 10.

128. *Id.*

129. *Id.* at 10, 12.

130. UNITED STATES ATTORNEYS’ MANUAL, *supra* note 50, at 9-28.300.

holders, employees, the public, and any other innocent third parties that the case could impact; (3) whether and to what extent Siemens faced a risk of debarment from government contracts; and (4) related cases of other governmental authorities.¹³¹

With respect to Siemens' "substantial assistance, cooperation, and remediation efforts," the sentencing memorandum states that the penalties are appropriate based on how Siemens substantially assisted the DOJ in related investigations, helped uncover evidence of prior corruption within the company, and committed to remediate its operations and improve transparency.¹³² With respect to "voluntary disclosure," the sentencing memorandum states that Siemens failed to self-disclose and thus only received a two-point deduction to its Culpability Score—"which is incongruent with the level of cooperation and assistance provided by the company in the [DOJ's] investigation."¹³³

3. *United States v. Alcoa World Alumina LLC*

In *United States v. Alcoa World Alumina LLC*,¹³⁴ the defendant pled guilty to violating the anti-bribery provisions of the FCPA.¹³⁵ Alcoa agreed to pay a criminal fine of \$209,000,000, which is substantially below the minimum of the Sentencing Guidelines fine range calculated to be between \$446,000,000 and \$892,000,000.¹³⁶ The plea agreement stated that the fine was appropriate based on the following factors:

(1) the potential effect of a penalty on Alcoa's financial condition and ability to compete, "including, but not limited to, its ability to fund its sustaining and improving capital expenditures, its ability to invest in research and development, its ability to fund its pension obligations, and its ability to maintain necessary cash reserves to fund its operations and meet its liabilities;"¹³⁷

(2) the large remedy that the SEC imposed on the Defendant's majority shareholder, Alcoa, for its

131. *Id.* at 11.

132. *Id.* at 15.

133. *Id.* at 16.

134. See Plea Agreement, *United States v. Alcoa World Alumina LLC* (W.D. Penn. Jan. 9, 2014) (Criminal No. 14-7), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/alcoa-world-alumina/01-09-2014plea-agreement.pdf>.

135. Specifically, with violating 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2. *Id.* ¶ 1.

136. *Id.* ¶¶ 7, 34.

137. *Id.* ¶ 35.

involvement;¹³⁸

(3) the appointment of a Special Committee by Alcoa's Board of Directors "to oversee an internal investigation by independent counsel;"¹³⁹

(4) the "substantial cooperation" provided by Alcoa, including "conducting an extensive internal investigation, voluntarily making employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information" for the DOJ;¹⁴⁰

(5) the efforts by Alcoa to remediate the problems, which included hiring ethics and compliance officers, as well as implementing improved due diligence reviews;¹⁴¹ and

(6) Alcoa's commitment to maintaining an effective anti-corruption compliance program.¹⁴²

4. *United States v. Daimler AG*

In *United States v. Daimler AG*, Daimler AG and its subsidiaries DaimlerChrysler China Ltd. (DCCL), DaimlerChrysler Automotive Russia SAO (DCAR), and Daimler Export and Trade Finance GmbH (ETF) pled guilty to violating the books and records provisions of the FCPA.¹⁴³ The three subsidiaries—DCCL, DCAR, and ETF—pled guilty to violating the anti-bribery provisions of the FCPA.¹⁴⁴ Daimler AG and its subsidiaries agreed to pay a total criminal fine of \$93,600,000, which is approximately 20% below the minimum of the Sentencing Guidelines fine range calculated to be between \$116,000,000 and \$232,000,000.¹⁴⁵

The DOJ, in accordance with the Principles of Prosecution, considered multiple factors when deciding the case, including (1) Daimler's cooperation and remediation efforts; (2) the potential disproportionate harm to shareholders, pension holders, employees, the public, and any other innocent third parties that the case could impact;

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Specifically, with violating 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a) as well as 18 U.S.C. § 2. United States' Sentencing Memorandum at 12, *United States v. Daimler AG*, (D.D.C. Mar. 24, 2010) (No. 1:10-cr-00063-RJL), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerag-sent.pdf>.

144. Specifically, with violating 15 U.S.C. § 78dd-3. *Daimler AG*, 1:10-cr-00063-RJL, at 12–13.

145. *Id.* at 14.

(3) whether and to what extent the defendants faced a risk of debarment from government contracts, particularly “European Union Directive 2004/18/EC, which provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts in all EU countries.”¹⁴⁶

With respect to “cooperation,” the sentencing memorandum states that the lower fine amount is appropriate due to Daimler’s cooperation in the DOJ investigation, such as revealing information about company corruption in other countries.¹⁴⁷ With respect to “voluntary disclosure,” Daimler only received a two-point reduction in its Culpability Score because it failed to self-report.¹⁴⁸ The DOJ submitted that the point reduction was “incongruent with the level of cooperation and assistance” the company provided in DOJ’s investigation.¹⁴⁹

C. Observations from the Seven Cases

In reviewing the disposition of these seven FCPA cases, it seems clear that voluntary disclosure does not guarantee a reduction in monetary penalties. Moreover, the *failure* to voluntarily disclose does not *preclude* a corporation from receiving a reduction in monetary penalties. Indeed, in both *Siemens* and *Daimler AG*, the sentencing memorandum states that because the defendant failed to self-report the matter, it would only receive a two-point reduction in its Culpability Score.¹⁵⁰ In both cases, however, the DOJ went on to state that such an outcome was “incongruent with the level of cooperation and assistance provided by the company in the Department’s investigation,” and the defendant ultimately paid a fine substantially below the minimum of the Sentencing Guidelines fine range.¹⁵¹

These conclusions comport well with conclusions arrived at by other FCPA scholars and researchers. For example, Professors Stephen Choi and Kevin Davis, both faculty members of the New York University School of Law, together conducted a quantitative analysis on a dataset of FCPA cases resolved from 2004 to 2011. The scholars wanted to determine if mitigating activity (whether self-disclosure, cooperation, or

146. *Id.* at 12.

147. *Id.* at 14.

148. *Id.*

149. *Id.*

150. Sentencing Memorandum at 16, *United States v. Siemens Aktiengesellschaft*, (D.D.C. Dec. 12, 2008) (No. 1:08-cr-00367-RJL), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/22/alstom_sa_plea_agreement.pdf; *United States’ Sentencing Memorandum*, at 14, *United States v. Daimler AG*, (D.D.C. Mar. 24, 2010) (No. 1:10-cr-00063-RJL), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerag-sent.pdf>.

151. Sentencing Memorandum, *Daimler AG* (No. 1:10-cr-00063-RJL), at 14.

remediation) conducted by a given transgressing company led to reduced sanctions by the federal government.¹⁵² After controlling for important effects such as bribe amount, these investigators found “no evidence to support the hypothesis that voluntary disclosure or cooperation or remediation correlates with reduced total monetary penalties.”¹⁵³

Professors Choi and Davis analyzed the data using several different models, each with different variables.¹⁵⁴ Still, these scholars ultimately arrived at the same conclusion: “[O]ur results do not support the view that mitigating activities correlate with reduced FCPA penalties”¹⁵⁵ Moreover, two other commentators arrived at similar findings. After analyzing forty FCPA cases from 2002 to 2009, researcher Bruce Hinchey concluded that “[t]he data evaluated here . . . give[s] support to the notion that there is *no benefit to voluntary disclosure in the published cases*.”¹⁵⁶ Researcher Bruce Klaw concluded that “even when companies do voluntarily disclose, a vast majority are nonetheless subjected to substantial sanctions.”¹⁵⁷ Specifically, Klaw concluded that of those companies that self-reported FCPA violations to the DOJ and SEC from the late 1990s to 2007, 86% of them subsequently faced government enforcement action.¹⁵⁸

Practitioners at a leading law firm arrived at a conclusion that appears to square well with these findings. These attorneys stated that while the DOJ and SEC threaten harsher penalties for corporations that fail to self-report, “the objective evidence and the experience of investigative and defense counsel during investigations suggest that the outcome of an investigation depends most heavily on the seriousness of the underlying facts, *and less on whether or not the company self-reported those facts*.”¹⁵⁹

152. Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act 20* (Public Law & Legal Theory Research Paper Series Working Paper No. 12–35, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487.

153. *Id.* at 20.

154. *Id.* at 23.

155. *Id.* at 24.

156. Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 399, 415 (2011) (emphasis added).

157. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 338 (2012).

158. *Id.* at 338–39.

159. Charles Carberry et al., *DOJ/SEC’s Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, JONES DAY (Dec. 2012), http://www.jonesday.com/doj_sec_resource_guide_to_fcpa/ (emphasis added); see also F. Joseph Warin & Jason A. Monahan, *Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure*, J. PAYMENT SYS. L. 433 (2005) (noting that “voluntary disclosure of an

IV. SELF-REPORTING AND THE RALPH LAUREN CORPORATION

While it is not ranked among the larger FCPA cases in terms of fine size (as were the seven cases just discussed), the *Ralph Lauren* matter is nevertheless important to review because of the largely uniform reaction to the case by experts and commentators. Specifically, the disposition of the matter is said to stand for the proposition that self-reporting's substantial benefits make it the most strategic course of action.¹⁶⁰ This Article challenges that assertion.

On April 22, 2013, the SEC announced an NPA with Ralph Lauren Corporation in connection with bribes paid to government officials in Argentina.¹⁶¹ After Ralph Lauren Corporation uncovered the misconduct through an internal audit, it promptly self-reported it to the SEC.¹⁶² The SEC did not charge the corporation with violations of the FCPA because of the company's response to the situation, which included self-reporting promptly, providing thorough information to the SEC, and cooperating in the SEC investigation.¹⁶³

In announcing the decision, the acting Director of the SEC's Enforcement Division commended the company for its actions, stating: "When they found a problem, Ralph Lauren Corporation did the right thing by immediately reporting it to the SEC and providing exceptional assistance in our investigation."¹⁶⁴ He added, "The NPA in this matter makes clear that we will confer substantial and tangible benefits on companies that respond appropriately to violations and cooperate fully with the SEC."¹⁶⁵ Other experts and commentators arrived at similar assessments of the matter, with headlines such as "Ralph Lauren Case Shows the Benefits of Cooperation,"¹⁶⁶ "Another Example of the

FCPA violation does not guarantee mitigation of civil and criminal penalties. Furthermore, the SEC and DOJ may give greater weight to voluntary disclosure in some cases . . . than in other cases"), available at <http://www.gibsondunn.com/fstore/documents/pubs/Warin-Monahan-FCPA-JPSL09.05.pdf>.

160. See, e.g., Shannon Walker, *A Case for Self-Reporting - Ralph Lauren Ethics Violation Experience*, WHISTLEBLOWER SEC., <http://blog.whistleblowersecurity.com/blog/bid/288041/A-Case-for-Self-Reporting-Ralph-Lauren-Ethics-Violation-Experience> (last visited July 22, 2015).

161. Press Release, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct, Sec. & Exch. Comm'n (Apr. 22, 2013) [hereinafter *Ralph Lauren Press Release*], available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.UrUm3ZqA2M8>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (emphasis added).

166. Peter J. Henning, *Ralph Lauren Case Shows the Benefits of Cooperation*, N.Y. TIMES (Apr. 29, 2013, 12:47 PM), http://dealbook.nytimes.com/2013/04/29/ralph-lauren-case-shows-the-benefits-of-cooperation/?_r=0.

Benefits of FCPA Self-Reporting,”¹⁶⁷ “Self-Reporting FCPA Violations Pays Off: Just Ask Ralph Lauren,”¹⁶⁸ and “Contrite Companies Can Be Forgiven in Bribery Cases: Enforcers Look Kindly on Bribery Suspects That ‘Fess Up.’”¹⁶⁹

A. *The Case Against Ralph Lauren Corporation*

As outlined by the SEC, Ralph Lauren Corporation’s Argentine subsidiary paid bribes to customs and government officials to assist in importing products into Argentina.¹⁷⁰ Paid through the company’s customs broker, the bribes were to avoid necessary paperwork and to avoid the inspection of prohibited products by customs officials.¹⁷¹ The bribes to Argentine officials totaled \$593,000 over a four-year period.¹⁷² Under the NPA, the company agreed to pay \$593,000 in disgorgement and \$141,845.79 in prejudgment interest.¹⁷³

Upon discovering the bribes, the company took immediate steps to halt the wrongdoing, such as terminating its customs broker.¹⁷⁴ Furthermore, the corporation reviewed its preexisting FCPA compliance program and implemented measures to upgrade the program, including: (1) amending the company anticorruption policy and translating it into eight languages; (2) enhancing third-party due diligence procedures; (3) modernizing policies for both gifts and commissions; and (4) implementing employee anticorruption training.¹⁷⁵ The company also stopped retail operations in Argentina and began to end all other operations there.¹⁷⁶

Ralph Lauren Corporation also provided extensive cooperation to the SEC and the DOJ, including providing a complete production (and translation) of documents and disclosure of large amounts of

167. Jonathan Green, *Another Example of the Benefits of FCPA Self-Reporting*, LAW360 (Apr. 24, 2013, 2:41 PM), <http://www.law360.com/articles/435727/another-example-of-the-benefits-of-fcpa-self-reporting>.

168. *Self-Reporting FCPA Violations Pays Off: Just Ask Ralph Lauren*, JDSUPRA (Apr. 24, 2013), <http://compliance.jdsupra.com/post/48778054353/self-reporting-fcpa-violations-pays-off-just-ask-ralph>.

169. Amanda Bronstad, *Contrite Companies Can Be Forgiven in Bribery Cases: Enforcers Look Kindly on Bribery Suspects That ‘Fess Up,’* THE LEGAL INTELLIGENCER, May 15, 2013.

170. Ralph Lauren Press Release, *supra* note 161.

171. *Id.*

172. *Id.*

173. *Id.*

174. Non-Prosecution Agreement at Statement of Facts (Exhibit A) ¶ 12, U.S. Sec. & Exch. Comm’n and Ralph Lauren Corporation (Apr. 22, 2013) [hereinafter Ralph Lauren NPA], available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

175. *Id.*

176. *Id.*

information pertaining to its bribery activities in Argentina; making witnesses available for interviews; and conducting an FCPA internal review and risk assessment of its operations in Hong Kong, Italy, and Japan, where no further transgressions were identified.¹⁷⁷

B. *Resolving Ralph Lauren Using a Non-Prosecution Agreement*

Rather than indictment and trial, both the DOJ and SEC resolved the *Ralph Lauren* matter through the use of NPAs. This is not unusual, as the government resolves the vast majority of FCPA matters through NPAs and DPAs; in fact, in the last twenty years, very few defendants have gone to trial in FCPA matters.¹⁷⁸ According to the DOJ, DPAs and NPAs “occupy an important middle ground between declining [to prosecute on the one hand] and obtaining [a] conviction [on the other].”¹⁷⁹ The fate of the accounting firm Arthur Andersen LLP probably instilled within both prosecutors and corporations the belief that serious collateral consequences surround corporate prosecutions.¹⁸⁰ Many commentators have suggested that the “mere indictment” of Arthur Andersen led to its closing—in the end, 28,000 people lost their jobs.¹⁸¹ Indeed, it was partly the repercussions from the collapse of Arthur Andersen that led the DOJ to “no longer see[] its role in the corporate context as solely that of indicting, prosecuting, and punishing.

177. *Id.*

178. See Mike Koehler, *FCPA 101: How Are FCPA Enforcement Actions Typically Resolved?*, FCPA PROFESSOR, <http://www.fcpaprofessor.com/fcpa-101#q16> (last visited July 22, 2015) [hereinafter Koehler, *FCPA 101*] (“Nearly every FCPA enforcement action against a company in this new era of FCPA enforcement is resolved through a non-prosecution agreement . . . or a deferred prosecution agreement . . .”).

179. *General Considerations of Corporate Liability*, U.S. ATTORNEYS’ MANUAL § 9-28.200, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm; see also Greenblum, *supra* note 8 (“Deferred prosecution offers prosecutors an intermediate option between declination and plea bargaining, as deferrals exact sanctions while circumventing the collateral consequences of a conviction.” (citation omitted)).

180. See generally *Indictment*, United States v. Arthur Anderson, LLP, No. CRH-02-121 (S.D. Tex. Mar. 7, 2002).

181. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006); see also Elkan Abramowitz & Barry A. Bohrer, *The Debate About Deferred and Non-Prosecution Agreements*, 248 N.Y. L.J. (2012) (“While the reality is that corporations may not face the type of collateral consequences suffered by Arthur Andersen, there is no question that fighting criminal charges can have a tremendous impact on a corporation’s reputation and pocketbook.”). But see Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 802 (2013) (challenging prevailing notions regarding the collateral consequences of convicting corporate entities). Using a database of organizational convictions, Gabriel Markoff comes to the conclusion that, from 2001 to 2010, no publicly traded company failed due to a conviction.

Instead it is a vehicle effecting widespread structural reform within corrupt corporate cultures.”¹⁸²

C. *The Fairness of Non-Prosecution Agreements*

However, using DPAs and NPAs in resolving FCPA matters may have a significant drawback: Companies may sometimes go along with a DPA or NPA not because of actual wrongdoing or guilt, but rather because they want to avoid the possibility of a negative outcome at trial. As one commentator puts it:

[T]he ugly truth is that while the existence of [NPAs and DPAs] can be welcome alternatives to an indictment, combined with a virtually strict liability regime, they can also permit the government to exact millions of dollars in fines from companies *that are genuinely without fault* but cannot afford to take the risk of an adverse outcome if they take on the government.¹⁸³

Another commentator suggests the current dynamic means that corporate entities have “little practical choice” when faced with choosing between indictment or accepting a DPA or an NPA.¹⁸⁴ He argues that this gives the government “enormous leverage” when negotiating terms of the agreements, which can in turn result in “prosecutorial overreaching” and deals that are unfair to corporate defendants.¹⁸⁵

In looking at the “deal terms” of such agreements, NPAs and DPAs oftentimes require (1) significant and long-term governance changes within the corporate entity, (2) admission of wrongdoing by the company, (3) acceptance of a “statement of facts” setting forth the company’s wrongful behavior, and (4) a prohibition upon the company

182. Thomas, *supra* note 35, at 454.

183. Jon May, *The New British Invasion: Will the UK Bribery Act of 2010 Eclipse the FCPA?*, 36 CHAMPION 28, 31 (2012) (emphasis added) (quoting National Association of Criminal Defense Lawyers Director of White Collar Policy, Shana-Tara Regon).

184. Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 163–64 (2009); see also Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?* 51 AM. CRIM. L. REV. 121, 125 (2014) (“[A]s reluctant as the DOJ has become post-*Arthur Andersen* to prosecute criminal charges against corporations, corporations have become even more reluctant to defend against such charges. The result is that criminal charges or potential criminal charges against corporations are almost always resolved by a negotiated resolution rather than through litigation.”).

185. Senko, *supra* note 184, at 163–64.

against making public statements that contradict admissions made in the agreement.¹⁸⁶ In the *Ralph Lauren* case, the company agreed to similar significant and ongoing obligations. In addition to agreeing to pay \$593,000 in disgorgement and \$141,845.79 in prejudgment interest,¹⁸⁷ the corporation agreed to the following “cooperation” duties:

1. The Respondent, a corporation organized and operating under the laws of Delaware, agrees to cooperate fully and truthfully in the Investigation and any other related enforcement litigation or proceeding to which the Commission is a party (the “Proceedings”), regardless of the time period in which the cooperation is required. In addition, the Respondent agrees to cooperate fully and truthfully, when directed by the Division's staff, in an official investigation or proceeding by any federal, state, or self-regulatory organization (“Other Proceedings”). The full, truthful, and continuing cooperation of the Respondent shall include, but not be limited to:

a. producing, in a responsive and prompt manner, all non-privileged documents, information, and other materials to the Commission as requested by the Division's staff, wherever located, in the possession, custody, or control of the Respondent;

b. using its best efforts to secure the full, truthful, and continuing cooperation, as defined in Paragraph 3, of current and former directors, officers, employees and agents, including making these persons available, when requested to do so by the Division's staff, at its expense, for interviews and the provision of testimony in the investigation, trial and other judicial proceedings in connection with the Proceedings or Other Proceedings; and

c. entering into tolling agreements, when requested to do so by the Division's staff, during the period of cooperation.

2. The full, truthful, and continuing cooperation of each

186. Jonathan S. Sack & Elizabeth Haines, *Be Careful What You Wish For: How Deferred and Non-Prosecution Agreements Can Be Used in Civil Litigation*, BLOOMBERG L. (Jan. 10, 2012), available at <http://about.bloomberglaw.com/practitioner-contributions/deferred-and-non-prosecution-agreements/>.

187. See *Ralph Lauren* Press Release, *supra* note 161.

person described in Paragraph 2 above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

- a. producing all non-privileged documents and other materials as requested by the Division's staff;
- b. appearing for interviews, at such times and places, as requested by the Division's staff;
- c. responding to all inquiries, when requested to do so by the Division's staff, in connection with the Proceedings or Other Proceedings; and
- d. testifying at trial and other judicial proceedings, when requested to do so by the Division's staff, in connection with the Proceedings or Other Proceedings.¹⁸⁸

Are these obligations unreasonably burdensome, vague, or expansive? How much time and money will the company spend to comply with these terms of the NPA agreement? While only the Ralph Lauren Corporation can accurately determine whether the obligations cross the line into being unfair or overreaching, one commentator has argued that prosecutors, in crafting DPAs and NPAs, tend to employ “nonspecific terms” that provide government investigators with “broad authority to compel disclosure of information and force internal changes, while leaving companies virtually defenseless.”¹⁸⁹ He further suggests that such terms “clearly favor the prosecutor” and that defendant companies agree to them only because “they have no ammunition at the bargaining table.”¹⁹⁰

Perhaps increased judicial review of these agreements would provide more protection for companies during the negotiation process. Unlike DPAs, NPAs are not filed with a court of law, thereby escaping judicial scrutiny that ensures the agreement is reasonable and fair. I have argued in a separate article that judicial review should be incorporated into the agreement-making processes of *both* NPAs and DPAs.¹⁹¹ After all, if

188. Ralph Lauren NPA, *supra* note 174, at ¶¶ 2–3.

189. Senko, *supra* note 184, at 184.

190. *Id.* at 177–78.

191. Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 394 (2014) (“With increased judicial review, not only would there be a more reasonable balance of power between prosecutors and corporations during the negotiation phase

the government can choose to negotiate a DPA that will be subject to judicial scrutiny or can instead choose to negotiate an NPA that bypasses judicial review and scrutiny altogether, it will have an increased incentive to rely upon NPAs. Thus, *both* forms of agreements should be subject to judicial review.

V. TOWARD AN FCPA SELF-REPORTING CALCULUS

The decision of whether to self-report a potential FCPA violation is a strategically difficult one.¹⁹² There can be certain advantages to self-reporting. First, doing so allows a company to frame the issues and set a tone for positive interaction with the government. This can include emphasizing the strength and effectiveness of the company's compliance programs, policies, and procedures, as well as its willingness to cooperate with the government.¹⁹³ As one FCPA expert put it, a voluntary disclosure "allow[s] the company to determine the disclosure's timing, waiting until it has fully investigated the violation and undertaken remedial steps, thus showing a pro-active commitment to compliance."¹⁹⁴ Another expert adds:

[S]elf-reporting impacts the dynamic between the company and the U.S. government throughout the course of the review. Self-reporting casts current management and the board of directors in the best possible light under difficult circumstances, giving defense counsel an opportunity to

of NPA and DPA deal making, but companies would be provided with guidance on how some of the more vague FCPA provisions . . . will be construed by the courts. Moreover, judicial review would ensure that DOJ's claims and theories of corporate wrongdoing actually stand on firm legal ground. Essentially, reviewing judges would help to locate and define that heretofore elusive line separating lawful from unlawful conduct, thereby providing more certainty in both FCPA compliance and enforcement." (footnotes omitted)). See also Candice Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14 (2007) ("Although negotiated resolutions offer enormous economic benefit, the omission of judicial oversight raises concerns when the determination of whether there is a breach of the agreement rests within the exclusive province of one party, and that party is the government, a party with extraordinary power.").

192. See Richard Marshall, *Uuuhhh, Look, We Messed Up Here*, CORP. COUNSEL, Jan. 28, 2010, available at <https://www.ropesgray.com/~media/Files/articles/2010/02/insights-for-in-house-counsel-grappling-with-self-reporting.ashx> ("The decision to self-report [an FCPA matter] can be one of the most important decisions the company can make, and such important decisions should never be made without careful reflection.").

193. See Marsha Gerber et al., *Voluntary Disclosure of FCPA Violations*, 43 REV. SEC. & COMMODITIES REG. 55, 63 (2010) ("[V]oluntary disclosure presents a tone of cooperation and commitment to FCPA compliance.").

194. See *id.*

show the government at the very start of the review that the company wishes “to do the right thing.”¹⁹⁵

The government appears to agree with these assessments: Stephen L. Cohen, Associate Director of the SEC’s Enforcement Division, has stated that “[n]othing sets the tone differently than self-reporting versus a phone call from us.”¹⁹⁶

Second, companies might wish to reap the benefits of self-reporting given that “[t]he risk of getting caught . . . is greater today than any point previously.”¹⁹⁷ As the SEC Enforcement Director Andrew Ceresney put it: “Given all the means that we have for finding out about misconduct . . . companies that choose not to self-report are taking a significant gamble.”¹⁹⁸ If the violation will likely come to light regardless, then why not get credit for self-reporting? One reason for the increased risk of “getting caught” is the whistleblower provisions passed in 2011 as part of the Dodd–Frank Wall Street Reform and

195. Carberry, et al., *supra* note 159; *see also* Mary Jo White, Chairwoman, Sec. & Exch. Comm’n, Speech Before the Stanford University Rock Center for Corporate Governance: A Few Things Directors Should Know About the SEC (June 23, 2014) *available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370542148863#.VQjRQU10zcs> (“The tone and substance of the early communications we have with a company are critical in establishing the tenor of our investigations and how the staff and the [SEC] will view your cooperation in the final stages of an investigation.”).

196. Emmanuel Olaoye, *Companies Will Be Treated Favorably If They Report Violations First, SEC Enforcer Tells Lawyers*, KNOWLEDGE EFFECT (Oct. 24, 2012), <http://blog.thomsonreuters.com/index.php/companies-will-be-treated-favorably-if-they-report-violations-first-sec-enforcer-tells-lawyers/>.

197. Andrew Ramonas, *The Perils of Keeping FCPA Infractions Under Wraps*, CORP. COUNSEL, Oct. 29, 2013 (quoting Charles Duross, then-deputy chief of DOJ’s FCPA unit, at the 2013 Los Angeles Association of Corporate Counsel’s Annual Meeting), *available at* <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202625548922&slreturn=20131130211025>; *see also* Timothy P. Peterson & Robertson Park, *Regulatory: Deciding Whether to Voluntarily Disclose a Potential FCPA Violation*, INSIDE COUNSEL (May 29, 2013), *available at* <http://www.insidecounsel.com/2013/05/29/regulatory-deciding-whether-to-voluntarily-disclos> (“Companies must assume that the probability is greater now that a corruption issue will come to the government’s attention, regardless of whether the company itself makes a voluntary disclosure, and must take that assumption into account in any calculations regarding the potential need for self-reporting.”).

198. *See* Ensign, *supra* note 4 (quoting an e-mail communication from Mr. Ceresney); *see also* Marshall L. Miller, Principal Deputy Assistant Attorney General, Criminal Division, U.S. DOJ, Remarks at the Global Investigation Review Program (Sept. 17, 2014), *available at* <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> (discussing the employment of enforcement tools “that may not have been used frequently enough in white collar cases in past years[,]” including wire taps, body wires, border searches, and physical surveillance). Miller reports that these “proactive investigative tools—previously used primarily in organized crime and drug cases—have become a staple in our white collar investigations.” *Id.*

Consumer Protection Act.¹⁹⁹ Under that law, monetary awards incentivize whistleblowers to be the first to report a violation. Specifically, “the [program] rewards high-quality original information that results in an SEC enforcement action with sanctions exceeding \$1 million.”²⁰⁰ Awards can range from 10%–30% of the money collected in a case.²⁰¹

There are also policies written to incentivize culpable individuals to report violations. While outright amnesty is unavailable to such whistleblowers, the SEC will consider their efforts pursuant to its Policy Statement on Cooperation.²⁰² Overall, the program seems to have increased in popularity: the number of whistleblower tips the SEC receives annually increased from 3001 in fiscal year 2012, to 3620 in fiscal year 2014.²⁰³ Since the program’s inception, the SEC has authorized awards to fourteen whistleblowers—nine of them in fiscal year 2014.²⁰⁴ On September 22, 2014, the SEC authorized the largest award made by the program to date: more than \$30 million to an unidentified whistleblower who revealed ongoing fraud that the government may not have detected without that help.²⁰⁵ Such awards will likely lead to increased publicity for the program, as well as increasing numbers of leads and tips.

Companies also discover potential FCPA violations during increasingly aggressive mergers and acquisitions (M&A) due diligence.²⁰⁶ When they find violations, the acquiring firm oftentimes requires the target firm to self-disclose the violation to the government so it can be fully addressed (i.e., they can pay monetary penalties, fire or reprimand personnel, implement or enhance internal compliance

199. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

200. Press Release, SEC Awards More Than \$14 Million to Whistleblower, U.S. Sec. & Exch. Comm’n (Oct. 1, 2013), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UsEJ3pqA2M8>.

201. *Id.*; *see also* 15 U.S.C. §78u-6 (2012).

202. 17 C.F.R. § 240.21F-15 (2014). The SEC states: “[W]e believe that the final rule appropriately incentivizes culpable whistleblowers to report securities violations while preventing culpable whistleblowers from financially benefiting from their own misconduct or misconduct for which they are substantially responsible.” Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34350 (June 13, 2011).

203. U.S. SEC. & EXCH. COMM’N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20 (2014).

204. *Id.* at 1.

205. *Id.* Sean McKessy, Chief of the Office of the Whistleblower, points out that the award was “the fourth award to a whistleblower living in a foreign country, demonstrating the program’s international reach.” *Id.*

206. *See* FCPA RESOURCE GUIDE, *supra* note 27, at 28 (“[D]ue diligence reduces the risk that the acquired company will continue to pay bribes.”).

programs, etc.) before the merger or acquisition takes place.²⁰⁷ This occurs because, while “[s]uccessor liability has not been squarely addressed in [FCPA] enforcement actions over the last few years[,] . . . avoiding such liability . . . has been a key driver of corporate behavior.”²⁰⁸ Indeed, M&A deals have become more complex and expensive as corporations have had to respond to an emerging doctrine where “[i]ssues of successor liability mean that the past improper practices of a target company may lead to problems for the acquiring company.”²⁰⁹

Finally, the federal government might learn about potential FCPA violations through mandatory disclosures in required SEC filings²¹⁰ or through increased cooperation with anticorruption regulators in foreign countries.²¹¹ Consider a multinational company based in the United

207. *Id.* (noting that “the consequences of potential violations uncovered through due diligence can be handled by the parties in an orderly and efficient manner through negotiation of the costs and responsibilities for the investigation and remediation”).

208. Lucinda A. Low & John E. Davis, *The FCPA in Investment Transactions*, 1 FOREIGN CORRUPT PRAC. ACT REP. § 5:23 (2d ed. 2010); *see also* FCPA RESOURCE GUIDE, *supra* note 27, at 28 (noting that the government will pursue successor (i.e., *acquiring*) companies only in “limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.” Indeed, the government will “more often” pursue actions against the predecessor (i.e., *acquired*) company, “particularly when the acquiring company uncovered and timely remedied the violations or when the government’s investigation of the predecessor company preceded the acquisition”).

209. Linda Braude & Jonathan Nelms, *FCPA Compliance in Russia*, 41 REV. SEC. & COMMODITIES REG. 169, 176 (2008).

210. For example, the SEC requires public companies to certify in quarterly and annual reports that “they have disclosed to the company’s outside auditors and to the audit committee . . . any fraud, whether or not material, that involves management or other employees who have a significant role in the internal controls.” Scott W. Mackay, *The Framework for Corporate Self-Governance: An Effective Ethics and Compliance Program*, Address at the ABA Business Spring Meeting (Feb. 11, 2003), in ABA BUS. L. SEC. NEWSL., Apr. 4, 2003, at 10–13, available at <http://apps.americanbar.org/buslaw/newsletter/0013/materials/aftermath.pdf>.

211. *See* Gwendolyn L. Hassan, *The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough*, 42 INT’L L. NEWS 1 (2013) (setting forth several risk factors for multijurisdictional prosecution, including (1) the increasing number of new antibribery and anticorruption laws across the globe; (2) the strengthening of existing antibribery and anticorruption laws in other jurisdictions; (3) new enforcement efforts in other jurisdictions; and (4) increasing prevalence of cross-border antibribery and anticorruption investigations and enforcement); *see also* Kristine Robidoux et al., *Anti-Bribery Legislation and Enforcement Pose Increasing Risks*, MONDAQ (Dec. 30, 2014), <http://www.mondaq.com/canada/x/362986/White+Collar+Crime+Fraud/Antibribery+legislation+and+enforcement+pose+increasing+risks> (noting that foreign anticorruption laws have increased in both number and scope in recent years, and that many of the laws are “extraterritorial in nature, and companies that find themselves offside anti-bribery laws in one

States with operations throughout the world. If a foreign government discovers corruption in a part of the company based within its own borders, that government is likely to contact American anticorruption regulators for assistance. This could lead to U.S. regulators initiating a separate investigation.²¹² It follows that the more widespread the illegal activity (in terms of the amount of money, geographic area, and number of individuals involved), the more likely it is that the corruption will come to light.²¹³

Despite those clear advantages to self-reporting, there is nonetheless a long list of possible negative consequences to doing so, including reputational harm;²¹⁴ decreasing stock prices;²¹⁵ decreasing employee morale;²¹⁶ additional enforcement by foreign governments²¹⁷ and

jurisdiction face the prospect of also being offside, and potentially prosecuted under, anti-bribery laws in other jurisdictions”).

212. See Choi & Davis, *supra* note 152 (“The DOJ and SEC do not appear to temper their FCPA sanctions to take into account foreign regulators. It could be that the DOJ and SEC obtain better evidence when a foreign regulator is involved, allowing the DOJ and SEC to construct a stronger case leading to a higher sanction. Alternatively, an egregious FCPA violation may attract both U.S. and foreign regulators, leading to the positive correlation between foreign regulators and the U.S. sanction without implying any causation. Looking at country level data, we find evidence that the SEC and DOJ impose disproportionately large sanctions against firms from countries which have strong legal institutions and cooperation agreements with the DOJ or the SEC . . .”).

213. Gerber et al., *supra* note 193, at 60.

214. See, e.g., Consolidated Complaint for Violation of the Federal Securities Laws, at 56; *In re Titan, Inc. Securities Litigation*, No. 04-CV-0676-LAB(NLS) (S.D. Cal. 2004) (“Moody’s has placed The Titan Corporation . . . on review for possible downgrade to reflect concerns about its reputation and cash flow from the impact of the company’s alleged violation of provisions set forth in the [FCPA].” (emphasis added) (quoting *Moody’s Places the Titan Corporation on Review for Possible Downgrade*, MOODY’S (July 1, 2004), https://www.moody.com/research/MOODYS-PLACES-THE-TITAN-CORPORATION-ON-REVIEW-FOR-POSSIBLE-DOWNGRADE--PR_83855)).

215. Raymond Wong & Patrick Conroy, *FCPA Settlements: It’s A Small World After All*, NAT’L ECON. RESEARCH ASSOCS. (Jan. 28, 2009), 12, available at http://www.nera.com/content/dam/nera/publications/archive1/Pub_FCPA_Settlements_0109_Final2.pdf (“[I]n some instances the implication of an alleged FCPA violation is considered serious by the market, over and above what one might expect given the magnitude of any disgorgements, fines, or penalties paid. For example, when Syncor International Corporation announced to the public that it was investigating suspicious payments in Asia that may have violated the FCPA, its stock price plummeted almost 45% on a market-adjusted basis, implying a loss of \$343 million in market capitalization, despite the relative small amount paid in its eventual settlement with the SEC and the DOJ.”).

216. See Gerber et al., *supra* note 193, at 10 (noting that self-reporting “negatively affects the company’s reputation and employee morale”).

217. See Matteson Ellis, *Top FCPA Enforcement Trends to Expect in 2015*, CORPORATE COMPLIANCE INSIGHTS (Jan. 23, 2015), <http://www.corporatecomplianceinsights.com/top-fcpa-enforcement-trends-expect-2015/> (discussing the increased focus upon bribery investigations by foreign governments: “They are targeting individuals, as evidenced by Brazil’s focus on former

multilateral development banks,²¹⁸ both of which can be assisted through multi-jurisdictional treaties and cooperation efforts;²¹⁹ the filing of private civil suits, thereby exposing individual executives to FCPA liability and reputational damage;²²⁰ civil class actions and shareholder

executives of Embraer and Petrobras and Canada's investigation of former employees of the engineering firm SNC-Lavalin. They are reaching blockbuster settlements with companies, such as the recent US \$240 million enforcement action by Dutch authorities against SBM Offshore for bribery offenses in Brazil, Angola and Equatorial Guinea. They are pursuing high-profile targets, such as the ongoing investigation by the UK's Serious Fraud Office into Rolls-Royce's activities in China and Indonesia"). See generally Hassan, *supra* note 211 (noting that "anticorruption efforts in other countries have seen a marked increase").

218. See Leonard McCarthy, *Dealing with Corruption in Development: What Works and What Comes Next?*, in WORLD BANK INTEGRITY VICE PRESIDENCY (INT) ANN. UPDATE 2013, at 3, 7–8, available at http://siteresources.worldbank.org/INTDOI/Resources/588889-1381352645465/INT_Annual_Update_FY13_WEB.pdf (discussing the bank's dedication to investigating and prosecuting corruption and other illicit practices in bank-financed projects).

219. In an FCPA case brought against Hewlett-Packard, for example, the DOJ and SEC worked with the Public Prosecutor's Office in Dresden, Germany; the DOJ also acknowledged "significant assistance" from the Polish Appellate Prosecutor's Office, the Polish Anti-Corruption Bureau, and "the contributions of our law enforcement partners in other countries involved in this matter." Press Release, Dep't. of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), available at <http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery>; see Press Release, U.S. Secs. & Exch. Comm'n, SEC Charges Hewlett-Packard with FCPA Violations (Apr. 9 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VQ26zU10zcs>; see also Mary Jo White, The Challenge of Coverage, Accountability and Deterrence in Global Enforcement, Remarks at the IOSCO 39th Annual Conference (Oct. 1, 2014) (transcript available at <http://www.sec.gov/News/Speech/Detail/Speech/1370543090864#.VMrHqyxrWew>) ("Rarely is there a week when one or more of the cases recommended by the enforcement staff does not involve critical international assistance. In fact, in the last fiscal year, the SEC made more than 900 requests for international assistance and, as a result, we were able to obtain critical evidence that helped us prosecute wrongdoers for a vast array of serious offenses."); Sung-Hee Suh, Deputy Assistant Attorney General, Implications for U.S. Law on EU Practice, Remarks at the Practising Law Institute's 14th Annual Institute on Securities Regulation in Europe (2015) (transcript available at <http://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities>) (discussing international bribery as well as international securities and commodities fraud). Suh stated that the DOJ is "increasingly coordinating with domestic and foreign regulators and law enforcement counterparts" and that the DOJ is "building and relying upon . . . relationships with our foreign counterparts to gather evidence, locate individuals overseas, conduct parallel investigations of similar conduct, and, when appropriate, coordinate the timing and scope of resolutions[,] . . . including accounting for the corporate monetary penalties paid in other jurisdictions when appropriate." *Id.*

220. An expert testifying on behalf of the U.S. Chamber of Commerce stated to Congress:

When companies and their senior officers and directors face personal civil liability in addition to any exposure to the DOJ and SEC, their judgments regarding what issues to investigate and what results to report to the DOJ and SEC necessarily will be affected, possibly to the detriment of the integrity of the government's investigation.

litigation against the company;²²¹ and, for government contractors, suspension or debarment.²²²

Any of these possible negative consequences of self-reporting could lead to increased expenditures in time, energy, and money for the company involved, especially when self-reporting results in wider government investigations. After a company self-reports a possible FCPA violation, the federal government will sometimes conduct its own independent investigation (albeit at the expense of the self-reporting company)—a process that can cost hundreds of thousands (if not millions) of dollars and take many months (if not years) to complete.²²³

Can We Sue Our Way to Prosperity?: Litigation's Effect on America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution, the H. Comm. on the Judiciary, 112th Cong. 41 (2011) (statement of John H. Beisner, Skadden, Arps L.L.P., testifying on behalf of the U.S. Chamber Institute for Legal Reform), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66540/pdf/CHRG-112hhrg66540.pdf>.

221. In shareholder litigation, plaintiffs sue alleging that bribery or corruption caused inaccurate pricing of stocks because of the benefits from bribery. In recent years, shareholders and former employees have sued corporations under securities laws, alleging that they purchased shares at inflated prices. See Khadijah M. Britton, *Avon Shareholders' FCPA China Bribe Class Action Tossed*, LAW360 (Sept. 29, 2014), <http://www.law360.com/articles/581981/avon-shareholders-fcpa-china-bribe-class-action-tossed> (discussing the dismissal of a class action lawsuit by Avon Products Inc. shareholders that accused the company and its senior executives of falsely inflating stock prices by hiding violations of the FCPA); Michael Volkov, *Additional Costs Of FCPA Investigations—Collateral Litigation*, JDSUPRA BUS. ADVISOR (Sept. 9, 2013), <http://www.jdsupra.com/legalnews/additional-costs-of-fcpa-investigations-29362/> (discussing the difference between the shareholder derivative action and the shareholder class action, and noting that “[t]ypically, plaintiffs launch these cases immediately after an FCPA investigation is disclosed. . . . In one particular situation, 23 individual shareholder actions were filed within two weeks of the disclosure of an FCPA investigation”); see also Nick Thornton, *Avon Faces Class-Action ‘Stock-Drop’ Suit*, BENEFITSPRO (Jan. 8, 2015), <http://www.benefitspro.com/2015/01/08/avon-faces-class-action-stock-drop-suit> (discussing a class action “stock drop” lawsuit against Avon Products Inc. by participants in company retirement plans in which plaintiffs allege that Avon should have frozen its purchase of company stock for the retirement plans as it was being investigated under the FCPA).

222. Under guidelines put forth by the U.S. Office of Management and Budget, individuals or firms that violate the FCPA can have their export licenses suspended, or they might be barred from doing business with the federal government. See 48 C.F.R. § 9.406-2 (2013); see also Lucinda A. Low et al., *The European Commission's First Biannual EU Anti-Corruption Report*, STEPTOE & JOHNSON LLP n.6 (Mar. 17, 2014), <http://www.stepto.com/publications-9420.html> (noting that, in *U.S. v. Siemens AG*, the DOJ charged Siemens with violating the FCPA's books and records provisions instead of bribery in part to avoid the damaging collateral consequences of a bribery conviction, including mandatory permanent debarment in the EU).

223. See Ensign, *supra* note 4 (noting that Avon Products Inc. “ha[s] spent approximately \$350 million on legal and other fees tied to” the government investigation surrounding an FCPA matter); see also Jacqueline C. Wolff & Pamela Sawhney, *FCPA Voluntary Disclosures: A Risk/Benefit Analysis*, COVINGTON & BURLING LLP 3 (2007), <http://www.cov.com/files/>

Since the government will likely decide the direction, speed, and aggressiveness of these investigations, companies need to carefully consider the implications of ceding this kind of power and control to the government; indeed, “the company may find itself in unwanted and unpleasant situations, such as helping the government prosecute a formerly valued employee or even a valued customer or business partner.”²²⁴

Moreover, these investigations can be difficult and complex. They can involve third-party agents, subcontractors, and subsidiaries located in other regions or countries.²²⁵ They can lead to government inquiries regarding other transactions, deals or projects, other accounting entries, and other internal investigations that the company has carried out.²²⁶ This, in turn, can lead to government findings of unlawful activities beyond (or in addition to) bribery, including tax violations, government contracting violations, or export control violations. Costs to the company can include employee time spent gathering data, organizing documents, and talking with investigators, as well as time spent hiring

Publication/97ca6c31-614b-4ace-a441-6dab61135c65/Presentation/PublicationAttachment/3980bda8-c3b1-4f62-9df9-7845d53e1764/FCPA%20Voluntary%20Disclosures%20-%20A%20Risk-Benefit%20Analysis.pdf (noting that the ensuing government investigation “tends to be significantly broader than the violation disclosed. A disclosure of a few improper payments by a small subsidiary in a small market can become a government investigation into the parent’s worldwide activities—all paid for by the disclosing company”).

224. Marshall, *supra* note 192, at 2.

225. See WORLD ECON. FORUM, GOOD PRACTICE GUIDELINES ON CONDUCTING THIRD-PARTY DUE DILIGENCE 6 (2013), available at http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf (discussing the importance “conduct[ing] reasonable due diligence before entering into a business relationship” with agents, advisors, subsidiaries, contractors, subcontractors, suppliers, etc., as well as the importance of “undertak[ing] appropriate measures to ensure that the third party does not engage in improper conduct”).

226. Arguably internal investigations constitute privileged information in accordance with *Upjohn Co. v. United States*. See 449 U.S. 383, 401–02 (1981). However, in some jurisdictions if the company has shared written reports of such investigations with auditors, which is a common practice, then the company may have waived any privilege. See Thomas R. Mulroy & Eric J. Munoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L. J. 49, 61 (2002) (“[A]ttorney-client communications disclosed to third parties, *not for the purpose of assisting the attorney in rendering legal advice*, lose their privilege. Privilege-waiving disclosures to third parties can arise in a number of contexts, including disclosure of materials to: a client’s underwriter and accountant; a corporation’s investment banker; one’s adversary in separate litigation, even if under a confidentiality agreement; and a witness in preparation for testimony.” (emphasis added)); see also *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756–57 (D.C. Cir. 2014) (preserving the core holding of *Upjohn* by ruling that, in the context of an internal company investigation, the attorney–client privilege applies to confidential communications between a company’s attorneys and its employees as long as a primary purpose of the communication was providing or obtaining legal advice).

outside legal counsel, accountants, and consultants to assist with the investigation.²²⁷

Finally, an investigation by one federal agency could very well expand into a multi-agency investigation. For example, after it completes its own investigation, the SEC has the ability to refer a matter to law enforcement authorities if it believes there is evidence of a willful violation,²²⁸ and federal securities laws authorize the SEC to share evidence—including its own investigation files—with the DOJ for this purpose.²²⁹ While the SEC's guidance on cooperation sheds very little light on the factors that would lead the SEC to make such referrals, it seems likely that the factors considered would be (1) the amounts of money involved; (2) the severity and pervasiveness of the transgression; and (3) the cooperator's level of culpability.²³⁰ Nevertheless, there should be more guidance from the government on this matter because it certainly plays a role in calculating the risks and rewards of self-reporting violations and cooperating thereafter.

CONCLUSION

The federal government needs to be more transparent and forthcoming regarding exactly what the benefits will be when corporate entities elect to self-report FCPA violations. Although the risks associated with voluntary disclosure tend to be concrete and predictable, the rewards have been largely uncertain. Ultimately, the government considers many factors in addition to self-reporting when dealing with a FCPA matter.²³¹ The DOJ and SEC must be more transparent about the

227. See Ceresney, Conference Remarks, *supra* note 5 (noting that in the Layne Christensen FCPA matter “the company provided real-time reports of its investigative findings, produced English language translations of documents, made foreign witnesses available, and shared summaries of witness interviews and forensic reports”); see also Press Release, U.S. DOJ, Avon China Pleads Guilty to Violating the FCPA by Concealing More Than \$8 Million in Gifts to Chinese Officials (Dec. 17, 2014), available at <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials> (noting that the company performed numerous tasks that were helpful to the DOJ, “including conducting an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing, translating and organizing voluminous evidence”).

228. 17 C.F.R. § 202.5(b) (2013); see also ENFORCEMENT MANUAL, *supra* note 66, § 5.6 (noting authority to refer matters to other regulatory and disciplinary bodies).

229. See 15 U.S.C. §§ 77t(b), 78u(d)(1) (2012).

230. John A. Nathanson & Jason M. Swergold, *SEC's Cooperation Initiative: Should You Go Along to Get Along?* N.Y.L.J. (Sept. 18, 2013), <http://www.newyorklawjournal.com/id=1202619610358/SECs-Cooperation-Initiative-Should-You-Go-Along-to-Get-Along> (subscription required).

231. As discussed in Part III, *supra*, federal prosecutors have a large amount of discretion in deciding what to do with potential FCPA violators—whether to prosecute at all, what charges

weight they will give (or not give) to voluntary disclosure versus other factors. If benefits were quantified and linked to specific factors involved in DOJ and SEC decision-making, companies would have a more accurate sense of what it means when a government official says that self-reporting is “a huge factor”²³² in deciding whether and how to prosecute a company, that there will be “meaningful credit”²³³ for companies that provide voluntary disclosure, or that self-reporting wrongful FCPA conduct is “always”²³⁴ in the company’s best interest.

Part of the difficulty is the lack of traditional FCPA jurisprudence. Because most cases are settled through NPAs and DPAs,²³⁵ little guidance exists regarding the interpretation of the FCPA and its application to various fact patterns and real-life situations. Without trials, jury verdicts, and appellate court decisions, legal precedent is not being developed in this area of the law. According to one commentator, such precedent is crucial because it allows courts to “clarify the boundaries of permissible legal conduct by resolving questions of ambiguity and vagueness; striking down overreaching laws as unconstitutional; and signaling to legislators where legal gaps exist.”²³⁶ While the DOJ and SEC published a much-anticipated guidebook regarding the statute in November of 2012 (FCPA Resource Guide),²³⁷ that publication was said to “break[] little new ground” in shedding light on what can sometimes be a subtle and complicated area of the law.²³⁸

to bring if prosecution moves forward, and how much of a penalty discount to give if there is a negotiated resolution.

232. See Ensign, *supra* note 4 (quoting James Koukios, Senior Deputy Chief of the Justice Department’s Criminal–Fraud Section).

233. Koehler, *World Bribery*, *supra* note 3 (quoting Charles Duross, then-Deputy Chief of the DOJ’s Criminal–Fraud Section).

234. Ceresney, Conference Remarks, *supra* note 5.

235. See Koehler, *FCPA 101*, *supra* note 178 (“Nearly every FCPA enforcement action against a company in this new era of FCPA enforcement is resolved through a non-prosecution agreement . . . or a deferred prosecution agreement . . .”).

236. Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J. L. ECON. & POL’Y 137, 155 (2010); see Pollack & Reisinger, *supra* note 184 (discussing how litigated cases “provide judicial opinions regarding what conduct violates the criminal laws and what does not. Thus, in addition to the criminal statutes themselves, corporations and individuals (at least those advised by competent counsel) would have guidance available to them in the form of judicial opinions providing elaboration as to what specific fact patterns constituted criminal behavior and, likewise, what fact patterns did not”).

237. See *supra* note 27.

238. Kevin J. Harnisch et al., *The Disappearing Exception for Facilitating Payments*, N.Y. L.J. (Feb. 11, 2013), available at <http://friedfrank.com/siteFiles/Publications/NYLJ%20-%20Harnisch-Witzel-Roth%20Feb%202013.pdf>.

In the FCPA Resource Guide, the government says it places a “high premium” on self-reporting.²³⁹ However, the guide then merely sets forth relevant provisions of the DOJ’s Principles of Prosecution, the Sentencing Guidelines, and the SEC’s Seaboard Report and Enforcement Manual.²⁴⁰ Numerous national and international business advocacy groups and associations have suggested that the government should publish a discussion of the *application* of those provisions and principles to realistic (even if hypothetical) business scenarios and situations.²⁴¹ Again, such a discussion should include objective, detailed information on how the government *weighs each individual factor* of self-reporting, cooperation, remedial measures, and other relevant factors. And it should also include more detailed information regarding how, when, and why the DOJ or SEC might decide upon prosecuting particular FCPA matters versus offering declinations, plea deals, or pre-trial diversion agreements such as DPAs or NPAs.²⁴² A small amount of progress has been made in this direction regarding declination decisions: the DOJ and SEC have been a bit more forthcoming in the last several years regarding when and why they have decided to decline pursuing a particular FCPA matter.²⁴³ However, the limited progress

239. FCPA RESOURCE GUIDE, *supra* note 27, at 54.

240. *Id.* at 54–56.

241. See Letter from U.S. Chamber of Commerce and thirty-two other business groups and associations, to Lanny A. Breuer, then-Assistant Attorney General, Criminal Division, U.S. DOJ, and George S. Canellos, then-Acting Director of Enforcement, U.S. Securities and Exchange Commission (Feb. 19, 2013). The letter responded to the December 2012 publication of the U.S. Foreign Corrupt Practices Act Resource Guide, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Coalition_Letter_to_DOJ_and_SEC_re_Guidance_2-19-13.pdf.

242. *Id.*

243. In 2014, four declinations involved companies that had self-reported possible FCPA violations to the government. These companies included Image Sensing, LyondellBassell, Layne Christensen, and SBM Offshore. See *Foreign Corrupt Practices Alert*, WILMERHALE 11–12 (Jan. 27, 2015), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/FCPA%20YIR%20Alert_01%202015.pdf. However, given the limited amount of information made available to the public, it is difficult to determine with any kind of certainty or specificity the reasoning behind the government’s decisions. While it seems clear that self-reporting the potential violations played a *role* in the final outcomes, it is impossible to know how the DOJ weighted that particular element against other elements of cooperation also factored into the decision-making process. For example, in the Layne Christensen case, the public learned little more than the fact that the DOJ declined to prosecute based on self-disclosure *and* exemplary cooperation *and* significant remediation. The question that needs to be addressed is: How were each of these elements *weighted* when the DOJ was making its final decision? See Russ Berland, Brian O’Bleness & Shellie Clausen, *Showing Leadership: Layne’s Journey from FCPA Investigation to DOJ Declination*, ASS’N OF CORPORATE COUNSEL 6–8 (Oct. 8, 2014), http://www.acc.com/chapters/midam/upload/2014-10-08_Stinson-Leonard_Street_PPTX-KS-NE.pdf. In the Image

made in the narrow and focused area of declinations must expand to the broader issues discussed in this Article. Companies need greater transparency regarding the specific benefits that the government will provide to reward particular cooperative behaviors that companies exhibit.

Moreover, businesses and their advocacy groups and associations are not the only ones calling for increased transparency in this regard. During the past decade, a number of scholars and former high-ranking SEC and DOJ officials have put forth proposals to amend the FCPA in various ways.²⁴⁴ Not only has the government failed to take meaningful

Sensing case, the public learned through a company press release that the DOJ declined to pursue the matter due to the company's "voluntary disclosure, thorough investigation, cooperation and voluntary enhancements to its compliance program." Again, members of the public need access to additional information if they want to have the ability to assess how each individual factor was weighted in the DOJ's decision-making process. *See ISS Announces Completion of Department of Justice Investigation*, IMAGE SENSING SYS. (Sept. 8, 2014), <http://www.imagesensing.com/company/news-and-events/140908.html>. This same weakness occurs with the information on declinations set forth by the DOJ and the SEC in their 2012 FCPA Resource Guide, which provides six anonymized examples of FCPA matters in which the government declined to take enforcement action. All six examples share the following five elements: (1) the company self-reported the potential violation to the government; (2) the company undertook an internal investigation; (3) the company took immediate action to halt the wrongdoing; (4) the company cooperated fully with the government; and (5) the company in some way strengthened compliance, either through remedial compliance training or through specific upgrades to its current compliance program. While this information is helpful, it is, again, impossible for one to discern how the government weighted each individual element mentioned in its decision-making process. *See FCPA RESOURCE GUIDE*, *supra* note 27, at 77–79.

244. *See, e.g.*, Judge Stanley Sporkin, Speech at the ABA National Institute on the Foreign Corrupt Practices Act: Origins of the FCPA (Oct. 16, 2006), *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21764&libID> (proposing an FCPA "immunization-inoculation program" that would "serve the dual purpose of: (1) creating suitable incentives to compliance-minded companies to adopt and maintain high ethical standards in the conduct of their business; and (2) reducing the case load and investigative burden of governmental agencies that enforce the FCPA while reassuring regulators that companies are taking active steps to limit corruption in their foreign contracting and other activities"); James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. L. 1233, 1233–34 (2007) (former SEC General Counsel advocating for a "Reg. FCPA" and a "new approach to administration of the FCPA, one that would provide a measure of regulatory certainty to public companies regarding the elements of good faith compliance. The policy issue before us in the FCPA area is not whether the cases that are being charged and prosecuted can be brought consistent with the standards of the statute; rather, the issue is whether our law enforcement agencies should be left to devise their own, case-by-case interpretation of the FCPA, without the rigor of greater regulatory clarity and the benefits of more consistent administrative interpretation" (emphasis added)); Stephen A. Fraser, *Introduction to Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. 1009 (2012) (suggesting that the government implement an FCPA amnesty program similar to that of the Department of Justice's Antitrust Division, where transgressing companies are able to calculate the discounts they would likely receive through

steps toward implementing any of the proposals, it has also failed to address the underlying, unifying issue that appears to motivate these proposals: The need for increased guidance and certainty for businesses worldwide that are attempting to abide by a rather complex and sometimes confusing statute. While the government need not implement any proposed changes that might somehow weaken the current statute,²⁴⁵ it *does* need to heed this clarion call for increased transparency.

The FCPA guidance and transparency sought by businesses, academics, former high-ranking government officials, and others within

cooperation); Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 659 (arguing that the implementation of an FCPA compliance defense would “better incentivize more robust corporate compliance, reduce improper conduct, and further advance the FCPA’s objective of preventing bribery of foreign officials”); Robert W. Tarun & Peter P. Tomczak, *Introductory Essay: A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 156 (2010) (advocating for a DOJ “Fraud Section FCPA leniency policy modeled after the Antitrust Division’s . . . Corporate Leniency Program”); *id.* at 172 (citing George J. Terwilliger, Proposed Change in DOJ Policy: Presumption of No Criminal Disposition for Voluntary Disclosure, Prepared Remarks for the Marcus Evans FCPA & Anti-Corruption Compliance Conference (June 23, 2010) (former Deputy Attorney General outlining an FCPA amnesty policy in which “there would be a presumption against criminal prosecution or disposition for organizations that voluntarily disclose wrongdoing and thereafter cooperate with the government by, for example, providing the results of an internal investigation and/or cooperating with additional government investigation”)); Larry D. Thompson, *In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 199, 216–17 (2014) (former Deputy Attorney General proposing that (1) “if a corporation establishes a comprehensive, fully funded, adequately staffed and trained FCPA compliance program, then the rogue employee who circumvents it and violates the FCPA . . . should be deemed to be acting outside the realm of his corporate responsibilities and the self-reporting corporation should not be held criminally liable for his misconduct” and (2) “that a genuinely cooperative, self-reporting company with a proper compliance program must be assured that it will not be debarred from contracting with the United States government or receiving the government permits required to run its operations”).

245. See, e.g., David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOC’Y FOUNDS. 31 (2011), available at <http://www.opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf> (arguing that “[c]reating a ‘compliance defense’ to knowing and intentional violations of the Act would amount to eliminating criminal liability under the Act all together by permitting a ‘fig leaf’ compliance program to insulate companies from knowing and intentional wrongdoing”). *But see* Koehler, *supra* note 244, at 659 (“A company’s *pre-existing* FCPA compliance policies and procedures and its good-faith efforts to comply with the FCPA should be relevant *as a matter of law*—not merely in the opaque, inconsistent, and unpredictable world of DOJ decision making—when a non-executive employee or agent acts contrary to those policies and procedures. An FCPA compliance defense would not eliminate corporate criminal liability under the FCPA or reward ‘fig leaf’ or ‘purely paper’ compliance. Rather, an FCPA compliance defense, among other things, will better incentivize more robust corporate compliance, reduce improper conduct, and further advance the FCPA’s objective of preventing bribery of foreign officials. The time is right to revisit an FCPA compliance defense.”).

the general public is the very kind of information that would naturally come to light if trials, jury verdicts, and appellate court decisions were the norm in this area of law. But since such verdicts and court decisions are *not* the norm in FCPA matters, and since courts are not generating legal precedent and providing the guidance, the federal government should be more aggressive in stepping in to fill the void. In other words, because the courts currently play such a negligible role in interpreting and applying the FCPA, it is the federal government—whether through Congress or through the DOJ and SEC—that has the power, the ability, and the *responsibility* to provide the necessary guidance. So far, the government has failed in this important task. While the government attempted to fulfill this responsibility by issuing the FCPA Resource Guide, Steven Tyrrell, former Chief of the DOJ’s Fraud Section, called the publication “more of a scrapbook of past DOJ and SEC successes than a guide book for companies who care about playing by the rules.”²⁴⁶

Meanwhile, if comparing the costs and benefits of self-reporting FCPA violations continues to be a “guessing game” for corporate entities and their counsel,²⁴⁷ some will surely conclude that the overall costs of voluntary disclosure outweigh the overall benefits. In *Ralph Lauren*, the company’s decision to self-report an FCPA violation resulted in a reduced penalty from the government.²⁴⁸ However, as practitioners at a leading national law firm state, it is not clear that any such discount “was sufficient to cover the . . . investigative and other costs incurred by the company as a result of the self-report, and the additional burdens the company has agreed to shoulder by entering into the NPAs.”²⁴⁹ That assessment—that the rewards conferred by the government for electing to self-report might, in some cases, not be worth the costs involved—even if targeted to one particular case, is the sort of conclusion the federal government likely does not want to hear from FCPA professionals working on the front lines.²⁵⁰

246. Joe Palazzolo, *U.S. Attempts to Clarify Antibribery Law*, WALL ST. J. (Nov. 14, 2012), <http://online.wsj.com/article/SB10001424127887324735104578118850181434228.html>.

247. Ensign, *supra* note 4 (quoting Laurence Urgenson, Partner at Mayer Brown LLP).

248. *See supra* Part V.

249. *The Ralph Lauren Case: Inadequate Rewards for Exemplary Corporate Cooperation*, COVINGTON & BURLING LLP (Apr. 26, 2013), available at <http://www.cov.com/files/Publication/4c57f566-0c8c-4058-a0bd-00f5b2de0185/Presentation/PublicationAttachment/abc31fce-c793-4611-a7de-0ed94eea3e01/E-Alert%20-%20The%20Ralph%20Lauren%20Case.pdf>.

250. *See* Richard Craig Smith et al., *Takeaways from Diebold’s FCPA Settlements*, LAW360 (Nov. 4, 2013), <http://www.law360.com/articles/484980/takeaways-from-diebold-s-fcpa-settlements> (“Although U.S. authorities may be willing to reward companies for self-disclosing FCPA issues . . . the positive credit received is not always clear. The ultimate

In the end, self-reporting is only one of numerous factors influencing whether and how the government decides to pursue a given FCPA matter.²⁵¹ With that knowledge in hand, and with the insights learned from *Ralph Lauren* and the other FCPA cases set forth in this Article, a corporate entity, when faced with the discovery of an FCPA violation, could reasonably conclude the following: “*We choose to keep quiet and not voluntarily disclose. If by chance the issue comes to light at a later time, which it may or may not, then it appears the consequences won’t be much harsher than if we had self-reported the matter ourselves—especially if we immediately agree to engage in significant and ongoing cooperation and remediation activities with the government.*”²⁵² In putting forth this possibility, this Article is neither advocating for nor condoning a corporate entity’s choice to not self-disclose a violation to the federal government. Rather, this Article simply points out that if the matter is truly a business decision prompting companies to undertake a cost–benefit analysis, then ultimately choosing not to self-report would, in many instances, likely be a reasonable decision based upon the information currently made available through the disposition of previous FCPA cases.²⁵³

financial and operational burden on a company may, in any given instance, outweigh credit received.”).

251. As discussed in Part III, *supra*, the federal government has enormous discretion in deciding what to do with potential FCPA violators—whether to prosecute at all, what charges to bring if prosecution moves forward, and how much of a penalty discount to give should there be a negotiated resolution.

252. *See* Ensign, *supra* note 4. Ensign quotes attorney Aaron Murphy, who suggested that instead of self-reporting an FCPA problem to the government, attorneys can “document everything very, very well, wrap it up and put a bow on it and put it on the shelf. Then one day if the government comes asking you can say, ‘Hey, look this is old news, we fixed it when we found out about it.’” *Id.*; *see also* DOJ Officials Encourage Companies to Cooperate Against Potentially Culpable Individuals, DEBEVOISE & PLIMPTON LLP FCPA UPDATE, Sept. 2014, at 2 (reporting that Marshall Miller, DOJ’s Principal Deputy Assistant Attorney General for the Criminal Division, stated at a Global Investigations Review conference in September 2014 that, in determining whether to bring charges against a company, the fourth of nine Principles of Federal Prosecution of Business Organizations (or so-called ‘Filip factors’) instructs prosecutors to consider both “the corporation’s timely and voluntary disclosure of wrongdoing *and* its willingness to cooperate in the investigation of its agents.” Miller noted that companies too often focus on the first prong of the factor and give “short shrift” to the second, which he describes as “the heart of effective corporate cooperation”).

253. Estimates are that only one-third of FCPA enforcement actions start based on information that companies self-report to the federal government. *See* DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT, § 10:2.10 n.15 (2009); *see also* Editor, *Mitigating FCPA Risk and Issues to Consider in Conducting Investigations*, METROPOLITAN CORP. COUNS., May 2011, at 19 (reporting an interview with Professor Mike Koehler, who states: “The enforcement agencies will tell you that they give credit for voluntary disclosures. However, from a strict dollars-and-cents perspective, realize this—if a company receives X

Moving forward, to increase the likelihood that companies will consistently choose to self-report FCPA violations, and thereby assist in eradicating the scourge of transnational bribery worldwide, the DOJ and SEC must be more forthcoming and transparent. Their policies, pronouncements, rules, and regulations must provide more certain, specific, and *calculable* incentives to companies for volunteering to come forward. The limited amount of information that the DOJ and SEC currently provide gives these agencies two enormously powerful tools in their dealings with alleged wrongdoers: flexibility and discretion.²⁵⁴ If the agencies do not set forth the benefits and incentive structures in a completely forthcoming and transparent manner, then each successive FCPA matter that comes before either agency can be negotiated on a relatively blank canvas—quite a different negotiation than would take place if the agencies were more constrained and directed through explicit, detailed, and specific rules, policies, and regulations that were relatively certain to be applied in each case, i.e., something that looked more like legal precedent.²⁵⁵

Indeed, a top DOJ official acknowledged the frustration existing within the private sector over the lack of certainty in self-reporting benefits but then proceeded to point out, according to one report, “that the DOJ *needs to retain flexibility and thus cannot make categorical pronouncements on the impact of a company’s determination to self-report.*”²⁵⁶ This Article suggests, however, that companies will be more

percent credit because of its self-disclosure, it is likely that the company will have spent X plus ten percent more on legal fees and related expenses to obtain that X percent credit”).

254. See *Examining Enforcement of the Foreign Corrupt Practices Act*, 111th Cong. 4 (2010) (testimony of Michael Volkov, partner at Mayer Brown LLP, before the Senate Judiciary Committee, Subcommittee on Crime and Drugs); U.S. SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON CRIME AND DRUGS 4 (Nov. 30, 2010), *available at* <http://www.judiciary.senate.gov/imo/media/doc/10-11-30%20Volkov%20Testimony.pdf> (testifying that the DOJ has not provided clarity on the matter of voluntary disclosure, but instead offers “vague promises of benefits and little to no certainty as to results, *all to preserve its discretion to impose a fine and plea as they see fit*” (emphasis added)).

255. See Editor, *supra* note 253 (reporting an interview with Professor Mike Koehler, who, when asked by the Editor if the DOJ’s corporate leniency policies have been successful in creating incentives for self-reporting, stated: “To the extent there are any leniency policies, they are ad hoc and generally not transparent. That is part of the problem. FCPA enforcement suffers from a lack of transparency like no other area of the law.”).

256. See *DOJ’s and SEC’s FCPA Enforcement Priorities*, DEBEVOISE & PLIMPTON LLP FCPA UPDATE, Nov. 2011, at 9 (reporting on the 26th National Conference on the FCPA organized by the American Conference Institute in Nov. 2011: “[Fraud Section Deputy Chief Charles E.] Duross acknowledged frustration by the private sector about the uncertain value of voluntary self-reporting but pointed out that the DOJ needs to retain flexibility and thus cannot make categorical pronouncements on the impact of a company’s determination to self-report” (emphasis added)).

likely to self-report in large numbers, and regarding significant FCPA matters, if and when they can determine with certainty and specificity that the rewards obtained will outweigh the risks involved. Scott D. Hammond, the DOJ's former Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division, bolsters this conclusion by stating that a "key component" to the success of that division's highly successful Corporate Leniency Program is "transparency and predictability."²⁵⁷ Commenting on leniency programs more generally, Hammond states: "If companies cannot confidently predict how an enforcement authority will apply its leniency program, [they] may ultimately decide against self-reporting and cooperation"²⁵⁸

Given that voluntary disclosure appears to be the "engine that fuels" the government's FCPA enforcement program,²⁵⁹ and given that there is "every reason to believe that much more misconduct is unearthed within the corporate setting than is publicly disclosed,"²⁶⁰ any changes leading to increased self-reporting of FCPA violations would simultaneously lead to (1) more company accountability for wrongdoing; (2) less government spending on costly investigations; and (3) more money accumulating in the U.S. Treasury through substantial fines. While the DOJ and SEC might argue that changes to the status quo are unnecessary, this Article urges the federal government to work toward bringing about the increases in certainty, predictability, and transparency discussed herein and contends that achieving those goals would be highly beneficial to companies, to the American public, and, most importantly, to the people and institutions throughout the nation and world currently suffering the ill effects of transnational bribery.

257. See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, DOJ, Antitrust Division, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, Address at the 54th Annual ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2006), available at <http://www.justice.gov/atr/public/speeches/215514.pdf>.

258. See Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, U.S. DOJ Director of Criminal Enforcement Antitrust Division, Presented at the ICN Workshop on Leniency Programs (Nov. 22–23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.pdf> (emphasis added).

259. See Michael Volkov, *Fixing the Justice Department's FCPA Voluntary Disclosure Program*, CORRUPTION, CRIME & COMPLIANCE (Oct. 7, 2012, 5:41 PM), available at <http://documents.lexology.com/9a72ec48-fc4a-4234-b91a-720d73f52acc.pdf> (stating that "[t]he FCPA Unit knows that voluntary disclosure has been—and will continue to be—the engine that fuels its aggressive enforcement program. SEC whistleblowers may identify a case here and there but in the end, companies which come in to the Justice Department and confess drive the recoveries and the numbers which have sent shockwaves through the corporate community").

260. James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 1, 18 (1997).

