Punishing the Penitent:
Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements

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Disclaimer

The opinions expressed in this article and any errors therein are those of the author alone.

Abstract of Thesis

Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements.

The Department of Justice has long promised tangible benefits to companies that voluntarily disclose Foreign Corrupt Practices Act (FCPA) violations. Justice Department officials have promised that the enforcement of the FCPA is both fair and consistent. Despite these promises, critics question the benefits of voluntary disclosure based on the outcome of a few, isolated cases. In this thesis, forty FCPA cases from 2002 through 2009 are compiled, comparing the ratio between bribes and fines for companies that do and do not voluntarily disclose. The results side with the critics and reveal that there does not appear to be a benefit to voluntary disclosure. The data from these cases is then used to identify how the FCPA can be honed to encourage compliance and deter violations in a fairer and more efficient manner. Next, comparisons are made between the FCPA and other anti-corruption organizations and entities, with the intent of incorporating refinements to the voluntary disclosure enforcement process. These comparisons consider not only the legal framework for preventing bribery but also how those laws are enforced. Finally, recent FCPA developments are considered along with some suggested actions to bring more fairness and efficiency to voluntary disclosures under the FCPA.

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I. Introduction

Bribery of foreign officials constitutes the exchange of something of value in order to gain an unfair competitive advantage.[1] Corruption of government officials carries a high economic and social price.[2] Specifically, bribery adversely impacts the allocation of scarce public resources.[3] In addition, public corruption has adverse economic consequences for ordinary citizens.[4] Public corruption also inappropriately shifts officials' focus away from fiduciary concerns, thereby deflating public confidence in government.[5] The Organisation for Economic Co-operation and Development (OECD) has warned that "[b]ribery of public officials to obtain advantages in international business raises serious moral and political concerns, undermines good governance and sustainable economic development, and distorts competition."[6]

There are different theoretical and historical approaches to dealing with the bribery of public officials.[7] Organizations and countries use various approaches in order

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[1] *See* John Macrae, *Underdevelopment and the Economics of Corruption: A Game Theory Approach*, 10 World Dev. 677, 678 (1982).

[2] *See* Press Release, World Bank, The Costs of Corruption (Aug. 8, 2004), http://go.worldbank.org/LJA29GHA80 (estimating that more than $1 trillion is paid in bribes each year).

[3] *See* Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

[4] *See* Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge Univ. Press 1999). Transparency International, a non-profit organization dedicated to eliminating corruption, reports that the poor are disproportionately affected by corruption. *See* Press Release, Transparency International, Poor Families Hit Hardest by Bribery, Even in Rich Countries, Finds New TI Poll (Dec. 6, 2007), http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_12_06_gcb_2007_en.

[5] *See* Susan Rose-Ackerman, "The Political Economy of Corruption." *Corruption and the Global Economy*, ed. Kimberly Ann Elliott. Washington: Institute for International Economics, *The Political Economy of Corruption, in Corruption and the Global Economy* 1997; *see also* Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314, 318 (2002) (citing the disregard of officials' duties as the most direct impact of bribery).

[6] OECD WORKING GROUP ON BRIBERY, *2008 Annual Report*, www.oecd.org/dataoecd/21/24/44033641.pdf.

[7] Many authors advocate shifting the anti-corruption focus away from legislative enforcement toward innovative free market style approaches. *See* Michael Almond & Scott Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 391 (1997).

to prevent corporations and individuals from gaining unfair competitive advantage and inappropriately influencing public officials' decision making.

A. The Foreign Corrupt Practices Act

One of the ways that the United States addresses bribery of public officials is through the Foreign Corrupt Practices Act (FCPA). After investigating corruption during the 1970s, Congress determined that there was a need for comprehensive legislation to address and remedy the problem.[8] The FCPA was enacted to address the moral and governance concerns, with the goal "to restore public confidence in the integrity of the American business system."[9] The FCPA has sought to achieve this through a combination of criminal and civil sanctions.[10] The Department of Justice (DOJ) has said that the "FCPA was intended to have and has had an enormous impact on the way American firms do business."[11] Structurally, the FCPA is comprised of two major parts: the anti-bribery provisions and the record keeping provisions.[12]

1. Anti-bribery Provisions in the FCPA

The anti-bribery provisions prohibit a company from making payments to a foreign official for the purpose of "influencing any act or decision of such foreign official

[8] 15 U.S.C. §§ 78m, 78dd et seq. (2008). Despite these goals, the FCPA was initially seldom utilized. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389-396 (2010) (discussing the dramatic increase in FCPA enforcement in the past decade).

[9] FRAUD SECTION, CRIMINAL DIV., U.S. DEP'T. OF JUSTICE, *Lay-Person's Guide to FCPA* 1, http://www.justice.gov/criminal/fraud/docs/dojdocb.html [hereinafter Lay-Person's Guide].

[10] *Id*. For a discussion of the provisions in the FCPA and how it can impact business, *see generally* Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579 (2008). Whether or not the FCPA has been effective at restoring confidence in American business is debated. *See* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 92-97 (2007).

[11] Lay-Person's Guide, *supra* note 9, at 1; *see also* Kevin J. Harnisch & Michelle L. Ramos*, Practical Considerations for Addressing FCPA issues*, 1687 PLI/CORP 557 (2008) (discussing the scope and effect of the FCPA on business decisions).

[12] *See generally* Shaheen Frederick & Natalia Green, *Foreign Corrupt Practices Act Trends*, BRIEFING PAPERS, July, 2005.

in his official capacity."[13] The statute specifically makes it unlawful for any company registered with the Securities and Exchange Commission (SEC), "or for any…employee, or agent of such issuer…to make use…of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or…the giving of anything of value" to a foreign official in order to gain a business advantage.[14] The Justice Department has stated that an issuer "is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC."[15] Notably, the anti-bribery provisions of the FCPA also apply to any "domestic concerns," including non-public companies.[16] In order to violate the bribery provisions of the FCPA, the issuer's employee or agent must have corrupt intent.[17] The Justice Department has also stated that corrupt intent is manifest when the issuer induces "the recipient to misuse his official position to direct business wrongfully to the payer or to any other person."[18] While the

[13] 15 U.S.C. §78dd(a)(1)(A)(i) (2008). The Lay-Person's Guide to the FCPA points out that "18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct." Lay-Person's Guide, s*upra* note 9, at 1. While the FCPA can apply to individuals as well as companies, this article focuses on the risks companies face.

[14] 15 U.S.C. §78dd(a)(1)(A)(i) (2008).

[15] Lay-Person's Guide, s*upra* note 9, at 2. Companies that do not fall within this definition are not required to comply with the record keeping provisions. *See* Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615, 618 (2009) (contending that "[w]ithout similar disclosure and accounting requirements for non-issuers, the enhanced ability of U.S. companies to conceal bribe payments becomes the self-fulfilling prophecy that bribery in foreign commerce is difficult to detect and prove"). Therefore, when these companies discover an FCPA violation they are extremely reluctant to self-report. *Id*. at 627.

[16] 15 U.S.C. § 78dd-2(h)(1)(B) (2008) (identifying a "domestic concern" extremely broadly as "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States").

[17] Lay-Person's Guide, s*upra* note 9, at 2.

[18] *Id*.

anti-bribery provision of the FCPA also applies to individuals, this article focuses on the provision's impact on companies.[19]

2. Record Keeping Provisions

In addition to prohibiting bribery, the FCPA establishes specific accounting and record keeping provisions.[20] The books and record provisions specifically require that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[21] Further, the books and records provision requires a company to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances."[22] The purpose of this statute is to prevent companies from inaccurately labeling expenditures, and hiding payments to foreign officials.[23] The standard for reviewing corporate behavior is broad because a company may violate the FCPA simply by knowingly failing "to implement a system of internal accounting controls or knowingly falsify any book."[24] Because bribes are often misrepresented in accounting records and are inconsistent with effective internal controls, the books and records provision allows the SEC to take actions against an issuer even if the DOJ is unable to bring criminal charges due to a lack of evidence.

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[19] For more information about potential criminal implications of the FCPA on individuals, *see* David E. Dworsky, Foreign Corrupt Practices Act, 46 Am. Crim. L. Rev. 671, 687-689 (2009).
[20] *See* Joseph Dyer, *Foreign Corrupt Practices Act*, BRIEFING PAPERS, Apr. 2000, at 6.
[21] 15 U.S.C. § 78m(b)(2)(A) (2008).
[22] 15 U.S.C. § 78m(b)(2)(B) (2008).
[23] *See* Robert C. Blume & Ryan V. Caughey, *The FCPA: Overview, Enforcement Trends and Best Practices*, 15 No. 13 ANDREWS SEC. LITIG. & REG. REP. (Nov. 3, 2009) (noting that the internal controls provisions were intended to "prevent improper uses of company assets").
[24] 15 U.S.C. § 78m(b)(5) (2008).

The FCPA also grants substantial investigative powers to the Attorney General to enforce the act.[25] The Justice Department may subpoena witnesses and "require the production of any books, papers, or other documents" from companies under investigation.[26] These investigative powers have a broad impact even beyond the particular company under investigation. In fact, enforcement trends reveal that as soon as the DOJ begins to investigate a particular company, other companies in the same industry may also face scrutiny.[27]

B. Sarbanes-Oxley Act

The Sarbanes-Oxley Act (SOX) of 2002 was enacted in response to corporate scandals and ethical lapses.[28] Since its enactment, SOX has had a significant impact on corporate self-governance.[29] The act has also had a significant impact on recent FCPA trends.[30] Among other things, SOX requires regulators to promulgate a rule requiring an issuer of securities to disclose if it has a code of ethics for management.[31] Section 406 of SOX identifies this as "written standards designed to deter wrongdoing," and to promote

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[25] 15 U.S.C. §78dd(d)(2) (2008).
[26] *Id*.
[27] Dechert LLP, *U.S. Government Officials Pledge to Continue Robust FCPA Enforcement*, Dec. 2007, http://www.dechert.com/library/White_Collar_12-07_U.S._Government_Officials.pdf ("Government officials also said that if they learn, whether through a government-initiated investigation or through a voluntary disclosure, that a particular corrupt practice is common in an industry, it is likely that the entire industry will be subject to scrutiny.").
[28] Pub. L. No. 107-204, 116 Stat. 745 (2002).
[29] *See* generally, Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313 (2007). The Sarbanes-Oxley Act (SOX) has impacted corporate self-governance by shifting regulatory enforcement costs to the private industry. *See* Larry Cata Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring after Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 341 (2004). Specifically, SOX has altered corporate compliance at the most fundamental level by requiring corporations to self-disclose. *See* Troy A. Paredes, *After The Sarbanes-Oxley Act: The Future of the Mandatory Disclosure System*, 81 WASH. U. L.Q. 229, 233 (2003) (discussing mandatory disclosures under SOX).
[30] *See, e.g.*, William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of the Modern Corporation's Last Chapter*, 33 Seattle U. L. Rev. 849, 872 (2010) (noting that SOX extended "the penetration of public enforcement considerably into the private sphere, forcing corporations to participate directly in the enforcement enterprise").
[31] Sarbanes-Oxley Act § 406, 17 C.F.R. § 229.406(b)(2)-(3).

accurate and fair reports and compliance with applicable laws.[32] Further, SOX also dramatically increases the maximum fines for false and misleading statements for corporations.[33] In addition, SOX, as implemented as a final rule, requires companies to establish and maintain internal controls for financial reporting and to evaluate those controls annually.[34] SOX also requires that corporate executives be much more cognizant of potential fraud. For example, executives are required to certify that they have read the company's quarterly and annual reports, and that, to their best knowledge, they do not contain untrue statements and are complete and accurate.[35] These new requirements, coupled with executives' concern about liability, have spurred more voluntary disclosures of FCPA violations.[36]

C. The United States Organizational Sentencing Guidelines

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[32] *Id.*

[33] 15 U.S.C. § 78ff(a) (2006).

[34] *See* Final Rule: Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Exchange Act Release No. 33-8238, 68 Fed. Reg. 36636-01 (Jun. 18, 2003), *available at* http://www.sec.gov/rules/final/33-8238.htm. By mandating more executive responsibility and liability for internal controls, SOX has resulted in a dramatic increase in FCPA enforcement in recent years. *See* Karen T. Cascini & Alan DelFavero, *An Assessment of the Impact of the Sarbanes-Oxley Act on the Investigating Violations of the Foreign Corrupt Practices Act*, 6 J. OF BUS. & ECON. RES.10, 25 (2008), *available at* www.cluteinstitute-onlinejournals.com/PDFs/1343.pdf, (stating the self regulation requirements in SOX have been the cause of increased self disclosure); *see also* Marie Leone, *Coming Clean about Bribery*, CFO.COM (Apr. 3, 2006), http://www.cfo.com/article.cfm/6764209/c_2984290/?f=archives (linking SOX's internal controls rules and other recordkeeping requirements with increased self disclosures). Thus, disclosures may be mandatory for companies covered by SOX's reporting obligations. *See* James G. Tillen, *Feeling the Impact, Both Positive and Negative, of the FCPA* 5, ASPATORE (2010), http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSw8JDm83!/document.name=/TillenChapter.pdf.

[35] *See* Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports, Exchange Act Release No. 33-8124, 67 Fed. Reg. 57276-01 (Sept. 9, 2002), *available at* http://www.sec.gov/rules/final/33-8124.htm. This requirement is likely another reason for the recent increase in FCPA enforcements.

[36] *See* Laura E. Kress, *How the Sarbanes-Oxley Act has Knocked the "SOX" off DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL'Y 2, 3-5 (2009).

In response to calls for more uniform sentencing, the United States Congress issued the Sentencing Reform Act in 1984.[37] That act created the United States Sentencing Commission with a charge to establish guidelines for appropriate penalties in criminal cases.[38] The work product of the group is known as the Federal Sentencing Guidelines for Organizations.

The Organizational Sentencing Guidelines have had many important impacts on how corporations do business in the United States and how the FCPA is enforced. First, the Organizational Sentencing Guidelines were instrumental in spurring corporations to use compliance programs.[39] Second, the Organizational Sentencing Guidelines themselves offered specific advice on what constitutes an appropriate compliance system.[40] Third, the Sentencing Commission's guidelines suggest lesser penalties for companies that have compliance programs in place.[41] Fourth, they give companies a reasonable idea of what punishment to expect.[42] Finally, the Sentencing Commission is a flexible body that has refined suggested penalties and amended its suggestions for

[37] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). For background to the Sentencing Reform Act, *see generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226-230 (1993) (identifying criticisms that contributed to the creation of the Sentencing Guidelines).
[38] 28 U.S.C.A. § 991 (2005).
[39] *See* Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, 1561 PLI/CORP. 13, 17−18 (2006); *see also* REBECCA WALKER, CONFLICTS OF INTEREST IN BUSINESS & PROFESSIONS: LAW AND COMPLIANCE § 8:3 (2010), *available at* Westlaw CONFINTBP § 8:3 (concluding that "there is little doubt that the Organizational Sentencing Guidelines have been extraordinarily effective in prompting large numbers of companies to implement formal compliance programs"). Although the Organizational Sentencing Guidelines have changed corporate behavior, the Supreme Court has declared them advisory. *See United States v. Booker*, 543 U.S. 220 (2005).
[40] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 [hereinafter Sentencing Guidelines].
[41] *Id.* at § 8C2.5(f).
[42] *Id*.

companies over the years.[43] For these reasons, the Organizational Sentencing Guidelines play an integral role in recent FCPA enforcements.

II. Analysis of Recent FCPA Enforcement Actions

In the context of the Organizational Sentencing Guidelines, this article compiles forty published FCPA cases against companies from 2002 through 2009 in order to gauge if there is a difference in fines between voluntary and involuntary disclosure. Voluntary disclosure occurs when a company chooses to approach enforcement officials about potential FCPA violations. Compilation and analysis of the data from the published cases appear to show that no tangible benefits to voluntary disclosure exist.

A. Assurances about Voluntary Disclosure

In recent years there has been a dramatic increase in enforcement actions against individuals and companies that violate the FCPA.[44] In response to recurring concerns about the benefits of voluntarily disclosing a violation, the DOJ has repeatedly assured companies that there are indeed benefits to being forthcoming.

In 2003, the DOJ issued a memorandum from Deputy Attorney General Larry Thompson regarding the various factors considered when deciding whether to investigate and prosecute a corporation.[45] In that memorandum, voluntary disclosure is listed as one

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[43] *See* UNITED STATES SENTENCING COMMISSION, SYNOPSIS OF AMENDMENT, PROPOSED AMENDMENTS TO CHAPTER EIGHT, at 109-12, (submitted to Congress May 1, 2004), *available at* http://www.ussc.gov/2004guid/RFMay04_Corp.pdf.

[44] Elliott Leary et al., *Trends in FCPA Enforcement*, METRO. CORP. COUNSEL, May 1, 2007, http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=6627; *See also* Shearman and Sterling, *Recent Trends and Patterns in FCPA Enforcement*, Feb. 13, 2008, www.shearman.com/files/upload/FCPA_Trends.pdf (last visited June 4, 2010) (discussing recent increases in enforcement) [hereinafter Shearman FCPA Trends 2008].

[45] Memorandum from Larry D. Thompson to Heads of Department Components and U.S. Attorneys, re. "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

of the factors that may mitigate potential penalties for corporate noncompliance.[46] Additionally, that memorandum included a footnote acknowledging that the Organizational Sentencing Guidelines "reward voluntary disclosure and cooperation with a reduction in the corporation's offense level."[47] Similarly, other statements by DOJ officials have also alleged a benefit to voluntarily disclosing FCPA violations. For example, Acting Deputy Attorney General Gary G. Grindler promised that companies would receive credit for voluntary disclosure and remedial actions.[48] While Mr. Grindler was not specific as to the extent of the credit, he did promise that cooperation would be considered "during the prosecutorial decision-making process."[49] Similarly, Assistant Attorney General of the Criminal Division, Lanny Breuer, recently said that voluntary disclosure would be appropriately rewarded.[50]

B. Skepticism about the Benefits of Voluntarily Disclosing

Despite promises that there are tangible benefits to voluntary disclosure, the DOJ is consistently vague regarding what benefits will actually be conferred to a disclosing

[46] *Id.* at 7.
[47] *Id.* at 7 (referencing Sentencing Guidelines *supra* note 40, at §8C2.5(g)).
[48] Gary G. Grindler, Acting Deputy Att'y Gen., Address at the 2010 Compliance Week Conference (May 25, 2010) (*available at* http://www.justice.gov/dag/speeches/2010/dag-speech-100525.html).
[49] *Id.*
[50] Lanny Breuer, Assistant Att'y Gen. Crim. Div., Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) (available at http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf) [hereinafter Breuer FCPA Speech]. Similarly, in a recent speech to the American Bar Association National Institute on the Foreign Corrupt Practices Act, then-Assistant Attorney General Alice Fisher stated, "If 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." Alice Fisher, Address at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), http://www.justice.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPASpeech.pdf. Later in the same address, Ms. Fisher noted that voluntary disclosure "may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit." *Id*.

corporation.[51] In addition, recent record-breaking settlements and increased enforcement have led many to question whether there actually is a tangible benefit for voluntarily disclosing.[52]

Criticism about the alleged benefits to voluntary disclosure began to mount after the Schnitzer Steel Industries Inc. (Schnitzer Steel) case in October 2006. In that case, Schnitzer Steel voluntarily disclosed bribes a subsidiary had made to Chinese officials for the purpose of gaining a competitive advantage.[53] Despite "exceptional cooperation" with the Justice Department, Schnitzer Steel still faced around $15 million in fines from the DOJ and the SEC for their alleged $1.8 million paid in bribes.[54]

Because Schnitzer Steel was a voluntary disclosure situation with costly results, many have used it as a reference point for arguing that there is no discernable benefit to self-reporting. For example, reflecting on the Schnitzer Steel case, one author stated: "Despite the Government's assurances that self-reporting and cooperation will result in a

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[51] In her prepared speech, Alice Fisher emphasized that "it would not make sense for law enforcement to make one-size-fits-all promises about the benefits of voluntary disclosure before getting all of the facts." Fisher, *supra* note 50.

[52] *See* Lucinda Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures* 24, 16th National American Conference Institute on the Foreign Corrupt Practices Act, Nov. 8-9, 2006, Washington, D.C., http://www.abanet.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf ("As FCPA penalties, and the collateral consequences of FCPA violations including third-country enforcement, continue to increase, companies are likely to begin to reassess the benefits of voluntary disclosure. Already there is anecdotal evidence that some companies that have made such disclosures may regret them."). One author referred to the benefits of voluntary disclosure as simply "a deviation from the worst-case scenario." Mark Vernazza & Helen Mueller, *The Long(er) Arm of the Foreign Corrupt Practices Act: The FCPA's Broad Reach and What Companies Can Do to Escape It*, (February 15, 2008), http://www.eapdlaw.com/files/News/20760964-fb7f-4ccd-9872-02a03965b4f4/Presentation/NewsAttachment/97e87083-1432-4601-afc3-030103d857f6/The%20Longer%20Arm%20of%20the%20Foreign%20Corrupt%20Practices%20Act.pdf.

[53] IN THE MATTER OF SCHNITZER STEEL INDUSTRIES, INC., Exchange Act Release No. 54606, 89 SEC. Docket 302 (Oct. 16, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54606.pdf [hereinafter Schnitzer Steel SEC Settlement].

[54] *See id*; *see also* Press Release, U.S. Dep't of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007), http://www.justice.gov/opa/pr/2007/June/07_crm_474.html [herein after Schnitzer Steel Executives' Pleadings].

tangible benefit, recent enforcement trends do not reflect this promise."[55] Another author mildly noted that the benefit of voluntary disclosure in Schnitzer Steel was simply "hard to discern."[56]

C. Voluntary Disclosure Critics' Conclusions

Because Schnitzer Steel had a disproportionate fine levied against it, critics reasonably questioned if there really was much of a benefit to voluntary disclosure. In addition, other cases have led some to conclude that "voluntary disclosures involve significant risks that may be less likely to be presented if the company simply responds responsibility [sic] to FCPA issues internally without making a voluntary disclosure."[57]

Although a few have alleged that the Schnitzer Steel case actually reflects the benefits of voluntary disclosure, they appear to be in the minority.[58] In fact, recent enforcement decisions caused another author to conclude that "it is difficult to ascertain what impact voluntary disclosures have on the monetary penalties not just in an individual case, but generally across cases."[59] The alleged inability to "quantify or assess with precision" potential fines led another author to conclude that "these risks represent yet another potential counterweight" to the perceived benefits of a deferred prosecution agreement.[60]

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[55] *See* Jessica Tillipman*, Foreign Corrupt Practices Act Fundamentals*, BRIEFING PAPERS, Sept. 2008, at 15.
[56] Michael Freedman, *Trust Us,* FORBES, Dec. 25, 2006, http://members.forbes.com/forbes/2006/1225/132.html?token=MTggT2N0IDIwMDcgMTU6MzE6MzggKzAwMDA%253D.
[57] Lucinda Low et al., *supra* note 52, at 1.
[58] Howard Goldstein made such an argument in his article, *Recent Foreign Corrupt Practices Act Developments*, N.Y. L. J. CORPORATE UPDATE*,* Jan. 4, 2007, http://www.friedfrank.com/siteFiles/Publications/EE4B7A2BC514AFD2AD447A4B05409BB7.pdf.
[59] Low et al., *supra* note 52, at 20.
[60] Joan McPhee*, Deferred Prosecution Agreements: Ray of Hope or Guilty Plea By Another Name?*, The Champion, Sept./Oct. 2006, http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/e4a884975d0659fb85257210005bd4d1?OpenDocument&Click=. There does not appear to be any literature that statistically compares FCPA

D. A Survey of FCPA Cases from 2002 through 2009

In response to these criticisms, this article compiles the settlement data of FCPA cases beginning in 2002 through 2009 with the purpose of determining if there is a pattern between the level of bribes paid and the amount of fines levied because of those bribes in voluntary and involuntary disclosure cases.[61] The principal means of analysis will be a comparison of averages between fines and penalties levied in relation to bribes paid. While it is clear that other factors affect the amount of penalty besides the amount of bribes, there is no way to completely quantify them statistically.[62] This is due to the fact that the DOJ and the SEC usually quantify only bribes and penalties in their public settlement agreements. The amount of revenue sought or obtained from bribery will occasionally be published; however, that information appears in only some of the cases.[63]

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corporate behavior and fines. Rather, authors that consider recent trends focus on broad observations and individual cases. *See, e.g.*, John Harper, *The Foreign Corrupt Practices Act - A 2009 Update*, Sept. 11, 2009, http://atlantaiia.net/uploads/IIA_FCPA_Presentation_11Sep09.pdf (contending that recent "increased aggressiveness" has also meant "larger penalties" for violators without statistically analyzing recent cases).

[61] The OECD has expressed concern about the lack of statistical data regarding the effectiveness of the FCPA. *See* OECD: United States: Phase 2; Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions 18 (Oct. 2002), available at http://www.oecd.org/dataoecd/52/19/1962084.pdf (concluding that "there are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA"). This article is intended to address some of the OECD's concerns by statistically evaluating recent FCPA cases in order to determine if there are benefits to voluntary disclosure.

[62] Some of the other factors affecting the potential total penalty include: the amount of revenue generated from a bribe; remedial actions taken by the company; the institution of compliance program reforms; the general amount of cooperation; and even the relationship between defense counsel and the enforcement agency.

[63] The benefit gained from a bribe either as revenue or profit is sometimes published in Department of Justice (DOJ) sentencing memoranda when a company pleads guilty. *See* United States v. Siemens Aktiengesellschaft, Cr. No. 1:08-cr-367 (RJL) (D.D.C., 2008), Department of Justice Sentencing Memorandum (identifying the revenue from contracts that were allegedly tainted by bribery). However, profit or revenue from bribery may not be published if the case results in a non-prosecution agreement. Further, the amount of revenue resulting from bribes will only be published occasionally if the case results in a deferred prosecution agreement. *See, e.g.,* U.S. v. AGCO Ltd., No. 1:09-cr-249-RJL (D.D.C. 2009) (not identifying the amount of revenue from the bribery). *But see* IN THE MATTER OF FARO TECH. INC., Exchange Act Release 2836, 93 SEC Docket 1124 (June 5, 2008) *available at* http://www.sec.gov/litigation/admin/2008/34-57933.pdf (identifying the "net profit" that resulted from

Because the DOJ or the SEC almost always publish the amount that a company allegedly bribed, comparing bribes-to-fines is a consistent means of contrasting penalties.

1. Why Compare Bribes Paid with the Subsequent Fines?

Some have questioned if there is a consistent relationship between fines companies have paid and the amounts that they bribed.[64] The forty cases considered below appear to show that there is some pattern. Additionally, comparing total fines with the amount given in bribes may be the most effective way to predict potential penalties in future cases.[65]

An alternative approach, basing the amount of fine on the amount of harm caused, has been disparaged. The OECD specifically discourages countries from basing penalties on the amount of harm caused. In 2008 the OECD published a review of Argentina's efforts to penalize foreign bribery proportionately to the amount of harm caused. The OECD criticized this approach, stating that "basing the fines principally on the harm actually caused may not sufficiently sanction companies that offer large bribes. In some cases where substantial bribery is discovered, there may not be much harm actually caused."[66]

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alleged bribery) [herein after Faro SEC settlement]. Because most FCPA cases result in either a non-prosecution agreement or a deferred prosecution agreement, there is not nearly as much data regarding the amount of revenue or profit a company gained from bribery compared to the amount it bribed. Because such data is difficult to obtain, other comparisons, like comparing bribes with fines, are natural alternatives.

[64] At least one author does not believe that there is any discernable pattern relating fines to bribes. *See* Richard L. Cassin, *Handicapping the FCPA*, THE FCPA BLOG (Jan. 24, 2008), http://www.fcpablog.com/blog/2008/1/25/handicapping-the-fcpa.html.

[65] Comparing bribes to fines in a ratio is just one way to analyze recent enforcement actions. As mentioned, there are many other factors that can influence an enforcement outcome. The variation in fine-to-bribe ratios among similar cases demonstrates that FCPA enforcement is often more art than science. However, comparing bribes with fines does reveal a general pattern. *See* tables *infra* Part II.D.5. This article contributes to the discussion about recent FCPA enforcement by demonstrating that a comparison of published data, like bribes and fines, results in a pattern.

[66] OECD, Directorate for Financial, Fiscal & Enterprise Affairs, Argentina: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions,

A comparison between the amount of revenue or profit a company earns from bribery and its subsequent penalties could be another way to analyze recent enforcements. This method, however, also has its limitations. Such a comparison can be criticized because the amount of revenue or profit gained from bribery often does not necessarily correlate with the unfair advantage gained.[67] Further, it is difficult to assess accurately the amount of revenue a company actually obtained through a bribe.[68] Finally, the DOJ and the SEC often do not include in their public statements the amount of profit or revenue gained from bribery by the company that has been fined.[69] Because these

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at 52, (June 20, 2008), http://www.oecd.org/dataoecd/35/28/40975295.pdf. Still, some call for enforcement agencies to consider the net gain resulting from bribery as a penalty factor in the FCPA arena just as it is considered in other securities fraud scenarios. *See* Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347 at 352 (2008).

[67] Consider, for example, a situation where a company bribes a foreign official to obtain a license to operate in a particular country. Just because it now has a license does not necessarily mean it will automatically be awarded contracts or obtain business in that country. *But see* FRANK R. GUNTER, ENCYCLOPEDIA OF SOCIAL PROBLEMS 174 (Vincent N. Parrillo ed., Sage Pub. Inc., 2008) (contending that there is a direct relationship between the size of the bribe and "the scale of the benefit sought by the bribe payer, and whether other officials might provide competition by offering to provide the same illegal benefit for a smaller bribe").

[68] The Justice Department and the SEC often do not have the resources to thoroughly investigate every potentially tainted contract from a company. Thus, the alleged amount of revenue or profit gained from tainted contracts is often a calculation that is provided by the companies themselves. *See* Telephone Interview with Mike Koehler, Assistant Professor of Business Law, Butler University, in Indianapolis, Ind. (July 16, 2010).

[69] *See, e.g.,* Press Release, U.S. Dep't of Justice, Justice Department Agrees to Defer Prosecution of York International Corporation in Connection with Payment of Kickbacks under the U.N. Oil for Food Program (Oct. 1, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_783.html [hereinafter York International Settlement]. Some have questioned the potency of an analysis of voluntary disclosure that is based on a comparison between the amounts of bribes paid with the amount of subsequent fines. Critics of such an analysis point out that such a comparison fails to quantify all of the factors that play a role in determining the fine. *See* Christopher M. Matthews, *Much Ado About Disclosure*, MAIN JUSTICE, Aug. 5, 2010, http://www.mainjustice.com/2010/08/05/much-ado-about-disclosure/ (quoting Jay Darden as contending that "the use of a single metric — any single metric — over simplifies what is a very complex decision on the part of a company and oversimplifies the analysis DOJ is required to do under the Principles of Federal Prosecution of Business Organizations, where cooperation is only one of nine factors to be considered, and where voluntary disclosure is only one of many different aspects of cooperation"). The models in this article confirm that there are other variables that are unaccounted for. Specifically, the model itself reveals that it is only accounting for only some of the variation. Nevertheless, the model comparing bribes with fines is still statistically sound. *See* tables, *infra* note 70. Unfortunately, only numbers that are published by the DOJ and the SEC can be statistically compared. The inherent problem with the above criticism is that the DOJ does not publish specific data that quantifies the other aspects of cooperation. Given that no such data exits, observers are left only to compare published figures like bribes and fines.

approaches are discouraged or difficult to evaluate, comparing fines with bribes may be the most effective way to predict future outcomes, simply because there are numerous cases to rely on and both bribes and fines are quantifiable. Although comparing fines to bribes is a statistically elementary approach to analyzing data, it helps to reveal patterns important to the discussion of reforming FCPA enforcement.[70]

[70] For simplicity's sake ratios between bribes and fines will be considered in this article. However, a linear regression analysis of the data offers a more thorough review of the data and is considered below. A regression analysis accomplishes this because it accounts for measurement errors, conflicting variables, and the fitness of a relationship of variables. The clear drawback to regression analysis in this case stems from the lack of data. There are only thirty-eight different cases considered in the regression analysis. Therefore, the sample size is insufficient for performing more accurate inferential statistics. While the insufficiency in data renders a thorough statistical analysis less potent, a regression analysis still is useful to demonstrate a correlation between penalties assessed and bribes paid. The bivariate regression analysis results follow below.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines and Forfeitures

Dependent Variable: Total Fines and Forfeitures Paid

Independent Variable	*Correlation Coefficient*	*Standard Error*	*t-value*	*P>t*
Bribes Paid	2.007341*	.3882622	5.17	0.000

Number of observations = 38 Prob > F = 0.0000
R-squared = 0.4261 Adj. R-squared = 0.4102

*Statistical Significance at .05 or less with two-tailed t-test (95% confidence interval)

The dependent variable in the table above is the total amount of fines and forfeitures paid from all three groups. Total bribes represent the independent variable or the explanatory variable because it serves to explain the change. The bivariate regression analysis reveals that for each unit increase in bribes paid there is a unit increase in fines and forfeitures of about 2.01 in dollars. This means that for each dollar of a bribe paid the correlating fine and forfeiture is about $2.00. Further, the t-ratio in this case is 5.17 which is above the desired threshold of 1.96 for a 95% confidence level. Thus, the data demonstrates a strong link between fines and bribes. A perfect model would have a fitness of 1. However, a low R-squared number, such as .4102, is not unacceptable given the few cases considered here and the fact they are "not uncommon" in social sciences. *See* JEFFERY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 41 (South-Westen Cengage Learning 2009). Similar bivariate regression analysis that does not include disgorgement and prejudgment interest follows.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines Paid

Dependent Variable: Total Fines Paid

2. Data Categorization

For the purpose of this article, the data has been divided into four principal groups and will be assessed according to that division. The first group includes companies that voluntarily disclose FCPA violations. Upon the discovery of an FCPA violation, the companies in this group take special action in order to bring themselves into compliance.[71] First, they will cooperate by voluntarily disclosing the infraction and they will also fully comply with a DOJ investigation and provide all of the information relating to the investigation.[72] These companies will also typically cooperate by initiating rigorous compliance programs or refining the program currently in place, which

Independent Variable	*Correlation Coefficient*	*Standard Error*	*t-value*	*P>t*
Bribes Paid	.6333*	.2946	2.15	0.038

Number of observations = 38	Prob. > F = 0.0384
R-squared = 0.1138	Adj. R-squared = 0.0892

*Statistical Significance at .05 or less with two-tailed t-test (95% confidence interval)

The difference between these two models is interesting. Although the statistics reveal a sound relationship between fines and bribes even when disgorgement and prejudgment interest are not considered, the model was stronger when those numbers were considered. The fact that the model can better predict outcomes when disgorgement and prejudgment interest is considered appears to negate criticism that these numbers should not be considered in such an analysis. *See* Richard Cassin, *More Math for the General Counsel*, FCPA BLOG (Aug. 4, 2010) http://www.fcpablog.com/blog/2010/8/4/more-math-for-the-general-counsel.html (arguing that "disgorgement paid to the SEC is not part of the fine calculation under the sentencing guidelines" and therefore should not be considered in a ratio between fines and bribes).

[71] *See* Gibson, Dunn & Crutcher LLP, 2009 Year-End FCPA Update (2009), http://www.gibsondunn.com/publications/Pages/2009Year-EndFCPAUpdate.aspx (summarizing cases from 2009 and noting corporate behavior before and after voluntary disclosure).

[72] Press Release, U.S. Dep't of Justice, Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability (Mar. 2, 2005), http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm [hereinafter Micrus Settlement]; Agreement between the U.S. Department of Justice and Micrus Corporation (Feb. 28, 2005), http://www.usdoj.gov/dag/cftf/chargingdocs/micrusagreement.pdf [hereinafter Micrus Agreement].

sometimes means they bring in a third-party compliance monitor.[73] These companies also generally take disciplinary actions against offending employees.[74]

The second group is unique because it is comprised of corporations that disclose FCPA violations because of an impending merger and acquisition. These companies are unlike the voluntarily disclosing group because the underlying reason motivating them to disclose is that their potential buyer does not want to deal with the consequences of an FCPA violation after acquisition.[75] In order to avoid such a scenario, the buyer makes self-disclosure and restitution a prerequisite for the acquisition.[76] Because the motivation behind this type of disclosure is quite unlike that of the voluntary disclosure group, the data for this group is considered separately.

The third group is composed of corporations that do not voluntarily self disclose FCPA violations and are approached by the DOJ or the SEC. Patterns appear to emerge regarding the companies in this group.[77] For example, many of the violators surveyed here were involved in the United Nations' Oil-for-Food program in Iraq.[78] The Justice Department also focused on medical and health care product manufacturers.[79] Given

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[73] *See* IN THE MATTER OF MONSANTO CO., Exchange Act Release No. 50,978 at 7, 2005 WL 38787 (Jan. 6, 2005), *available at* http://www.sec.gov/litigation/admin/34-50978.htm [hereinafter Monsanto Settlement].
[74] Press Release, Dep't. of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks through the United Nations Oil-for-Food Program (May 11, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-461.html (settlement statement that does not reference the amount of benefit sought) [hereinafter Novo Nordisk Settlement].
[75] *See* Brian Chilton, *The Foreign Corrupt Practices Act Enforcement Juggernaut Steams On in 2007*, COMPLIANCE TODAY, May 2007, at 42, http://www.foley.com/files/tbl_s31Publications/FileUpload137/4136/Compliance_Chilton.pdf.
[76] *See* Goldstein, *supra* note 58.
[77] *See* Gibson, Dunn & Crutcher LLP, 2008 Year-End FCPA Update (Jan. 5, 2009), http://www.gibsondunn.com/publications/Pages/2008Year-EndFCPAUpdate.aspx [hereinafter Gibson 2008 Review].
[78] The Oil-for-Food Program was "established by the United Nations to enable Iraq to sell its oil for humanitarian purposes, in the context of an extensive international sanctions regime." *See* Novo Nordisk Settlement, *supra* note 74.
[79] Michael Himmel & Melissa Toner Lozner, *Foreign Corrupt Practices Act Enforcement Blitz Snares Health Care Companies*, Bloomberg Law Reports, http://www.lowenstein.com/files/Publication/05c3d829-0498-4843-b6ea-09f804b0be04/Presentation/PublicationAttachment/8c28c7b6-7ee9-4363-8efa-

recent statements by DOJ officials, it appears as though the DOJ may now be focusing on pharmaceutical companies.[80]

3. Ratios Between Penalties and Bribes Paid

The fine-to-bribe ratios discussed below are calculated simply by dividing the total fine a company paid by the amount of bribery reported. A similar ratio, the fine and forfeiture-to-bribe ratio, is calculated by combining the fine a company faced with forfeitures and prejudgment interest and then dividing that sum by the amount of bribes. Group ratios were calculated by dividing total fines by total bribes and also by dividing total fines and forfeitures by total bribes for each of the groups.[81] Companies that

0ea979c34b82/Foreign%20Corrupt%20Practices%20Act%20Enforcement%20Himmel%20Lozner%20BB%2009.pdf; *see also* Mike Koehler, *A Malady in Search of a Cure—The Increase in FCPA Enforcement Actions Against Health-Care Companies*, 38 U. MEM. L. REV. 261, (2008) (noting enforcement patterns against medical device makers).

[80] *See* Lanny A. Breuer, Assistant Att'y Gen. Crim. Div., Keynote Address to The Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, (Nov. 17, 2009), http://online.wsj.com/public/resources/documents/111709breuerremarks.pdf [hereinafter Breuer Pharmaceutical Speech].

[81] The bivariate regression analysis follows below for each of these groups considered individually with the exception of the two outliers. Like the ratios discussed, the coefficients below reveal similar relationships between fines and bribes for each group. Further, the coefficients also provide another prediction for likely scenarios for what a company may expect depending on the amount of bribe depending on which group they fall into.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines and Forfeitures by Disclosure Type

Dependent Variable: Total Fines and Forfeitures Paid

Independent Variable	*Correlation Coefficient*	*Standard Error*	*t-value*	*P>t*	*N*	R^2
Voluntary Disclosure						
Bribes Paid	4.259917*	1.03719	4.11	0.001	15	0.5684
Mergers and Acquisition						
Bribes Paid	7.690244*	2.393851	3.21	0.085	4	0.8377
Involuntary Disclosure						
Bribes Paid	1.649584*	.3248688	5.08	0.000	19	0.6026

voluntarily disclose appeared to face a fine-to-bribe ratio of 2.45. In other words, for every dollar paid in bribes, companies appear to have been fined on average $2.45. The fine and forfeiture-to-bribe ratio for the voluntary disclosure group was 4.54. In other words, for every dollar paid in bribes, companies appear to have been fined and ordered to disgorge on average $4.54. The mergers and acquisitions group, however, appears to have faced much heftier fines on average. The apparent average fine per dollar bribed in that group was 7.47 while the fine and forfeiture-to-bribe ratio was 10.70. Finally, companies that did not self-disclose faced an average fine-to-bribe ratio of 1.70. Companies that did not self disclose appeared to face a fine and forfeiture-to-bribe ratio

*Statistical Significance at .05 or less with two-tailed t-test (95% confidence interval)
Ratio 1: total penalties/bribes paid = 4.117486

The coefficients listed above suggest that voluntarily disclosing companies tend to face stiffer fines and forfeitures than those that do not voluntarily disclose. The linear regression model above shows that the difference between these two groups is nearly 2.5:1. Further, there appears to be less margin of error for the involuntarily disclosing group, as compared to the voluntary disclosure group, given the larger sample size. Similar bivariate regression analysis that does not include disgorgement and prejudgment interest follows below.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines Paid by Disclosure Type

Dependent Variable: Total Fines Paid

Independent Variable	*Correlation Coefficient*	*Standard Error*	*t-value*	*P>t*	*N*	R^2
Voluntary Disclosure						
Bribes Paid	2.19644*	.4878051	4.50	0.001	15	0.6093
Mergers and Acquisitions						
Bribes Paid	3.990503	4.179047	0.95	0.440	4	0.3131
Involuntary Disclosure						
Bribes Paid	.3832311	.3071887	1.25	0.229	19	0.0839

*Statistical Significance at .05 or less with two-tailed t-test (95% confidence interval)
Ratio 1: total penalties/bribes paid = 4.117486

of 3.19. The data tends to show that the difference between voluntarily disclosing and non-disclosing companies is about 1.5:1 in fines. In other words, companies seem to face a penalty one and a half times larger if they voluntarily disclose FCPA violations as compared to companies that do not.[82]

4. The Two Outliers

The two cases with record-breaking fines imposed for FCPA violations make up the fourth group.[83] In 2008, Siemens Aktiengesellschaft (Siemens) was fined approximately $1.96 billion for systemic bribery, $810 million of which came from the United States.[84] In 2009 Kellogg Brown & Root LLC (KBR) was fined approximately $579 million for bribes, some of which were used to influence Nigerian government officials.[85] The KBR and Siemens cases resulted in fines much larger than anything else seen in FCPA enforcement.[86] Curiously, a fine-to-bribe ratio analysis reveals that both the KBR and Siemens cases seem statistically disproportionate compared to companies that voluntarily disclosed.[87] The data suggests that KBR and Siemens faced about one-fourth of the fines that typical voluntary disclosing companies faced and about one fourth of what non-voluntary disclosing companies averaged.

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[82] These statistics appear to contradict recent statements by Lanny Breuer that in FCPA cases the DOJ strives "to apply a consistent and principled approach" and endeavors to "provide clarity, consistency, and certainty in outcomes." *See* Breuer FCPA Speech, *supra* note 50.
[83] *See* Melissa Aguilar, *Siemens Teaches Cos. FCPA Dos & Don'ts*, COMPLIANCE WEEK, (Jan. 20, 2009), http://www.complianceweek.com/article/5234/siemens-teaches-cos-fcpa-dos-and-don-ts.
[84] Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 in Combined Criminal Fines, (Dec. 15, 2008) www.usdoj.gov/usao/dc/Press_Releases/2008%20Archives/December/08-1105.pdf [hereinafter Siemens Settlement].
[85] Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine, (Feb. 11, 2009) http://www.justice.gov/opa/pr/2009/February/09-crm-112.html [hereinafter KBR Settlement].
[86] *See* Mara V.J. Senn, *The Foreign Corrupt Practices Act 2009: Coping with Heightened Enforcement Risks*, 1737 PLI/CORP 289, 291 (2009) (commenting that the Siemens settlement was "almost 20 times higher than the largest previous penalty under the FCPA").
[87] *See* tables *infra* Part II.D.5.

Perhaps the reason for the apparent statistical anomaly is the sheer size of the fines they faced.[88] The two companies' combined fines totaled nearly $2.5 billion. Because of the size of the fines and the anomalous fine-to-bribe ratio in these two cases, they were considered in a category by themselves rather than with the other non-disclosing companies. Considering these two cases separately also makes sense given the fact that there is simply no corresponding data from an extremely large voluntary disclosure situation comparable with either KBR or Siemens. Because of the disparities between the statistics and the lack of similar cases, grouping KBR and Siemens cases with other non-disclosing cases is not statistically beneficial.

However, when considered as a separate group, the Siemens and KBR cases may demonstrate a disappointing trend. Despite the record-breaking nature of the fines in these two cases, the average ratio between fines administered and bribes paid for KBR and Siemens was apparently less than 1:1.[89] Because this ratio appears to be significantly lower than what voluntary disclosing companies seem to face, the discrepancy could have a chilling effect on voluntary disclosure for larger corporations with unusually large FCPA violations. Given the size of the fines that Siemens and KBR faced, it is less likely that a company will voluntarily disclose similar large-scale systemic corruption.

While the total penalty Siemens faced may have been drastic, the amount of bribery conducted by Siemens was simply unprecedented.[90] The amount of penalty that Siemens faced in relation to that rampant bribery appears to have been considerably less

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[88] Thomas Gorman, *The Siemens FCPA Case: A Record Settlement and a Warning To All*, (Dec. 16, 2008), http://www.secactions.com/?p=655.
[89] *See* tables i*nfra* Part II.D.5.
[90] The case against Siemens was the largest FCPA case to date. *See* Siemens Settlement, *supra* note 84. In fact, the alleged amount of bribery in the Siemens case was at least 68 times greater than the highest case in the involuntary disclosing group. *See* tables i*nfra* Part II.D.5.

than what other firms appear to receive. This disparity led one author to ask, "What deterrence is there when an FCPA violator (let alone the most egregious violator in the history of the FCPA) can immediately get U.S. government business, including from the same government agency that prosecuted it for violating the FCPA?"[91] Further, others have noted that the Siemens settlement, rather than deterring companies from bribery, may have had the opposite effect for large, well-financed corporations in similar situations.[92] In response to these criticisms, Mark Mendelsohn, the former Deputy Fraud Section Chief during the Siemens enforcement, argued that the fine in the Siemens case was appropriate given "the cost of the investigation itself for the company, and the remediation."[93] One problem with this statement is that many other companies involved in similar FCPA investigations with the DOJ also face proportionately similar investigation and remediation costs but also appear to face much higher fines.[94]

Whether Siemens and KBR will impact other settlements remains to be seen. Perhaps more important than the fines levied against KBR and Siemens is the fact that the DOJ is willing to tackle large cases of corruption.[95] Nevertheless, most cases are

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[91] Mike Koehler, *Siemens...The Year After*, FCPA PROFESSOR (Dec. 14, 2009), http://fcpaprofessor.blogspot.com/2009/12/siemens-year-after.html (last visited June 1, 2010).
[92] *See* David Crawford & Mike Esterl, *Siemens Settlement Sets Off Criticism of German Inquiries*, WALL ST. J., Oct. 8, 2007 (quoting the spokesman for the German Association of Police Detectives as saying the settlement was "a joke and insignificant").
[93] Christopher M. Matthews, *Mendelsohn Defends FCPA Settlement with Siemens*, MAIN JUSTICE, Feb. 10, 2010, http://www.mainjustice.com/2010/02/10/mendelsohn-defends-fcpa-settlement-with-siemens/.
[94] Curiously, while addressing the costs associated with involuntary disclosure Lanny Breuer noted that the DOJ was "fully aware that internal investigations and remedial measures may be costly." *See* Breuer Pharmaceutical Speech, *supra* note 80, at 3. By recognizing that most companies face the same types of costs, Mr. Breuer further demonstrates that Siemens was not unique and thus the disproportionately low fines were an anomaly. Nevertheless, Mr. Breuer cautioned that criminal fines and negative publicity can make the costs of not disclosing "much higher." *Id*. However, he did not address the disproportionately low fines that the non-disclosing companies considered in this article seem to face compared with those who voluntarily disclose.
[95] Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf (noting that "[m]ore important than the size of the penalty are the multi-year trends of increasing numbers of enforcement").

quite unlike KBR and Siemens. The FCPA cases from 2002 through 2009 surveyed here reveal that most companies with reported FCPA violations will have committed bribes in the million to tens of millions of dollars range.[96] Given the monetary differences, a company facing a typical FCPA investigation and enforcement should probably not focus on the Siemens or KBR cases, but rather focus on potential costs and benefits stemming from similar voluntary disclosure cases.

5. Table of Cases

i. Voluntary Disclosures

The table below highlights fifteen voluntary disclosure cases and lists the amount of bribes and the corresponding amount of fines and forfeitures in each case. Ratios comparing these statistics are also listed.

Voluntary disclosure - occurs when a company self-discloses the infraction	Amount of money paid or to be paid in bribes as reported by the DOJ or the SEC	Disgorgement and interest	DOJ plus SEC fines	Fine-to-bribe ratio without disgorgement	Total fines and forfeitures combined	Fine and forfeitures-to-bribe ratio
Corporations	**Bribes Paid**	**Disgorgement**	**Total Penalty**	**Ratio**	**Total Payout**	**Ratio**
Micrus Corp.[97]	$355,000.00	$0.00	$450,000.00	1.27	$450,000.00	1.27
Monsanto Co.[98]	$700,000.00	$0.00	$1,500,000.00	2.14	$1,500,000.00	2.14
Statoil ASA[99]	$5,200,000.00	$10,500,000.00	$10,500,000.00	2.02	$21,000,000.00	4.04
Schnitzer Steel Ind. Inc.[100]	$1,800,000.00	$7,725,201.00	$7,500,000.00	4.17	$15,225,201.00	8.46

[96] *See* tables *infra* Part II.D.5.
[97] Micrus Settlement, *supra* note 72; Micrus Agreement, *supra* note 72.
[98] Monsanto Settlement, *supra* note 73; SEC V. MONSANTO CO., Litigation Release No. 19023, 84 SEC. Docket 2284 (Jan. 6, 2005), *available at* http://www.sec.gov/litigation/litreleases/lr19023.htm.
[99] Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), http://www.justice.gov/opa/pr/2006/October/06_crm_700.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006), http://www.sec.gov/news/press/2006/2006-174.htm [Statoil SEC Settlement].

Baker Hughes Inc.[101]	$4,100,000.00	$23,000,000.00	$21,000,000.00	5.12	$44,000,000.00	10.73
Bristow Group Inc.[102]	$423,000.00	$0.00	$0.00	0.00	$0.00	0.00
Paradigm B.V.[103]	$250,948.00	$0.00	$1,000,000.00	3.98	$1,000,000.00	3.98
York Int'l Corp.[104]	$7,500,000.00	$10,320,880.00	$12,000,000.00	1.60	$22,320,880.00	2.98
AGA Med. Corp.[105]	$480,000.00	$0.00	$2,000,000.00	4.17	$2,000,000.00	4.17
Faro Tech. Inc.[106]	$444,492.00	$1,850,000.00	$1,100,000.00	2.47	$2,950,000.00	6.64
Con-way Inc.[107]	$417,000.00	$0.00	$300,000.00	0.72	$300,000.00	0.72
Aibel Group Ltd.[108]	$2,100,000.00	$0.00	$4,200,000.00	2.00	$4,200,000.00	2.00
ITT	$200,000.00	$1,428,650.11	$250,000.00	1.25	$1,678,650.11	8.39

[100] Schnitzer Steel SEC Settlement, *supra* note 53; SEC V. SI CHAN WOOH, Litigation Release No. 20174, 90 SEC Docket 2926 (June 29, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20174.htm.

[101] Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), http://www.justice.gov/opa/pr/2007/April/07_crm_296.html [hereinafter Baker Hughes Settlement]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), http://www.sec.gov/news/press/2007/2007-77.htm.

[102] IN THE MATTER OF BRISTOW GROUP INC., Exchange Act Release No. 56533, 91 SEC. Docket 1825 (Sept. 26, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56533.pdf; Press Release, U.S. Sec. & Exch. Comm'n, SEC Institutes Settled Enforcement Action against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations (Sept. 26, 2007), http://www.sec.gov/news/press/2007/2007-201.htm [hereinafter Bristow Group SEC Settlement].

[103] Press Release, U.S. Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), http://www.justice.gov/opa/pr/2007/September/07_crm_751.html [hereinafter Paradigm Settlement].

[104] York International Settlement, *supra* note 69; SEC V. YORK INT'L CORP., Litigation Release No. 20319, 91 SEC Docket 2139 (Oct. 1, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56533.pdf.

[105] Press Release, U.S. Dep't of Justice, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-491.html; Deferred Prosecution Agreement between the U.S. Dep't of Justice & AGA Medical Corp. (June 3, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-03-08aga-agree.pdf.

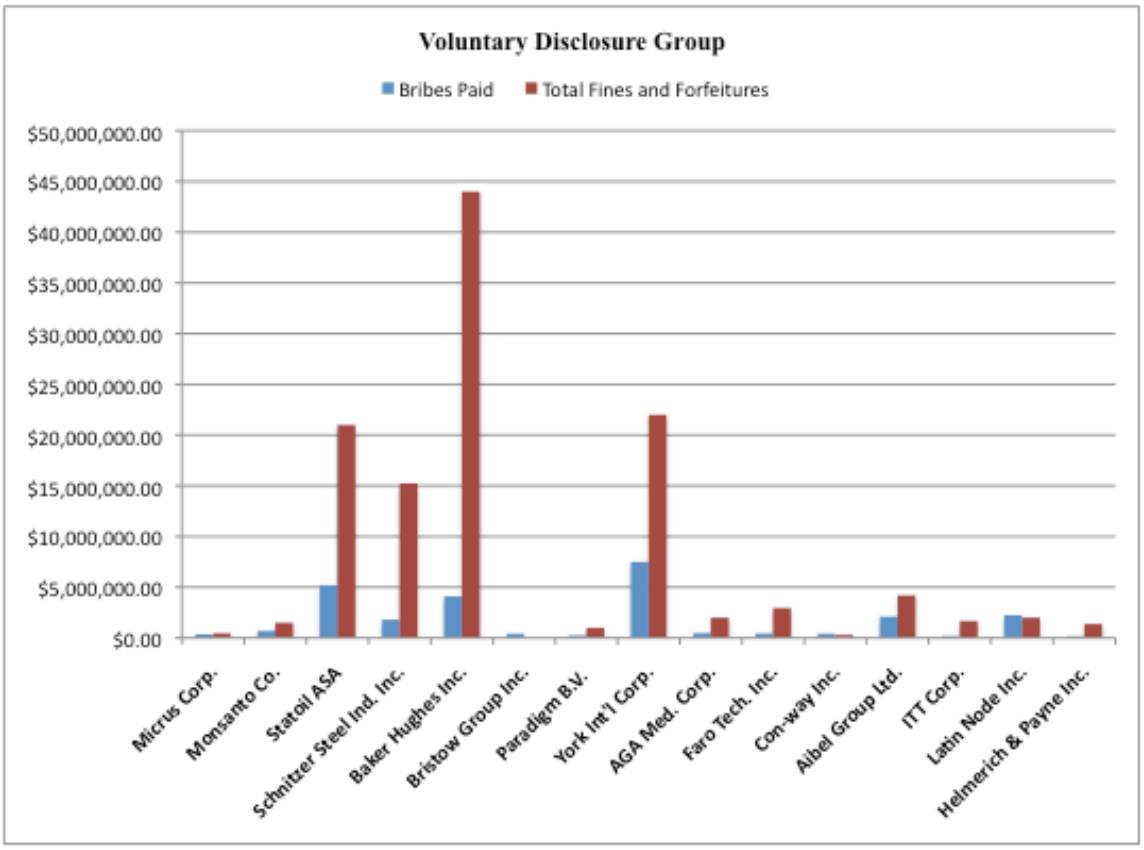
[106] Press Release, Dep't. of Justice, Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-505.html; Faro SEC settlement, *supra* note 63.

[107] SEC V. CON-WAY INC., Litigation Release No. 20690, 93 SEC Docket 3105 (Aug. 27, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20690.htm.

[108] Press Release, Dep't. of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), http://www.usdoj.gov/opa/pr/2008/November/08-crm-1041.html.

Corp.[109]						
Latin Node Inc.[110]	$2,250,543.00	$0.00	$2,000,000.00	0.89	$2,000,000.00	0.89
Helmerich & Payne Inc.[111]	$185,673.00	$375,681.22	$1,000,000.00	5.39	$1,375,681.22	7.41

Voluntary disclosure group totals.	Total bribes	Total fines	Total fines and forfeitures	Total fine-to-bribe ratio without disgorgement and interest	Total fine and forfeitures-to-bribe ratio
	$26,406,656.00	$64,800,000.00	$120,000,412.33	2.45	4.54



[109] SEC v. ITT Corp., Litigation Release No. 20896, 95 SEC Docket 568 (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20896.htm.
[110] Press Release, Dep't. of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), http://miami.fbi.gov/dojpressrel/pressrel09/mm040709.htm [hereinafter Latin Node Settlement].
[111] In the Matter of Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009), *available at* www.sec.gov/litigation/admin/2009/34-60400.pdf; [hereinafter Helmerich SEC Settlement] Press Release, Dep't. of Justice, Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-741.html [herein after Helmerich DOJ Settlement].

ii. Mergers and Acquisitions

The table below highlights four cases that arose because of mergers and acquisitions and identifies the amount of bribes and the corresponding amount of fines and forfeitures the companies faced. Ratios comparing these statistics are also listed.

Self-disclosure resulting from a merger and acquisition	Amount of money paid or to be paid in bribes as reported by the DOJ or the SEC	Disgorgement and interest	DOJ plus SEC fines	Fine-to-bribe ratio without disgorgement	Total fines and forfeitures	Fine and forfeitures-to-bribe ratio
Corporations	**Bribes Paid**	**Disgorgement**	**Total Penalty**	**Ratio**	**Total Payout**	**Ratio**
ABB Ltd.[112]	$1,000,000.00	$5,915,405.64	$10,500,000.00	10.50	$16,415,405.64	16.42
InVision Tech.[113]	$203,000.00	$617,703.57	$1,300,000.00	6.40	$1,917,703.57	9.45
Titan Corp.[114]	$3,500,000.00	$15,479,000.00	$13,000,000.00	3.71	$28,479,000.00	8.14
Vetco Int'l Ltd.[115]	$2,100,000.00	$0.00	$26,000,000.00	12.38	$26,000,000.00	12.38

[112] SEC V. ABB LTD., Litigation Release No. 18775, 83 SEC Docket 849 (July 06, 2004), *available at* http://www.sec.gov/litigation/admin/34-51199.htm; Press Release, Dep't. of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004), http://www.justice.gov/opa/pr/2004/July/04_crm_465.htm.

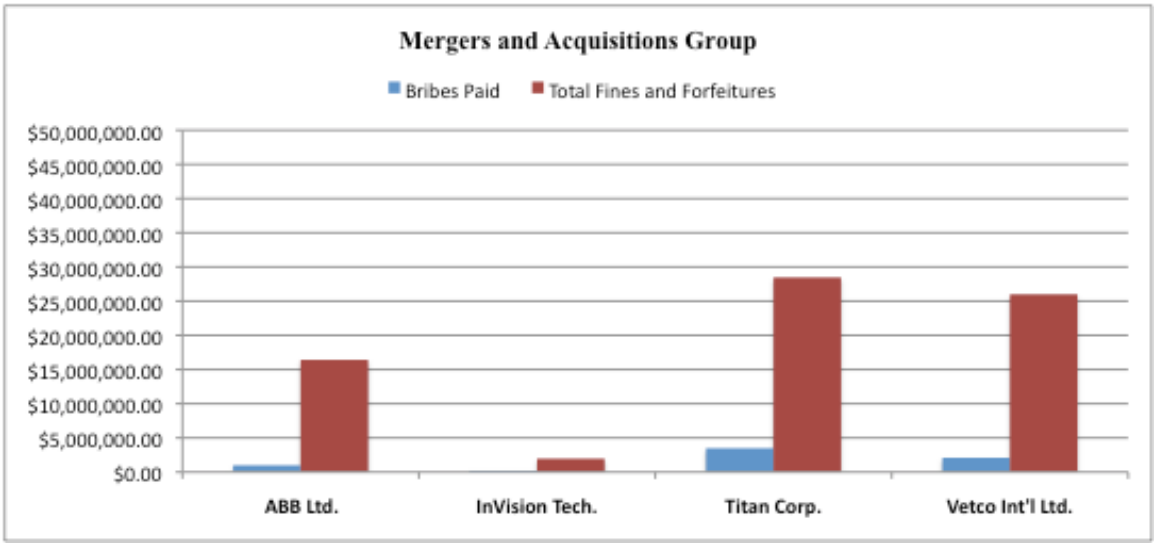
[113] Press Release, Dep't. of Justice, Invision Technologies, Inc. Enters into Agreement (Dec. 6, 2004), http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm; IN THE MATTER OF GE INVISION INC., Exchange Act Release No. 51199, 84 SEC Docket 2986 (Feb. 14, 2005), *available at* http://www.sec.gov/litigation/admin/34-51199.htm.

[114] SEC V. THE TITAN CORP., Litigation Release No. 19107, 84 SEC. Docket 3413 (Mar. 1, 2005), *available at* http://www.sec.gov/litigation/litreleases/lr19107.htm; *U.S. v. Titan Corp.*, No. 05-CR-0314 BEN (S.D. Ca. Feb. 22, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/03-01-05titan-plea.pdf (plea agreement).

[115] Press Release, Dep't. of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb 6, 2007), http://www.justice.gov/opa/pr/2007/February/07_crm_075.html. The mergers and acquisitions group is considered separately from the voluntary disclosure group in this article. However, a table combining the two groups is included here to demonstrate how the voluntary disclosure group statistics would appear had the two groups been combined.

Voluntary disclosure group combined with the mergers and acquisitions group	Total bribes	Total fines	Total fines and forfeitures	Fine-to-bribe ratio without disgorgement	Fine and forfeiture-to-bribe ratio
	$33,209,656.00	$102,050,000.00	$193,812,521.54	3.07	5.84

Mergers and acquisitions group totals	Total bribes	Total fines	Total fines and forfeitures	Total fine-to-bribe ratio without disgorgement and interest	Total fine and forfeitures-to-bribe ratio
	$6,803,000.00	$50,800,000.00	$72,812,109.21	7.47	10.70



iii. Involuntary Disclosures

The table below highlights nineteen cases where companies did not self disclose and identifies the amount of bribes and the corresponding amount of fines and forfeitures faced. Ratios comparing these statistics are also listed.

Non-Disclosing Corporation: These do not self-disclose violations	Amount of money paid or to be paid in bribes as reported by the DOJ or the SEC	Disgorgement and interest	DOJ plus SEC fines	Fine-to-bribe ratio without disgorgement	Total fines and forfeitures	Fine and forfeitures-to-bribe ratio
Corporations	**Bribes Paid**	**Disgorgement**	**Total Penalty**	**Ratio**	**Total Payout**	**Ratio**
Syncor Taiwan, Inc.[116]	$344,110.00	$0.00	$2,500,000.00	7.27	$2,500,000.00	7.27
Diagnostic Prod.	$1,623,326.00	$2,788,622.00	$2,000,000.00	1.23	$4,788,622.00	2.95

[116] Press Release, Dep't. of Justice, Syncor Taiwan Inc. Pleads Guilty to Violating The Foreign Corrupt Practices Act (Dec 10, 2002), http://www.justice.gov/opa/pr/2002/December/02_crm_707.htm; SEC. V. SYNCOR INT'L CORP., Litigation Release No. 17887, 2002 WL 31757645 (Dec. 10, 2002), *available at* http://www.sec.gov/litigation/litreleases/lr17887.htm.

Corp.[117]						
Dow Chem. Co.[118]	$200,000.00	$0.00	$325,000.00	1.63	$325,000.00	1.63
El Paso Corp.[119]	$5,500,000.00	$5,482,363.00	$2,250,000.00	0.41	$7,732,363.00	1.41
Delta & Pine Land Co.[120]	$43,000.00	$0.00	$300,000.00	6.98	$300,000.00	6.98
Textron Inc.[121]	$650,539.00	$2,735,040.68	$1,950,000.00	3.00	$4,685,040.68	7.20
Ingersoll-Rand Ltd.[122]	$600,000.00	$2,270,987.00	$4,450,000.00	7.42	$6,720,987.00	11.20
Chevron Corp.[123]	$20,000,000.00	$25,000,000.00	$3,000,000.00	0.15	$28,000,000.00	1.40
Lucent Tech. Inc.[124]	$1,300,000.00	$0.00	$2,500,000.00	1.92	$2,500,000.00	1.92
Akzo-Nobel, NV[125]	$279,491.00	$2,231,513.00	$1,550,000.00	5.55	$3,781,513.00	13.53

[117] Press Release, Dep't. of Justice, DPC (Tianjin) Ltd. Charged With Violating the Foreign Corrupt Practices Act (May 20, 2005), http://www.justice.gov/opa/pr/2005/May/05_crm_282.htm; IN THE MATTER OF DIAGNOSTIC PRODUCTS CORP., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005), *available at* www.sec.gov/litigation/admin/34-51724.pdf.

[118] SEC V. THE DOW CHEMICAL CO., Litigation Release No. 20000, 89 SEC Docket 3176 (Feb. 13, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20000.htm.

[119] Press Release, Sec. & Exch. Comm'n, SEC Files Settled Books and Records and Internal Controls Charges Against El Paso Corporation for Improper Payments to Iraq Under the U.N. Oil for Food Program (Feb. 7, 2007), http://www.sec.gov/news/press/2007/2007-16.htm.

[120] SEC V. DELTA & PINE LAND CO. & TURK DELTAPINE, Litigation Release No. 20214, 91 SEC Docket 512 (July 26, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20214.htm.

[121] Press Release, Dep't. of Justice, Textron Inc. Agrees to $1.15 Million Fine in Connection with Payment of $600,000 in Kickbacks by its French Subsidiaries under the United Nations Oil for Food Program (Aug. 23, 2007), http://www.justice.gov/opa/pr/2007/August/07_crm_646.html; SEC V. TEXTRON INC., Litigation Release No. 20251, 91 SEC Docket 1197 (Aug. 23, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20251.htm.

[122] Press Release, Dep't. of Justice, Ingersoll-Rand Agrees to Pay $2.5 Million Fine in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 31, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_872.html; SEC v. Ingersoll-Rand Co. Ltd., Litigation Release No. 20353, 91 SEC Docket 2516 (Oct 31, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20353.htm

[123] Press Release, Dep't. of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html; SEC v. Lucent Technologies Inc., Litigation Release No. 20414, 92 SEC Docket 867 (Dec. 21, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20414.htm.

[124] Press Release, Sec. & Exch. Comm'n, Chevron to Pay $30 Million to Settle Charges For Improper Payments to Iraq Under U.N. Oil For Food Program (Nov. 14, 2007), http://www.sec.gov/news/press/2007/2007-230.htm [hereinafter Chevron Settlement].

[125] Press Release, Dep't. of Justice, Akzo Nobel Acknowledges Improper Payments Made by Its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007), http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html

Westinghouse Corp.[126]	$137,400.00	$288,351.00	$387,000.00	2.82	$675,351.00	4.92
Flowserve Corp.[127]	$604,651.00	$3,574,225.00	$7,000,000.00	11.58	$10,574,225.00	17.49
AB Volvo[128]	$6,206,331.00	$8,602,649.00	$11,000,000.00	1.77	$19,602,649.00	3.16
Novo Nordisk A/S[129]	$1,437,946.00	$6,005,079.00	$12,025,066.00	8.36	$18,030,145.00	12.54
Willbros Group Inc.[130]	$6,300,000.00	$10,300,000.00	$22,000,000.00	3.49	$32,300,000.00	5.13
Fiat S.p.A.[131]	$4,300,000.00	$7,209,142.00	$10,600,000.00	2.47	$17,809,142.00	4.14
Avery Dennison Corp.[132]	$81,000.00	$318,470.00	$200,000.00	2.47	$518,470.00	6.40
Control Components Inc.[133]	$6,850,000.00	$0.00	$18,200,000.00	2.66	$18,200,000.00	2.66

[hereinafter Akzo Nobel Settlement]; SEC V. NOBEL, Litigation Release No. 20410, 92 SEC Docket 709 (Dec. 20, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20410.htm.

[126] Press Release, Dep't. of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_116.html; SEC V. WESTINGHOUSE AIR BRAKE TECH. CORP., Litigation Release No. 20457, 92 SEC Docket 1883 (Feb. 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20457.htm.

[127] Press Release, Dep't. of Justice, Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Feb. 21, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_132.html [hereinafter Flowserve Settlement]; SEC V. FLOWSERVE CORP., Litigation Release No. 20461, 92 SEC Docket 1999 (Feb. 21, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20461.htm.

[128] Press Release, Dep't. of Justice, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Mar. 20, 2008), http://www.justice.gov/opa/pr/2008/March/08_crm_220.html; SEC V. AB VOLVO, Litigation Release No. 20504, 92 SEC Docket 2804 (Mar. 20, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20504.htm.

[129] Novo Nordisk Settlement, *supra* note 74; SEC V. NOVO NORDISK A/S, Litigation Release No. 21033, 95 SEC Docket 2394 (May 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21033.htm.

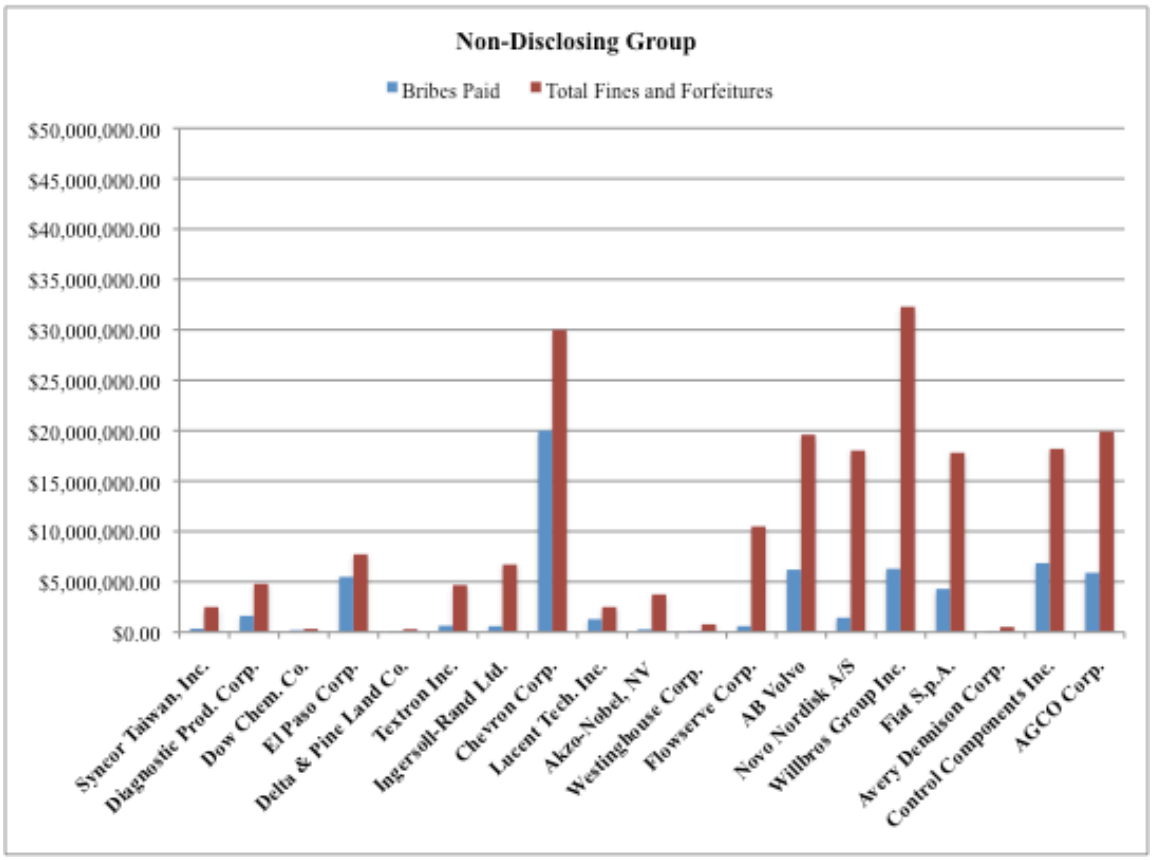
[130] Press Release, Dep't. of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay $22 Million Penalty for FCPA Violations (May 14, 2008), http://www.justice.gov/opa/pr/2008/May/08-crm-417.html; SEC V. WILLBROS GROUP, Inc., Litigation Release No. 20571, 93 SEC Docket 723 (May 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20571.htm.

[131] Press Release, Dep't. of Justice, Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program (Dec. 22, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1140.html; SEC V. FIAT S.P.A. AND CNH GLOBAL N.V., Litigation Release No. 20835, 94 SEC Docket 3092 (Dec. 22, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20835.htm.

[132] *SEC v. Avery Dennison Corp.*, Litigation Release No. 21156, 2009 WL 2243830 (July 28, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21156.htm.

AGCO Corp.[134]	$5,900,000.00	$15,907,393.00	$4,000,000.00	0.68	$19,907,393.00	3.37

Involuntary disclosure group totals	Total bribes	Total fines	Total fines and forfeitures	Total fine-to-bribe ratio without disgorgement and interest	Total fine and forfeitures-to-bribe ratio
	$62,357,794.00	$106,237,066.00	$198,950,900.68	1.70	3.19



iv. The Two Outliers

The table below lists two cases that were so statistically different from the other cases that they were considered separately. The table identifies the amount of bribes and

[133] Press Release, Dep't. of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Fine (July 31, 2009), http://www.justice.gov/usao/cac/pressroom/pr2009/091.html [hereinafter CCI Settlement].
[134] Press Release, Dep't. of Justice, AGCO Corp. to Pay $1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-For-Food Program (Sept. 30, 2009), http://www.justice.gov/opa/pr/2009/September/09-crm-1056.html; Press Release, Sec. & Exch. Comm'n, AGCO Corporation Agrees to Pay $18.3 Million to Settle SEC Charges of FCPA Violations (Sept. 30, 2009), http://www.sec.gov/news/press/2009/2009-212.htm [herein after AGCO SEC Settlement].

the corresponding amount of fines and forfeitures the companies faced. Ratios comparing these statistics are also listed.

Companies whose fines were unprecedentedly large yet did not correspond to the involuntary ratios above	Amount of money paid or to be paid in bribes as reported by the DOJ or the SEC	Disgorgement and interest	DOJ plus SEC fines	Fine-to-bribe ratio without disgorgement	Total fines and forfeitures	Fine and forfeitures-to-bribe ratio
Corporations	**Bribe**	**Disgorgement**	**Total Penalty**	**Ratio**	**Total Payout**	**Ratio**
KBR LLC[135]	$182,000,000.00	$177,000,000.00	$402,000,000.00	2.21	$579,000,000.00	3.18
Siemens AG[136]	$1,360,000,000.00	$350,000,000.00	$450,000,000.00	0.33	$800,000,000.00	0.59

Outlier Group Totals	Total Bribes	Total Fines	Total fines and forfeitures	Total fine-to-bribe ratio without disgorgement and interest	Total fine and forfeitures-to-bribe ratio
	$1,542,000,000.00	$852,000,000.00	$1,379,000,000.00	0.55	0.89

6. 2002 Through 2008

i. Voluntary Disclosures

From 2007 through 2008 there were some notable voluntary FCPA disclosure cases. Perhaps the most interesting case was a settlement between the SEC and Bristow Group Inc. (Bristow Group).[137] Bristow Group, a manufacturer of oil and gas facilities, allegedly made improper payments to Nigerian officials in order to receive a reduction in employment taxes in that country.[138] Bristow Group also underreported its expatriate payroll expenses.[139] The total improper payments from Bristow Group to Nigerian

[135] KBR Settlement, *supra* note 85; SEC V. HALLIBURTON COMPANY AND KBR, INC., Litigation Release No. 20897A, 95 SEC Docket 570 (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.
[136] Siemens Settlement, *supra* note 84; SEC V. SIEMENS AKTIENGESELLSCHAFT, Litigation Release No. 20829, 94 SEC Docket 2869 (Dec. 15, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20829.htm.
[137] Bristow Group SEC Settlement, *supra* note 102.
[138] *Id*.
[139] *Id*.

officials totaled approximately $423,000.[140] Despite the large amount of bribes, Bristow Group did not have to pay any fines and was ordered only to cease and desist.[141] The Securities and Exchange Commission noted that Bristow Group had "cooperated with the Commission's investigation and took a number of remedial steps."[142] If the voluntary disclosure average highlighted in the table above would have been applied in this case, Bristow Group could have incurred a fine and forfeiture on the order of $4.5 million. In that regard, Bristow Group is the case that tends to give hope for small penalties when a corporation voluntarily discloses and takes appropriate steps to remedy its actions.[143]

Although not as remarkable, the case against Paradigm B.V. (Paradigm) is also important because it represents what appears to be the average fine for a company that voluntarily discloses.[144] Paradigm, a company that produces enterprise software for oil explorations, violated the FCPA by bribing various foreign officials in developing countries.[145] However, Paradigm voluntarily disclosed the violation and the DOJ reported that the company had conducted a "thorough self-investigation of the underlying conduct" and made "extensive remedial efforts."[146] The Justice Department recognized these efforts and agreed not to prosecute the company and Paradigm received a 3.98 fine and forfeiture-to-bribe ratio, somewhat below the apparent voluntary disclosure average but still dramatically higher than the apparent average for a non-disclosing company.[147] Ironically, because Paradigm faced a lower fine than the apparent average for non-

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[140] *Id*.
[141] *Id.*
[142] *Id*.
[143] *See* Kevin J. Harnisch et al., *Practical Considerations for Addressing FCPA Issues*, 1687 PLI/CORP 557, at 564, (2008) (citing Bristow Group as a case where voluntary disclosure yielded "significant tangible benefits").
[144] *See* Paradigm Settlement, *supra* note 103.
[145] *Id*.
[146] *Id*.
[147] *Id*.

disclosing companies, it has been highlighted as an example of the benefits of voluntary disclosure.[148]

ii. Involuntary Disclosure

During the same time period, Flowserve, Inc. (Flowserve) faced stiff penalties for its alleged bribery.[149] A subsidiary of Flowserve paid over $600,000 in kickbacks to Iraqi officials for the sale of large water pumps.[150] The case is interesting because of the large fines that the DOJ and the SEC imposed on Flowserve. Despite the company's efforts to improve "compliance policies and procedures," it still faced apparently $10.5 million in collective fines and disgorgement.[151] This case stands out as one of the highest apparent fine-to-bribe ratios for that period. Flowserve fine and forfeiture-to-bribe ratio was 17.49, significantly higher than the average for the non-disclosing group.

iii. Disconcerting Cases

Perhaps the most problematic case from this time period was the settlement of FCPA violations by Baker Hughes Inc. (Baker Hughes). Baker Hughes, an oilfield service company, agreed through its subsidiary to pay kickbacks to Kazakhstan officials in order to win a contract.[152] Despite voluntarily disclosing the misconduct, Baker Hughes faced stiff fines that raised serious concerns about the actual monetary benefits of voluntary disclosure.[153] Arguably the most disconcerting aspect of the Baker Hughes

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[148] *See* Melissa Klein Aguilar, *FCPA Case Shows Benefit of Self-Disclosure*, COMPLIANCE WEEK, Oct. 30, 2007, *available at* http://www.complianceweek.com/article/3744/fcpa-case-shows-benefit-of-self-disclosure (stating the Paradigm settlement was "soothing news to corporate executives" yet failing to address the disproportional fine as compared to average non-disclosing companies).
[149] *See* Flowserve Settlement, *supra* note 127.
[150] *Id.*
[151] *Id.*
[152] Baker Hughes Settlement, *supra* note 101.
[153] Willkie Farr & Gallagher, *Baker Hughes to Pay Record Amount in FCPA Case*, May 7, 2007,

settlement was the fact that the DOJ justified the $11 million fine by contending that it was well below the suggested fine in the Organizational Sentencing Guidelines. While that may have been factually correct, the trouble with that contention is that it failed to acknowledge that the total penalty faced by Baker Hughes was a record high and dramatically disproportionate when compared with the apparent fine faced by non-disclosing companies.[154] The fine and forfeiture-to-bribe ratio the company faced appeared to be twice as high as the average for voluntary disclosing companies and nearly three times higher than involuntarily disclosing companies.[155] This apparent inconsistency in enforcement is problematic because it sends a mixed signal to companies and perpetuates dissatisfaction regarding the fairness of FCPA enforcement.

On the other end of the spectrum, the FCPA case against an oil company, the Chevron Corporation (Chevron), was equally perplexing. Unlike Baker Hughes, Chevron did not voluntarily disclose its FCPA violation. Chevron was involved in kickbacks to Iraqi officials for contracts under the U.N.'s Oil-for-Food program.[156] Chevron allegedly used third parties to make $20 million in illicit payments to Iraqi

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http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C2420%5CBaker_Hughes_to_Pay_Record_Amount_In_FCPA_Case.pdf (noting the discrepancy between promised benefits for voluntary disclosure and the record fine).

[154] *See* Steptoe & Johnson, *International Law Advisory - Baker Hughes Agrees to Pay Record $44.1 Million to Resolve DoJ and SEC FCPA Enforcement Actions*, May 3, 2007, http://www.steptoe.com/publications-4449.html#9.

[155] Despite voluntarily disclosing the FCPA violation and taking remedial actions, Baker Hughes probably received a significantly higher fine due to the fact that it failed to comply with previous deferred prosecution agreement (DPA) standards. *See* Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, 17 CURRENTS: INT'L TRADE L.J. 27, 36 (2009), *available at* Westlaw 17-SUM Currents: Int'l Trade L.J. 27. Nevertheless, the apparent inconsistency here lies in the fact that Baker Hughes voluntarily disclosed the subsequent problem and still received a fine-to-bribe ratio nearly twice the average of what an involuntarily disclosing company appears to receive. *See* Baker Hughes Settlement, *supra* note 101.

[156] Chevron Settlement, *supra* note 123 (citing a third party who alleged that Chevron knew about the illegal surcharges). The regression analysis of the data in this article, also appears to show that the Chevron case was statistically anomalous compared to other involuntarily disclosing companies in the same group. *See supra* notes 70, 81.

officials.[157] Despite the extensive bribes, Chevron faced only a $3 million fine and $25 million in disgorgement.[158] Chevron's fine and forfeiture-to-bribe ratio was 1.4, significantly lower than the average for the involuntary disclosure group. Without considering disgorgement and interest, Chevron only faced a .15 fine-to-bribe ratio, significantly below the voluntary disclosure group average. Despite failing "to devise and maintain a system of internal accounting controls to detect and prevent such illicit payments" and likely knowing about the corruption, Chevron faced a fine and forfeiture-to-bribe ratio that was almost half what the voluntary disclosure group averaged.[159] The problem with the Chevron case is that it bolsters the argument that FCPA enforcements are somewhat unpredictable. The disparity in proportionality Chevron experienced in fines when compared with both the voluntary and involuntary disclosure groups surveyed in this article raises questions about the underlying fairness of FCPA enforcements.

7. The 2009 Trends in FCPA Enforcement

i. Voluntarily Disclosing and Avoiding Large Fines

Among the FCPA cases of 2009, two cases stand out. Perhaps as a way to set the tone for the year and the possible future of FCPA enforcement actions, two contrasting FCPA decisions were issued in the spring of 2009. First, in April, Latin Node Inc. (Latin Node), a private company, pled guilty to criminal violations under the FCPA for bribery.[160] The Justice Department reported that Latin Node made nearly $2.25 million

[157] Chevron Settlement, *supra* note 123.
[158] *Id.*
[159] *See Id*.
[160] Latin Node Settlement, *supra* note 110.

in improper payments to gain competitive advantages in the telecommunications business in Honduras and Yemen.[161]

The Latin Node case is somewhat encouraging to companies considering voluntary disclosure because the DOJ assessed only a $2 million penalty.[162] Thus, the fine-to-bribe ratio was 0.89, dramatically lower than the average voluntary disclosure ratio. In its public statement, the DOJ expressly stated that the low fine was because Latin Node "voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latin Node management with involvement in or knowledge of the violations."[163]

It is difficult to tell at this point if Latin Node's fine was unusually low because DOJ was trying to send a message about voluntary disclosures or if this is what is to be expected in the future. However, it is clear that the DOJ went out of its way to level an apparently low fine-to-bribe ratio and then openly attributed that decision to Latin Node's behavior after the violation.[164] At least one author has hailed this decision as a sign that voluntary disclosure does have tangible benefits.[165]

ii. Involuntary Disclosure and Strong Fines

In contrast to Latin Node, in May of 2009, Novo-Nordisk A/S (Novo Nordisk) agreed to pay the Justice Department $9 million and the Securities and Exchange

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[161] *Id*.
[162] *Id.*
[163] *Id*.
[164] *Id*.
[165] Richard L. Cassin, *In Step with DOJ*, FCPA BLOG (April 21, 2009), http://www.fcpablog.com/blog/2009/4/21/in-step-with-the-doj.html.

Commission nearly $9 million in total fines and disgorgement stemming from $1.4 million in bribes paid.[166] The bribes were paid to the Iraqi government under the U.N. Oil-for-Food program.[167] The fine and forfeiture-to-bribe ratio was 12.54. That ratio was nearly four times the average non-disclosing ratio and was nearly three times what the average voluntary discloser may expect.

In further contrast with the Latin Node case, the Justice Department's public announcement simply stated: "In recognition of [Novo Nordisk's] thorough review of the illicit payments and its implementation of enhanced compliance policies and procedures, the Department has agreed to defer prosecution of criminal charges against [Novo Nordisk] for a period of three years."[168] While Latin Node was not required to install compliance monitors and was not given a time limit to pay the fine, Novo Nordisk was assigned both.[169] The differences between the Novo Nordisk and Latin Node are encouraging because they appear to show a strong distinction in outcomes between voluntary and involuntary disclosures.

iii. Remaining Inconsistencies

Despite these two cases, inconsistencies from 2009 remain. ITT Corp. (ITT), for example, was a voluntary disclosure case from 2009 in which the company faced an 8.39 fine and forfeiture-to-bribe ratio. In that case, ITT paid nearly $1.5 million in disgorgement and $250,000 in fines for an alleged $200,000 in bribes.[170] The penalty against ITT may have been higher because it "failed to devise and maintain a system of

[166] Novo Nordisk Settlement, *supra* note 74.
[167] *Id.*
[168] *Id*.
[169] *Id.*
[170] *ITT Corp*, *supra* note 109.

internal accounting controls."[171] Nevertheless, ITT was praised by the SEC for cooperation in the investigation and for instituting subsequent "remedial measures."[172] Still, ITT appears to have faced a fine and forfeiture-to-bribe ratio that was nearly twice as high as the group average for voluntarily disclosing companies. Not considering disgorgements and prejudgment interest, ITT's fine-to-bribe ratio was 1.25, barely below the average for the involuntary cases but more proportionate.

Another voluntary disclosure case from 2009 that was surprising was the enforcement action against oil drilling equipment company Helmerich & Payne Inc. (Helmerich). In that case, Helmerich made improper payments to officials in Argentina and Venezuela.[173] The illicit payments totaled nearly $200,000 and the company received a combined penalty of nearly $1 million.[174] The sums at issue in this case were similar to those in the ITT case. Just as in the ITT case, the DOJ acknowledged Helmerich's voluntary disclosure and the company's cooperation in the investigation.[175] Nevertheless, the fine-to-bribe ratio was nearly double what the apparent average is for voluntarily disclosing companies. Curiously, the ITT and Helmerich cases are the third- and fourth-highest fine and forfeiture-to-bribe ratios for voluntary disclosures surveyed in this article. Perhaps the most perplexing fact is the apparent disproportion between the ratios in these two cases and what Latin Node faced. ITT and Helmerich faced fine and forfeiture-to-bribe ratios nearly seven times higher than Latin Node. The apparent statistical incongruities between these voluntary disclosure cases tend to undercut the

[171] *Id*.
[172] *Id*.
[173] Helmerich DOJ Settlement, *supra* note 111.
[174] Helmerich SEC Settlement, *supra* note 111.
[175] Helmerich DOJ Settlement, *supra* note 111.

notion that FCPA enforcement in 2009 was more proportionate or fair than in previous years.

In addition to 2009 inconsistencies in the voluntary disclosure group, there were also some unsettling cases in the non-disclosing group. For example, in 2009 Control Components Inc. (CCI) allegedly paid $6.85 million in bribes to Middle Eastern and Asian officials.[176] CCI, a manufacturer of power generation valves, was fined $18.2 million for said bribery.[177] The Justice Department also required CCI to implement a compliance program and to pay for compliance monitors for that program.[178] In that regard, the CCI case was quite similar to the Novo Nordisk matter discussed above. Nevertheless, unlike Novo Nordisk, CCI was assessed only a 2.66 fine-to-bribe ratio, whereas Novo Nordisk, a similar involuntarily disclosing company, faced a ratio that was nearly three times larger. Despite not self-disclosing its bribery, CCI faced a fine-to-bribe ratio that was significantly less than the apparent average for the involuntarily disclosing group. The CCI case manifests some of the differences in enforcement that companies have experienced even when they have seemingly similar behavior. These differences tend to cast an inconsistent shadow on 2009 enforcement trends.

Another involuntary disclosure case that raises possible inconsistency concerns is AGCO Corp. (AGCO). AGCO, a manufacturer of agricultural equipment, was fined over $18 million for bribes to Iraqi officials under the U.N.'s Oil-for-Food program.[179] Despite paying nearly $5.9 million in kickbacks, AGCO faced only a 3.37 fine and

[176] CCI Settlement, *supra* note 133.
[177] *Id*.
[178] *Id*.
[179] AGCO SEC Settlement, *supra* note 134.

forfeiture-to-bribe ratio.[180] Ignoring disgorgement and prejudgment interest, AGCO only faced a .68 fine-to-bribe ratio. The fines in this case were apparently lower because of remedial acts taken by AGCO.[181] Nevertheless, like CCI, AGCO also "failed to maintain an adequate system of internal controls."[182] Despite that failure, AGCO apparently faced a fine-to-bribe ratio that was significantly lower than the average for voluntarily disclosing companies even though they did not self-disclose.

While it might be argued that the government was trying to send a positive signal in 2009 regarding voluntary disclosures with the Latin Node case, it is impossible to cheer the Latin Node decision while ignoring the other apparent inconsistent cases from 2009. For example, CCI and AGCO, the two involuntary 2009 cases discussed, faced a collective fine-to-bribe ratio that was only slightly larger than what Latin Node faced despite collectively bribing nearly $13 million compared to Latin Node's voluntary disclosure of $2 million in bribes.

8. Ramifications of the Statistical Data for Companies

The information discussed in this article is relevant to any business that faces potential FCPA investigation and enforcement because it provides a prediction for what penalties a company may expect based on previous cases. This information is particularly relevant for any business that has reason to suspect that its industry is the latest focus for FCPA enforcement. In a recent address at a pharmaceutical convention, Assistant Attorney General Lanny Breuer made clear that the DOJ was now focused on that industry. He stated: "Our focus and resolve in the FCPA area will not abate, and we will be intensely focused on rooting out foreign bribery in your industry. That will mean

[180] *Id.*
[181] *Id*.
[182] *Id*.

investigation and, if warranted, prosecution of corporations to be sure, but also investigation and prosecution of senior executives. Effective deterrence requires no less."[183]

Mr. Breuer's remarks carry all the more potency in light of recent FCPA indictments against law enforcement and military equipment manufacturers at the Las Vegas 2010 Shot-Show.[184] The complex undercover investigations in those cases may have been a trial run for investigating other industries, such as pharmaceutical companies, that deal extensively with foreign governments.[185] Whether a company is the subject of a DOJ investigation, is involved in an industry that is under DOJ scrutiny, or is concerned about potential FCPA risks, understanding what the general outcome has been for other companies is important. The data evaluated here is valuable for companies considering voluntary disclosure because it helps to refine business decisions and gives support to the notion that there is no benefit to voluntary disclosure in the published cases.[186]

III. Other Costs and Considerations in an FCPA Disclosure

[183] Breuer Pharmaceutical Speech, *supra* note 80, at 2.
[184] Dan Margolies & Jeremy Pelofsky, RUETERS, *U.S. Charges 22 With Bribery Involving Arms Sales*, Jan. 19, 2010. The public arrests of 21 of 22 suspects at the convention was probably intended to serve as a warning to other companies but possibly also marks a shift in FCPA enforcement towards complex, international undercover investigations. *See* McGuire Woods, *CATCH-22: Lessons from DOJ's Massive Undercover FCPA Sting*, *available at* http://www.mcguirewoods.com/news-resources/item.asp?item=4481.
[185] Dale Van Demark & Joel Rush, *Increased FCPA Enforcement Highlights Need For Compliance by Healthcare Companies*, EPSTEIN BECKER GREEN, Jan. 22, 2010, *available at* http://www.ebglaw.com/showclientalert.aspx?Show=12365.
[186] Mike Koehler is another author to argue that there are some benefits to voluntary disclosure. He points out that these benefits need to be considered when a company encounters an FCPA violation and is deciding how best to handle it. *See Voluntary Disclosures and the Role of FCPA Counsel*, FCPA PROFESSOR (Dec 1, 2009), http://fcpaprofessor.blogspot.com/2009/12/voluntary-disclosures-and-role-of-fcpa.html.

When deciding whether to voluntarily disclose an FCPA violation, a company faces a multitude of factors to consider.[187] Fines and disgorgements are not the only potential costs that a company may face in such a situation.[188] Additional costs range in scope from possible civil and criminal penalties to economic and social costs, such as compliance monitoring costs and loss of corporate good will.[189]

A. Potential Costs

While concerns about FCPA compliance predominantly focus on potential penalties, some companies face adverse costs even when they choose to behave responsibly. This possible cost resulting from FCPA compliance arises when a company decides not to conduct business in a particular country or region because of rampant corruption. These companies are immediately disadvantaged compared to foreign companies who operate without enforced legal constraints on bribery.[190]

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[187] One of these factors is certainly the potential for huge corporate fines. *See* Miller & Chevalier, *FCPA Winter Review 2010*, Jan 12, 2010, http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=23807 (alleging that the average corporate penalty in 2009 was $58.6 million). Additional considerations range from determining when a problem is significant to when to bring in outside counsel and even what documents to preserve. *See, e.g.*, Gregory Husisian, *Coping with US Regulation of International Conduct: Compliance Strategies for the Foreign Corrupt Practices Act*, INSIGHTS, vol. 23, no. 11, Nov. 11, 2009, at 17 (offering a in-depth compliance program checklist and discussing the potential costs and inconveniences of an FCPA violation).

[188] While the principal focus of this article is to gauge quantitatively if there is any financial benefit to voluntarily disclosing under the FCPA with regards to government-imposed fines, there are other serious costs at stake that should be considered. This section is dedicated to highlighting a few of the additional potential costs and benefits that companies should consider while confronting potential FCPA violations. The purpose of this section is not only to show the hidden costs of compliance, but also to review how current FCPA enforcement can have the unintended consequence of encouraging companies to ignore FCPA violations rather than to self-disclose.

[189] *See* Dionne Searcey, *Breuer: Beware, Execs, DOJ Will Take Your Fancy Cars*, WALL. ST. J., http://blogs.wsj.com/law/2009/11/17/breuer-beware-execs-the-doj-wants-your-fancy-cars/; s*ee also* Dionne Searcey, *To Combat Overseas Bribery, Authorities Make It Personal*, WALL. ST. J., Oct 8, 2009, at A.13 (stating concerns about potential prison sentences may resonate more with executives than potential corporate fines).

[190] *See* Michael Marinel, *Is U.S. Business Hampered by Foreign Corrupt Practices Ban?* WORLD TRADE, Sept. 2007, at 8 (contending that companies from the United States "remain uniquely at risk of criminal prosecution for overseas bribery" because the United States is the only country to vigorously enforce anti-bribery measures.); s*ee also* Andrew Kramer, *Ikea Plans to Halt Investment in Russia*, N. Y. TIMES, June 23, 2009, *available at* http://www.nytimes.com/2009/06/24/business/global/24ruble.html?_r=1&dbk (discussing a company's plans to halt business operations in Russia because of rampant corruption).

Other potential FCPA costs arise only when there has been a violation of the Act. For example, one of the potential costs that should be considered is multijurisdictional liability from an FCPA violation. In light of heavy fines levied in recent years it is probable that other countries will follow recent enforcement trends in the United States and Europe. Consider the Siemens case, where after Germany initiated an investigation against the company, the United States joined in. As soon as Siemens agreed to a record-breaking penalty with the United States and Germany, other countries immediately opened investigations against the company.[191]

Other potential costs that may arise in an FCPA enforcement are parallel shareholder litigations. In these cases, 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 brought suits against corporations under securities laws alleging that shares were purchased at inflated prices.[192]

Perhaps the most significant potential harm that may result from an FCPA violation for a government contractor is the possibility of suspension or debarment. Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the

[191] Matt A. Vega, *Sarbanes-Oxley & the Culture of Bribery: Expanding the Territorial Scope of Private Whistleblower Suits to Overseas Employees,* 46 HARV. J. ON LEGIS. 425, 454 (2009).
[192] *See* Shearman FCPA Trends 2008, *supra* note 44, at 6; s*ee also* Mary Carter Andrues & John C. Letteri, *Internal Affairs*, DAILY J., July 17, 2009, *available at* http://www.howrey.com/files/News/f7cf7394-91cc-475a-808d-c851b362deb7/Presentation/NewsAttachment/b96b8958-ddc3-4b68-a332-3635ea60fda9/Internal%20Affairs.pdf (discussing recent parallel litigation suits based on breach of duty claims).

government. Similarly, if a company is found to have violated the FCPA, it could have their export licenses suspended.[193]

Another cost associated with an FCPA violation is the potential loss of good will. This cost includes not only a potential immediate impact on stock prices and public distrust, but also other long-term concerns.[194] For example, a company involved in an FCPA scandal may find difficulty in recruiting future corporate leaders or even maintaining employee morale.

B. Other Voluntary Disclosure Factors to Consider

In recent years there has been a dramatic increase in reliance on deferred prosecution agreements.[195] Essentially, deferred prosecution agreements allow the DOJ to defer charges against a company until a later date, while non-prosecution agreements result in closing the case after a probationary period.[196] When considering voluntary disclosure, companies need to be cognizant of the potential problems associated with a deferred prosecution agreement. One problem is that it allows "prosecutors to impose substantial reforms on a company without having to internalize the considerable costs and risks of investigating and trying their case."[197] A deferred prosecution agreement gives

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[193] 48 C.F.R. §9.406-2 (1993).
[194] Raymund Wong & Patrick Conroy, *FCPA Settlements: It's a Small World After All*, NAT'L ECON. RESEARCH ASSOCIATES, Jan 28, 2009, http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf (noting that "there are a substantial number of companies that experienced negative [stock] price reactions that are quite large in light of the relatively small regulatory settlements imposed").
[195] *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1727-18 (2007) (noting the increase in the use of DPA and corporate monitors).
[196] *See* Russell Mokhiber, *Twenty Things You Should Know about Corporate Crime*, 25 CORP. CRIME REP. 25 (2007), *available at* http://www.corporatecrimereporter.com/twenty061207.htm (last visited Feb. 10, 2008) (stating that "most major corporate crime prosecutions" are concluded through a DPA now).
[197] Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 n.8 (2008); *see also* Jacqueline Wolff & Pamela Sawhney, Covington & Burling LLP, *FCPA Voluntary Disclosures: A Risk/Benefit Analysis* 3, 2008, (highlighting the fact that while deferred prosecution agreements allow companies to avoid prosecution, they may also "subject the company to ongoing investigations, monetary penalties, follow-on civil

the DOJ a tremendous amount of leverage regarding how a company will behave going forward.[198] The likelihood of future regulatory scrutiny is a real possibility that must be considered.

On the other hand, a deferred prosecution agreement is always better than debarment in the long run. Further, a deferred prosecution agreement or a non-prosecution agreement may mitigate some of the damage resulting from the loss of good will.[199] In the UK, for example, the Serious Fraud Office highlights "the opportunity to manage, with us...any publicity proactively" as one of the benefits of voluntary disclosure.[200] This type of publicity management also appears in the DOJ and the SEC settlements where explicit praise is given for remedial actions and self-disclosure.[201]

Depending on the facts of the case, there may also be some important positive outcomes to consider in an FCPA self-disclosure case. For example, one author notes that "[v]oluntary disclosure does allow the company to determine the disclosure's timing, waiting until it has fully investigated the violation and undertaken remedial steps, thus

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litigation, and the imposition of a compliance monitor at the company's own expense"). One survey of recent FCPA cases contends that every DPA in 2008 resulted in "some sort of business reform." *See* Lawrence D. Finder et al., *Betting the Corporation: Compliance or Defiance?*, CORP. COUNS. R., *S. Tex. C. of L.,* Vol. XXVIII, No. 1, May 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1332033.

[198] Jacqueline Wolff & Pamela Sawhney, BUS. CRIMES BULLETIN, *Voluntary Disclosures Under the FCPA* (2007), *available at* Westlaw 14 No. 6 Bus. Crimes Bull. 1
(noting that in a deferred prosecution scenario "the ensuing government investigation under a DPA, moreover, tends to be significantly broader than the violation disclosed").

[199] *See* Robert J. Meyer & Martin J. Weinstein, *General Disclosure Requirements Potentially Applicable to FCPA Violations—SEC Disclosure Requirements*, Foreign Corrupt Practices Act Reporter, at § 6:5 (2010), *available at* Westlaw 1 Foreign Corrupt Prac Act Rep § 6:5 (listing publicity and other disclosure factors); s*ee also* Joshua Andrix, *Negotiated Shame: An Inquiry into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations*, 28 CARDOZO L. REV. 1857, 1855-90 (2007) (discussing the history and efficacy of publicity sanctions on corporations).

[200] Serious Fraud Office, Approach of the Serious Fraud Office to Dealing with Overseas Corruption 1, July 21, 2009,
http://www.sfo.gov.uk/media/110693/approach%20of%20the%20serious%20fraud%20office%20v5.pdf.

[201] *See* Latin Node Settlement, *supra* note 110.

showing a pro-active commitment to compliance."[202] In addition, in some cases, potential costs can be avoided simply because extensive investigations may not be necessary.[203]

C. How Potential Additional Costs May Discourage Voluntary Disclosure

While a potential fine or disgorgement may be damaging to a company, it is only one of many costs that a company should be aware of when considering voluntary disclosure. Unfortunately, concerns about the potential costs and problems associated with a voluntary FCPA disclosure may be causing some companies to balk at the option.[204] Part of the problem here may stem from the apparent disproportion in voluntary disclosure enforcements.[205] Given perceived inconsistencies in the amount of penalties voluntarily disclosing companies currently face, companies may naturally wonder how much larger these other potential costs and problems will be if they voluntarily disclose. These concerns naturally lead some to seriously question whether disclosure is the best action to take.[206]

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[202] Marsha Gerber et. al., *Deciding Whether to Self-Report FCPA Violations, in* REVIEW OF SECURITIES & COMMODITIES REGULATION 55-64, Vol. 43, No. 4 (May 2010), *available at* http://www.bowne.com/securitiesconnect/details.asp?storyID=2031.

[203] *See* Wendy Wysong, *New Attention on FCPA Investigations*, FINANCIAL EXECUTIVE, Oct. 2009, at 52. In other cases however, companies have paid millions of dollars to investigate FCPA violations. *See also* Aruna Viswanatha, *Avon Increases FCPA Spending by $18 Million*, MAIN JUSTICE, Apr. 30, 2010 (highlighting a cosmetic company's expenditure of nearly $20 million to investigate FCPA violations).

[204] *See* Lucinda A. Low, *The New Dynamics of FCPA Internal Investigations: Often Not a Private Affair*, FOREIGN CORRUPT PRACTICES ACT REPORTER, at §12:22 (2010), *available at* Westlaw 1 Foreign Corrupt Prac Act Rep § 12:22 (noting that when "faced with the lack of a clear benefit and this expanding list of risks, companies historically have tended to be reluctant to make voluntary disclosure").

[205] *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (arguing that high corporate compliance costs and increased corporate liability do "not necessarily reduce corporate crime and, indeed, may result in increased crime").

[206] *See* Christopher M. Matthews, *Terwilliger to Propose New Rules for FCPA Disclosures*, MAIN JUSTICE, June 22, 2010, *available at* http://www.mainjustice.com/2010/06/22/terwilliger-to-propose-amnesty-for-fcpa-disclosures/ (citing prepared remarks by Former Deputy Attorney General George Terwilliger noting that "the benefits of disclosure are uncertain, and the companies that have disclosed wrongdoing have received disparate treatment—factors which discourage disclosure").

IV. Refining the FCPA and Its Effectiveness through the Incorporation of Best Practices from Other Anti-Corruption Measures

There is no question that in recent years FCPA enforcement has dramatically increased.[207] Recent statements by Justice Department officials reveal that these current trends will likely continue.[208] In addition to an increase in the number of enforcement actions, the scale of settlements has also been impressive and will probably increase in scope.[209] There is little doubt that recent FCPA enforcement has had a significant impact on how businesses conduct themselves.[210] Corporate compliance is now a pressing concern and has even created a growing demand for compliance assistance services.[211] However, there is much debate about whether the FCPA is effective as an anti-bribery measure.[212] While most consider the statute effective at curbing some bribery, disagreements arise as to whether or not it is fair, stifles growth, or is the most effective means of combating corruption.[213] Despite differences in opinions, the question remains

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[207] Dechert LLP, *U.S. Government Officials Pledge to Continue Robust FCPA Enforcement*, Dec. 2007, http://www.dechert.com/library/White_Collar_12-07_U.S._Government_Officials.pdf.
[208] Bridget Rohde, *DOJ Criminal Chief's Recent Speech Foreshadows Increased FCPA Prosecutions and Reminds Companies to Implement and Follow Best Practices*, Mintz Levin, Jan 2010, http://www.mintz.com/publications/2050/DOJ_Criminal_Chiefs_Recent_Speech_Foreshadows_Increased_FCPA_Prosecutions_and_Reminds_Companies_to_Implement_and_Follow_Best_Practices.
[209] Christopher Matthews, A Dramatic Decade For FCPA Enforcement, MAIN JUSTICE, Jan. 2010, http://www.mainjustice.com/2010/01/03/a-dramatic-decade-for-fcpa-enforcement/.
[210] Lee C. Buchheit & Ralph Reisner, *Why Has the FCPA Prospered?*, 18 NW. J. INT'L L. & BUS. 263, 266 (1998) (calling the FCPA "remarkably effective" at shifting corporate behavior towards self-regulation); *see also* Shearman FCPA Trends 2008, *supra* note 44 at 8 (identifying the recent dramatic shift towards voluntary disclosure due to concerns about prosecution).
[211] *See generally* Priya Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, (2008) (discussing thorough training and monitoring approaches to prevent FCPA violations in light of recent enforcement actions).
[212] *See* Steven Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 238 (1997) (identifying two possible reasons why the FCPA has allegedly been unable to reduce corruption). In fact, one author even argues that the FCPA has made it easy for companies to commit bribery abroad. *See* Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 Fla. J. Int'l L. 169, 186 (2006).
[213] Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But for How Long?*, 2 TUL. J. INT'L & COMP. L. 289, (1994) (discussing concerns that the FCPA disadvantages non-bribing businesses); *see also* Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?,* WALL

of how the FCPA can be improved to remove the apparent disproportion and inconsistent fines discussed above.

A. A Brief History of Exporting the FCPA

The FCPA is one of the preeminent devices in global anti-corruption efforts. Because the FCPA was the first anti-corruption measure of its kind and scale, it became the standard that other countries and organizations would adopt to combat bribery.[214] In addition, the United States has used its economic and political influence to spread the FCPA's anti-corruption standards.[215] These efforts were also spurned by concerns that U.S. companies were disadvantaged by anti-bribery regulations with which many foreign companies did not need to comply.[216] Because of those efforts, most of the anti-corruption systems in organizations and other countries now in place share many similarities with the FCPA. Nevertheless, these FCPA-inspired approaches invariably have key differences that should be considered in order to improve the FCPA.

B. The Utility of Comparison and Supplementation

Although the United States is a member of the OECD convention, membership does not necessarily mean that FCPA enforcement is completely in line with convention

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ST. J., Mar. 16, 2010, http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/ (discussing various authors' opinions regarding the stifling effects of the FCPA on impoverished Haiti); Letter from Andy Spalding to Richard L. Cassin (Apr. 29, 2010), *available at http://www.fcpablog.com/blog/tag/andy-spalding* (questioning the practical effects of the FCPA enforcement in Kazakhstan resulting in U.S. businesses being reluctant to operate there; Chinese firms, with disregard to anti-bribery conventions, are filling their place); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351, 403 (2010) (calling for change in disproportionate FCPA sanctions and noting their impact on emerging markets).

[214] Masako N. Darrough, *The FCPA and the OECD Convention: Some Lessons from the U.S. Experience* (2004), http://ssrn.com/abstract=555643

[215] *See* MICHAEL JOHNSTON & ARNOLD HEIDENHEIMER, POLITICAL CORRUPTION: CONCEPTS AND CONTEXTS (3d ed. 2002).

[216] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988) (recognizing that U.S. firms were disadvantaged by the FCPA, the United States sought to export its anti-bribery legislation).

requirements. Further, membership also does not guarantee that enforcement agencies are actively implementing new OECD suggestions.[217] For example, on one occasion the OECD had to request that the DOJ conform to OECD standards by disclosing what criteria were being used in determining priorities used in prosecuting FCPA cases.[218] Thus, while many international anti-corruption agreements appear to require similar standards, the "divergence in the legislative approaches to such implementation is significant."[219] Therefore, a comparison of approaches can lead to a refinement of FCPA enforcement.[220]

C. OECD Anti-Bribery Convention

1. Introduction to the OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention establishes minimum standards that countries must meet before they can be members.[221] In order to join the convention a

[217] For example, a divergence between OECD recommendations and anti-corruption policies in the United States is visible in the OECD's 2009 efforts to ban facilitation payments. *See* OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 26, 2009 (recommending that members "encourage companies to prohibit or discourage the use of small facilitation payments"). Despite these OECD requirements, these payments remain as one of the exemptions to the FCPA. *See* Thomas Fox, *End of Grease Payments Coming*, CORP. COMPLIANCE INSIGHTS, May 4, 2010, http://www.corporatecomplianceinsights.com/2010/end-of-grease-payments/. Another example highlighting the possible difference between membership and the actual implementation of OECD requirements can be seen in the United Kingdom's recent anti-bribery measures. Although a member of the OECD, the UK was criticized for decades of legislative deficiencies in combating bribery. *See* OECD Working Group on Bribery, Annual Report 2008, *available at* http://www.oecd.org/dataoecd/21/24/44033641.pdf [herein after OECD 2008 Report].

[218] *See* OECD, Directorate for Financial Enterprise Affairs, *United States: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 12 (June 1, 2005), *available at* http://www.oecd.org/dataoecd/7/35/35109576.pdf.

[219] David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 488 (2009).

[220] For example, the United States has acted in the past to enact some new OECD requirements. *See* Dep't of Justice, Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Feb. 17, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/oecd-convention.pdf.

[221] OECD introduction, *available at* http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

country agrees to implement laws designed to reduce public corruption.[222] Broadly, the convention requires each member to pass laws that seek to reduce corruption by appropriately punishing bribery.[223] For example, the convention requires parties to implement "such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."[224]

The OECD Convention gives guidance and establishes legal prerequisites regarding specific standards aimed at reducing bribery. This is accomplished by requiring members to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."[225] Further, OECD guidance on corruption continues through the OECD Working Group on bribery. For example, in a recent report, the group urged members to establish laws "imposing effective, proportionate and dissuasive sanctions (including confiscation of bribes and any proceeds) upon foreign bribery convictions."[226] By encouraging members to continue to refine their laws to be proportionate and dissuasive, the report manifests the OECD's flexibility and innovation when it comes to deterring corruption.

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[222] OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, *available at* http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html; *see also* Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 66-76 (1999) (discussing the history of the OECD Anti-Bribery Convention and its requirements).

[223] OECD, *supra* note 218; *see also* Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 501-506 (discussing in detail the OECD's requirements for criminal penalties for the bribery of foreign officials).

[224] OECD WORKING GROUP ON BRIBERY, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

[225] *Id.* at 7.

[226] OECD WORKING GROUP ON BRIBERY, supra note 5.

2. Recent Developments at the OECD

In 2009, 38 countries agreed to put into place new measures aimed at reducing foreign corruption of public officials.[227] In addition, these measures were designed to help countries improve their detection and deterrence of foreign corruption.[228] The new provisions also focused on helping incentivize whistleblowers through greater protection, and increasing communication between a party's law enforcement agencies.[229] These provisions demonstrate the OECD's dedication to continuing to refine its approach to reducing bribery.

3. Monitoring Members' Implementations of the Provisions

In addition to establishing minimum anti-corruption requirements for member states, the OECD also has a tiered system for monitoring them. Currently, the OECD relies on a two-phased approach to evaluating its member states' current laws and for recommending improvements to those laws. During the first phase of OECD review of a member state, the OECD considers the country's national laws to implement the Convention itself.[230] The second phase evaluates the "effectiveness of Parties' legislative and institutional anti-bribery frameworks in practice."[231] The OECD also has plans to add a third step to the review process in order to further evaluate anti-corruption

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[227] OECD, *Governments agree to step up fight against bribery*, *available at* http://www.oecd.org/document/35/0,3343,en_2649_34487_44232739_1_1_1_1,00.html; *see also* Lillian V. Blageff, *International Efforts to Curb Bribery and Corruption*, INT'L Q., April 2010, *available at* Westlaw 22-2 International Quarterly Article II (highlighting the 2009 OECD changes).
[228] OECD, *supra* note 218.
[229] *Id*.; *see also* Jeffrey Clark et al., *Anti-Corruption*, 44 Int'l Law. 451, 469 (2010) (relating the immediate impact of the whistleblower provisions in one location).
[230] OECD, *Ensuring the Continuing Effectiveness of the Convention*, http://www.oecd.org/dataoecd/21/24/44033641.pdf.
[231] *Id*.

efforts.[232] The OECD is unique because the levels of analysis are not only thorough but also evolving.

4. Incorporating OECD Ideas to Improve the FCPA

i. Incorporating OECD Flexibility into the FCPA

Although the OECD Convention was inspired by the FCPA, the FCPA could improve by incorporating some of the different approaches the OECD has taken to combating corruption. Foremost, because the OECD is an organization rather than a legislative governing body, it benefits from working groups and constant updates and revisions. The 2009 changes to the OECD represent a prime example of the organization's continuous efforts to combat bribery. The OECD is able to adjust and make improvements and suggest those improvements to its members.

While FCPA enforcement is not exempt from change, most of the dialogue about amending the act occurs at the academic level. Concrete changes to the law or how it is enforced would require an amendment by Congress, the publication of regulations or a shift in focus by the enforcing agencies. The FCPA was amended in 1988 and again in 1998.[233] However, significant changes seem unlikely, given recent trends that suggest FCPA enforcement appears to be escalating and given DOJ statements that enforcement

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[232] OECD, Phase 3 Country Monitoring of the OECD Anti-Bribery Convention, http://www.oecd.org/document/31/0,3343,en_2649_34859_44684959_1_1_1_1,00.html ("The purpose of Phase 3 is to maintain an up-to-date assessment of the structures put in place by Parties to the OECD Anti-Bribery Convention to enforce the laws and rules implementing the Convention and the 2009 Recommendations."); s*ee also* Patrick Moulette, *The OECD Anti-Bribery Convention – Successes and Future Challenges*, CAYMAN FIN. R., Jan. 5, 2010, http://www.compasscayman.com/cfr/2010/01/05/The-OECD-Anti-Bribery-Convention-%E2%80%93-successes-and-future-challenges/ ("This third monitoring step will focus on: key cross-cutting issues; the progress made by parties on specific weaknesses identified in earlier evaluations; enforcement efforts and results; and any issues raised by changes in countries' legislation or institutional frameworks.").

[233] *See* Cortney Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*. 29 REV. LITIG. 439, 446 (2010) (discussing amendments to the FCPA)

will continue.[234] Flexibility, therefore, is one area where the FCPA could be improved. Although the United States is a member of the OECD Convention and agrees to comply by its standards, the FCPA could be improved if it were more flexible in how frequently the act was updated. Without the focus groups and yearly reviews that the OECD relies on, the FCPA is limited in its ability to adapt quickly to changing international efforts and to refine the effective and less effective measures of the act.

ii. Incorporating Proportionate Sanctions into the FCPA

Enforcement of the FCPA could benefit from focusing on imposing more effective, proportionate and dissuasive sanctions, rather than fines and disgorgement penalties, which appear to be more punitive in nature. One of the problems with current voluntary disclosure enforcements is that the fine-to-bribe ratio in those cases appears to be one and a half times larger compared to involuntary disclosure cases.[235] In addition, there is a great deal of variation in the amount of penalties that companies face when they voluntarily disclose FCPA violations.[236]

The discrepancies between penalties and bribes among the voluntarily disclosing cases appear to have little relation to the parties' post-FCPA violation behavior.[237] Companies that voluntarily disclose FCPA violations usually engage in the same types of behavior. For example, these companies will usually notify the DOJ and the SEC of FCPA violations, purge the problematic employees, cooperate fully in the federal

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[234] *See* Fredric Firestone & Boris Uphoff, *United States: DOJ and SEC Will Significantly Increase FCPA Enforcement Efforts*, (March 2010) http://www.mondaq.com/unitedstates/article.asp?articleid=96896.
[235] *See* tables *supra* Part II.D.5.
[236] *See* Voluntary Disclosure Table *supra* Part II.D.5.i (listing cases with fine-to-bribe penalty ratios ranging from 0 to 10.73); Weiss, *supra* note 219, at 474 (noting that in the case of disgorgements, "there are clearly extreme complexities and uncertainties in calculating" the penalties, especially given the fact that specific factors are not published"); s*ee also* Low et al., *supra* note 52, at 20 (contending that because disclosure usually triggers extensive cooperation, it is difficult to estimate how much credit is based on these actions).
[237] *See* discussion regarding ITT and Baker Hughes *supra* Parts II.D.6.iii, II.D.7.iii.

investigation, and then implement stringent compliance policies and internal monitors.[238] Despite these relatively uniform actions, the ratio between the amount of fines and forfeitures that a violating company may face and the bribes it committed ranges anywhere from 0 to 10.73. The glaring problem with these statistics is that a voluntarily disclosing company is left to guess whether it will face a penalty that is on par with its bribe or significantly higher.

iii. Moving Beyond Seemingly Random Fines

The current means of FCPA enforcement is ineffective in at least two fundamental ways. First, random penalties for responsible actors may remove the incentives for voluntary disclosure.[239] Secondly, a system that penalizes similar bad actors with mismatched severity is fundamentally unfair.[240] By encouraging proportionate punishment of anti-bribery provisions the OECD offers a balanced approach to improving the FCPA. If the FCPA were to incorporate the OECD's efforts to be more effective through proportionate penalties, it would dissuade bribery in a fairer manner. While the OECD's commitment to proportionate penalties can be criticized as a merely nebulous statement without concrete standards, the fact remains that achieving proportionate and fair penalties is one of the goals of the U.S. justice system and should be sought after.

FCPA enforcement could potentially become more fair and proportionate to those who voluntarily disclose by simply limiting the range of penalty to a more consistent

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[238] *See* Micrus Settlement, *supra* note 72.
[239] Michael Freedman, *Trust Us,* FORBES, Dec. 25, 2006, http://members.forbes.com/forbes/2006/1225/132.html?token=MTggT2N0IDIwMDcgMTU6MzE6MzggKzAwMDA%253D.
[240] Consider for example the recent overturn of disproportionate penalties for possession of different forms of the illegal narcotic cocaine. *See* Kimbrough v. United States, 128 S. Ct. at 575 (2007) (upholding a lower court's decision to treat possession of different forms of the same illicit drug equally).

number. Such an effort would prevent enforcement agencies from repeating the apparent, disproportionately heavy penalty in the Schnitzer Steel case.[241] In that case, despite voluntary disclosure, the government levied a $15 million fine for less than $1.8 million in reported bribes.[242] The company faced an 8.46 bribe to penalty ratio, which is apparently much higher than the average ratio for companies who did not voluntarily disclose FCPA violations in the recent years.[243] This type of apparent inconsistency is ripe for reform. Thus, by keeping penalties for voluntary disclosing companies within a more constant and predictable range and well below what non-disclosing companies face, the DOJ could send a clear message that voluntary disclosure is not only a good ethical decision, but a sound business decision as well. This would also help resolve some critics' concerns that there is no benefit to voluntary disclosure of FCPA violations.[244]

D. The United Kingdom's Anti-Bribery Act

Before this year, the United Kingdom's (UK) anti-bribery laws had existed as merely a patchwork of common law.[245] This lack of consolidated anti-bribery legislation had also been criticized for years. Recently, the OECD cited the UK's failure to bring anti-bribery laws into compliance with convention requirements.[246] The OECD

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[241] *See* Schnitzer Steel SEC Settlement, *supra* note 53; s*ee* also Schnitzer Steel Executives' Pleadings, *supra* note 54. The DOJ would likely counter that Schnitzer received unusually high penalties because of the high-ranking corporate offenders.
[242] *Id*.
[243] *See* Voluntary and Involuntary Disclosure Tables *supra* Part II.D.5.
[244] One critic referred to the benefits of voluntary disclosure as simply "a deviation from the worst-case scenario." Mark Vernazza & Helen Mueller, *The Long(er) Arm of the Foreign Corrupt Practices Act: The FCPA's Broad Reach and What Companies Can Do to Escape It*, (February 15, 2008), http://www.eapdlaw.com/files/News/20760964-fb7f-4ccd-9872-02a03965b4f4/Presentation/NewsAttachment/97e87083-1432-4601-afc3-030103d857f6/The%20Longer%20Arm%20of%20the%20Foreign%20Corrupt%20Practices%20Act.pdf.
[245] Samuel Rubenfeld, *Key Guidance on UK Bribery Law to be Issued By July*, WALL ST. J. (Apr. 16, 2010) *available at* http://online.wsj.com/article/BT-CO-20100416-710484.html.
[246] OECD 2008 Report, *supra* note 217.

highlighted the fact that, despite being a member of the OECD for over ten years, the United Kingdom had not had a single conviction of a company for foreign bribery.[247]

1. The UK Bribery Act

The United Kingdom's approach to bribery, however, shifted dramatically after a whistleblower revealed that BAE Systems had been providing Saudi Arabian royals with "cash, cars, prostitutes and houses in exchange for lucrative defense contracts" for years.[248] The United Kingdom then proposed a new anti-bribery bill, which became law on April 9, 2010. The new law predominantly follows the FCPA but also has some important variations of its own.[249] One of the important differences is the Act's prohibition against bribing private business officials, as well as public.[250] The act is also extra- territorial in nature because it allows the United Kingdom to prosecute both individuals and companies that have a minimum connection to the UK for bribery offenses they commit regardless of where the conduct occurred.[251] In addition, the United Kingdom's law is unique because it makes accepting a bribe illegal and prohibits the bribery of any official regardless of nationality.[252] Finally, the United Kingdom's new bribery act makes it an offense to fail to prevent a bribe.[253] Putting "adequate procedures" in place can defend a company from the prosecution for negligent business

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[247] *Id*.
[248] Christopher Matthews, *U.K. Parliament Passes Bribery Bill*, MAIN JUSTICE, Apr. 2010 http://www.mainjustice.com/2010/04/09/u-k-parliament-passes-bribery-bill/.
[249] *See* Bribery Act 2010, 2010 Chapter 23, *available at www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100023_en.pdf.*
[250] Roger M. Witten ET. AL., *Draft UK Bribery Bill Would Expand Scope of UK Anti-Corruption Initiatives and Jurisdiction*, (Apr 2009) *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8940.
[251] *Id.*
[252] Bribery Act, *supra* note 249, at 1.
[253] *Id*.

practices, though what constitutes adequate procedures remains to be defined.[254] How the Serious Frauds Office will interpret this important caveat could dramatically impact enforcement of the new law.

2. The UK Bribery Act and Improving the FCPA

FCPA enforcement could be improved by incorporating some of the measures that the United Kingdom's Bribery Act utilizes. The FCPA could deter more corruption by including a measure that would punish the receipt of a bribe as well as the briber. Such a measure would require responsible business practices on the part of bribe recipients as well as bribers, thereby creating one standard for everyone.[255] In addition, the United Kingdom's Bribery Act also contains a provision that appears to offer some protection to companies that implement "adequate procedures."[256] The Act states: "[I]t is a defence for [a company] to prove that [company] had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such [illegal] conduct."[257] Unfortunately, the SFO has not defined what constitute adequate procedures.

While the SFO has not defined adequate procedures, the fundamental principle of limiting liability is still noteworthy. Creating requirements by which companies can become protected from rogue actors would improve the FCPA. Such a standard could better combat bribery if it also included a detailed adequate procedures defense for

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[254] Pulina Whitaker, *UK Bribery Act 2010: Be Prepared*, King & Spalding, Apr., 2010, javascript:%20OpenAttachment('/members/Article_Atachment.aspx?od=305582&id=995882&filename=asr-995884.Act.pdf').
[255] *See* David Hess & Thomas Dunfee, *Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 623-26 (2000) (addressing how to combat the supply side and demand side of bribery generally).
[256] Bribery Act, *supra* note 249, at 7(2).
[257] *Id.*

companies that, despite zealous compliance efforts, discover violations by rogue employees.[258]

While the Organizational Sentencing Guidelines currently take business compliance protocols into consideration, that is not enough. As discussed above, fair enforcement requires that those that voluntarily disclose receive a consistent and proportionate fine. Unfortunately, there appears to be a large degree of variance in the amount of fine assigned despite good corporate behavior.[259] These inconsistencies could be overcome by including a section of adequate procedures in the FCPA. Such guidance would help companies comply with tangible ethical standards and minimize risk.

E. Private Initiatives

Another possible source of FCPA enforcement overhaul could come from private initiatives. Some private solutions to industry problems have been effective in the past and may prove effective at curbing corruption as a supplemental mechanism in the future. Consider the Defense Industry Initiative (DII), an outgrowth of the President's Blue Ribbon Commission on Defense Management in 1986, which primarily focused on defense contractor fraud and waste.[260] The DII was unique because it created a voluntary code of ethics and a program for self-disclosure.[261] In the same year the DOJ instituted a

[258] Anti-bribery enforcement in the United States appears to be slowly moving towards elements of the adequate procedures defense. *See* Thomas Fox, *Changes Coming: US Sentencing Guidelines, UK Bribery Bill & OECD on Facilitation Payments-Part I*, FCPA COMPLIANCE AND ETHICS BLOG, (April 14, 2010) http://tfoxlaw.wordpress.com/2010/04/14/changes-coming-us-sentencing-guidelines-uk-bribery-bill-oecd-on-facilitation-payments-part-i/ (identifying proposed changes in the Organizational Sentencing Guidelines that could give companies more credit and time to resolve potential violations).
[259] *See* Voluntary and Involuntary Disclosure Tables, *supra* Part II.D.5.
[260] *See* Defense Industry Initiative, *Origins of DII*, *available at* http://www.dii.org/about-us/history/.
[261] *See* David Packard et al., PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, Final report to the President, *A Quest for Excellence,* June (1986), *available at* http://www.ndu.edu/library/pbrc/36ex2.pdf.

voluntary disclosure program, through which compliance with the clear standards encouraged by the DII significantly reduced the chance of suspension or debarment.[262]

Another benefit of the DII voluntary disclosure initiative was the fact that even when compliance later became mandatory in 2008, the new requirements were not drastically different from what was already being self-imposed by members of DII.[263] Thus, private measures can effectively hasten refinement and help government establish specific standards.[264] Further, the DII model also shows that the DOJ can fairly and effectively grant credit to companies that voluntarily disclose under private guidelines.

The corporate social responsibility movement is a current private initiative to promote ethical corporate behavior that may generate reform similar to the DII.[265] Within this movement groups have partnered, for example, to create the RESIST Handbook, to help companies train employees to deal with clients that push for bribes.[266] While novel approaches to countering corruption may initiate in the private sector, some contend that such advances may not negate the need for government monitoring.[267] Still,

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[262] Joseph P. Covington, ET. AT., Jenner & Block LLP, *Doing Business Under the FCPA*, (March 2009), http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/4176/Doing_Business_Under_FCPA_TOC.pdf.

[263] *See* Defense Industry Initiative, *What the GAO Says about Us*, *available at* http://www.dii.org/about-us/what-the-gao-says/; s*ee also* U.S. GOV'T ACCOUNTABILITY OFF., DEFENSE CONTRACTING INTEGRITY: OPPORTUNITIES EXIST TO IMPROVE DOD'S OVERSIGHT OF CONTRACTOR ETHICS PROGRAMS, GAO-09-591, at 7, (Sept. 2009), *available at* ww.gao.gov/new.items/d09591.pdf.

[264] In fact, many of the standards in the President's Blue Ribbon Commission on Defense Management form the backbone of most ethics codes today. *See* Louis M. Brown et al., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 8:87 (2009) (discussing minimum compliance mechanisms as set out in the Organizational Sentencing Guidelines, some of which were part of the Blue Ribbon Commission's recommendations).

[265] *See generally*, Jennifer Zerk, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY (Cambridge Univ. Press) (2006).

[266] *See* International Chamber of Commerce, *New Tool Launched to Help RESIST Corruption* (Mar. 16, 2009), http://www.iccwbo.org/policy/anticorruption/index.html?id=28224.

[267] Mark B. Baker, *Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?* 23 CONN. J. INT'L L. 123 (2007) (argues that corporate self governance can be effective when coupled with external monitoring and uniform legislative standards). Recent corporate corruption and subsequent behavior in response to whistleblowers cast a less than positive light on the actual potency of corporate self-governance. Consider, for example, ITT Corp.'s alleged treatment of an employee

some conclude that there has been impressive success from private initiatives.[268] Given past successes of industry initiatives, any future changes to the FCPA or how the act is enforced should be considered in conjunction with input from the industry.

V. Improving FCPA Enforcement in Voluntary Disclosure Scenarios

The Organizational Sentencing Guidelines recognize that for a law to be effective it must encourage ethical behavior in addition to punishing criminal actions.[269] Specifically, the Organizational Sentencing Guidelines address promoting ethics through "appropriate incentives."[270] Given the Organizational Sentencing Guidelines' goals, there should be no reason why calculating the benefits to voluntary disclosure should be "difficult to quantify."[271] However, current seemingly disproportionate and inconsistent penalties levied in some of the cases surveyed in this article reveal that the government has fallen short in this mandate. Further, enforcement agencies may actually be failing to encourage ethical behavior by maintaining disproportionate fine-to-bribe ratios between voluntary and involuntary disclosures.[272]

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whistleblower that brought potential FCPA violations to light. *See* Haddad v. ITT Industries, Inc., slip op at 4-5, 2007 WL 141949 (N.D. Ind. 2007) (order denying a motion to dismiss).

[268] Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 417 (1993) (identifying possible insufficiencies in private codes).

[269] Sentencing Guidelines *supra* note 40, at § 8B2.1(b)(6).

[270] *Id*.

[271] Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and Effects of International Standards*, 1665 PLI/CORP 711, 779 (2008).

[272] *See* Sue Reisinger, *Companies are disclosing overseas bribes in record numbers. Is that always necessary?*, CORP. COUNSEL, July 16, 2007, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1184231196297 (discussing other options to disclosure when a violation is not large in the context of recent large settlements). Further, penalties that are disproportionate or too high tend to deter corporations and may cause them to actually avoid self-policing. *See* Richard A. Bierschbach & Alex Stein, *Overenforcement,* 93 GEO. L.J. 1743, 1774 (2005) ("If by self-monitoring and self-policing a firm increases the probability of its own conviction under the vicarious liability standard, then firms subject to that standard will have a disincentive to undertake such measures, or at least to undertake them in good faith past a certain point."). There is also concern that disproportionate fines will disadvantage American companies in the global market place. *See Ungreasing the Wheels*, ECONOMIST, Nov. 19, 2009, at 69.

A. Moving Towards Fair FCPA Enforcement Actions in Voluntary Disclosure Scenarios

Criticism is also mounting regarding how the government conducts FCPA investigations and the use of deferred prosecution agreements.[273] One author argues that penalties imposed on corporations now are "more a matter of bargaining before charges are ever filed" than a proportionate penalty.[274] Another concludes that the DOJ is "leveraging the prosecutions to secure adoption of sweeping internal reforms."[275] Likewise, another raises concerns about consistency in light of recent shifts in enforcement priorities.[276] Further, concern is also being raised that the penalties levied in these cases often exceed what a court might have concluded was appropriate.[277]

Unfortunately, the current FCPA enforcement regime may also incentivize companies to ignore FCPA problems. Because of the apparent backwards fine-to-bribe ratios between voluntary and involuntary disclosures surveyed in this article, a refinement of the law is necessary.[278] Some have even gone further and suggested that a focus on punishing companies rather than the individuals that commit bribery reflects a general

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[273] *See* Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 259-264, (2008) (drawing attention to three popular criticisms of DPAs).

[274] Peter J. Henning, *The Organizational Guidelines: R.I.P.?,* 116 YALE L.J. POCKET PART 312, 315 (2007), http://yalelawjournal.org/images/pdfs/528.pdf.

[275] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007). Another author sharply condemns recent enforcements actions as "often wildly out of proportion to the perceived wrongdoing. It ... often is ... a state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct." Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1095 (2006).

[276] *See* Weiss, *supra* note 219, at 511 (contending that prosecutorial discretion and frequent changes in prosecutorial priorities undercuts consistency).

[277] Lawrence D. Finder & Ryan D. McConnell, *Third Verse, Same as the First*, CORP. COUNSEL, Mar. 27, 2007, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005477145.

[278] If FCPA enforcement agencies are intent on encouraging voluntary disclosure, they should adjust the punishment system to encourage this behavior. *Cf.* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, (Jan. 2009) (noting that a "punishment system that cannot customize its deterrent effect at a more individualized level is an awfully blunt instrument").

lack of proportionality in punishment.[279] Because deterrence can be problematic in the corporate realm, extra care needs to be given to ensure that punishments are precise and proportionate.[280] The foremost problem with the current enforcement regime is that it appears to disproportionately penalize companies that voluntarily disclose.[281]

Possible solutions are considered below to some of these most pressing areas of concern regarding the FCPA and how it is enforced in the case of voluntary disclosures.

B. Actual Testing of an FCPA Indictment

One of the ways FCPA uncertainties could be resolved is through the courts. The call to test the limits and ambiguities present in the FCPA and how they may be viewed in court, rather than through settlement agreements, is not new.[282] Nonetheless, in the nearly four decades of the FCPA existence there have been few disputes resolved in court.[283] Cases are traditionally settled outside of court for similar reasons. First, most of the cases that the DOJ is currently investigating have surfaced because the companies approached the government about an FCPA concern with the intention to resolve the case

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[279] *See* Kent J. Schmidt & Bryan McGarry, *Is BAE Systems Too Big To Fail?,* LAW360, Dec. 16, 2009, http://www.dorsey.com/files/upload/mcgarry_antifraud_law360_dec09.pdf. However, this trend may be abating. *See* also Miller Chevalier, *FCPA Winter Review 2010*, Jan 12, 2010, http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=23807 (noting that 17 of the 35 resolved enforcement actions were related to individuals during 2009).

[280] *See* John C. Coffee, Jr., *Making Punishment Fit the Corporation: The Problems of Finding an Optimal Criminal Sanction*, 1 NORTH. ILL. L. REV. 1, 6-10 (1980) (noting that sanctions against a corporation are often complicated by the fact that corporate officers' motivations can be disconnected from that of the shareholder).

[281] *See* tables *supra* Part II.D.5.

[282] See Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?,* 20 VAND. J. TRANSNAT'L L. 431, 494 (1987) (asserting that almost every enforcement proceeding is settled by plea agreements, preventing adjudication of issues and interpretation of provisions).

[283] *See* United States v. Kozney, 493 F.Supp.2d 693, 697 (S.D.N.Y. 2007) (stating that "there has been surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years"); *See also,* John A. Howell et al., *Increased Enforcement of the Foreign Corrupt Practices Act: Understanding the FCPA and Assisting Clients with Compliance Measures*, ASPATORE SPECIAL REP., Dec. 2009. The Fifth Circuit Court of Appeals is the highest court in recent years to address a challenge to the FCPA. *See* United States v. Kay, 513 F.3d 432, 441 (5th Cir. 2007), *cert. denied* 129 S.Ct. 42 (2008).

expeditiously.[284] Second, the DOJ often couples FCPA charges with attendant violations, like money laundering, which increase the total amount of potential penalties.[285] In order to avoid potentially large penalties and other trouble, most plead guilty or pay a fine to settle the FCPA violation.[286] Third, some believe that settlements are the norm because companies want to limit any future investigation.[287] The reasoning goes that the government has tremendous investigative powers and may discover other previously unknown problems during an investigation.[288] Finally, the most compelling reason that companies settle is because of the unknown. Thus, there is a reluctance to be the test subject in an uncharted trial. Companies are reluctant to lose an opportunity to settle and then potentially face severe fines or suspension and debarment down the road.[289]

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[284] One survey estimates that the majority of new FCPA cases from 2005 through 2007 were self-reported. *See* Shearman FCPA Trends 2008, *supra* note 44, at 8.

[285] *See, e.g.,* Press Release, Dep't of Justice, *Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for their Alleged Participation in Bribery Scheme*, Dec. 7, 2009, *available at* http://www.justice.gov/usao/fls/PressReleases/091207-01.html; Press Release, Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, Jan. 19, 2010, http://www.justice.gov/opa/pr/2010/January/10-crm-048.html [hereinafter DOJ Shot-Show Statement].

[286] *See also* Matthew J. Kovacich, *Backyard Business Going Global: The Consequences of Increased Enforcement of the Foreign Corrupt Practices Act ("FCPA") on Minnesota and Wisconsin*, 32 HAMLINE L. REV. 529, 559 (2009) (noting that settlements are "consistent" and "almost immediate").

[287] The argument here is that by being proactive in FCPA compliance a company likely knows the extent of a violation and therefore is in the best position "to respond to future government inquiries." Brian Loughman et al., Association of Corporate Counsel, *Top Ten Tips for FCPA Compliance*, Mar. 1, 2010, http://www.acc.com/legalresources/publications/topten/fcpa-compliance.cfm.

[288] Consider for example the FCPA case against NATCO Group Inc, not included in the data tables above because it is a case from 2010. In that case the company's voluntary disclosure "triggered the government's request for further investigation." *See* Morgan Lewis & Bockius LLP, *Foreign Corrupt Practices Act Enforcement Actions*, Jan. 11, 2010, http://www.morganlewis.com/documents/fcpa/FCPA-EnforcementActions.pdf. Consider also the Stolt-Nielsen S.A. voluntary disclosure case. *See* Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 180 (3rd Cir. 2006). There, the company voluntarily disclosed an antitrust violation and entered into a non-prosecution agreement with the government. *Id.* The government later expanded its investigation and concluded that the company was in violation of the NPA and sought to indict the company. *Id.* Although Stolt-Nielsen won an injunction at the district court, which concluded they had complied with the NPA, the appellate court reversed on the grounds that the DOJ had the authority to bring an indictment even though improper. *Id.* This case may serve as a model for the possibility that even though a court may side with a company in reviewing their compliance efforts that is no guarantee that other problems might not arise.

[289] In fact, some in Congress are even concerned that settlements and DPAs against government contractors with ethics violations are being used to forestall suspension and debarment. *See* Letter from Congressman Edolphus Towns to Att'y Gen. Eric Holder (May 18, 2010), *available at*

Although unlikely, a scenario where a voluntarily disclosing company refuses a settlement offer and decides to proceed to trial could completely alter the landscape of current FCPA enforcements. One of the chief concerns that such a trial could potentially resolve is how much credit a court is likely to give a company for a robust compliance program followed by a voluntary disclosure of an FCPA violation. Similarly, a judicial assessment might also address critics' concerns by aiding companies in the evaluation of a deferred prosecution agreement.[290]

During such a trial a defendant might analogize to protections afforded companies with robust compliance programs in sexual harassment cases. For example, in 1998 the Supreme Court issued an opinion that may serve as a judicial indicator for a potential FCPA test of reliance on compliance programs. In *Burlington Indus., Inc. v. Ellerth*, the Court concluded that a company could be sheltered from liability if it had adequate compliance programs in place to prevent sexual harassment and the victim failed to take advantage of those to report a violation.[291] Again in 1999 the Supreme Court determined that in the punitive damages context a company could not be vicariously liable for a manager's actions that were "contrary to the employer's good faith efforts to comply."[292] By allowing a company's good-faith compliance actions to help shield them from

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http://oversight.house.gov/images/stories/Correspondence/Holder.DOJ.051810.Kellogg_Brown_and_Root.Poor_performance_on_federal_government_contracts.pdf (questioning whether "settlements of civil and criminal cases by DOJ are being used as a shield to foreclose other appropriate remedies, such as suspension and debarment, that protect the government from continuing to do business with contractors who do not have satisfactory records of quality performance and business ethics").

[290] The U.S. Chamber Institute for Legal Reform makes a strong case against disproportionate penalties and deferred prosecution agreements for corporations resulting from the independent acts of low level employees. *See* Andrew Weissmann et al., U.S. Chamber Institute for Legal Reform, *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, Oct. 2008, *http://www*.judiciary.house.gov/hearings/pdf/Garrett091119.pdf.

[291] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

[292] Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).

liability, courts could create another "incentive for companies to have strong compliance programs."[293]

However, Mary Beth Buchanan, former U.S. Attorney for the Western District of Pennsylvania, has countered this line of reasoning by arguing that "a corporation is vicariously liable under federal law for the criminal conduct of its agents...even though the agents' actions may have been contrary to corporate policy."[294] Ms. Buchanan relied on a U.S. Sentencing Commission report and a case against Hilton Hotel Corp. to bolster her argument.[295] In that case, Hilton Hotel Corp. was found liable for an agent's illegal dealings even though those dealings were against company policy.[296] Similarly, a recent U.S. Court of Appeals for the Second Circuit decision stated that prosecutors are not required to prove that a corporation lacked "effective policies and procedures to deter and detect criminal actions by its employees" as a separate element in a vicarious liability case.[297] Nevertheless, it is impossible to guess how a judge might reconcile favorable and unfavorable judicial precedent for good-faith compliance actions in an FCPA case.

Another potential challenge to the FCPA could be based on the constitutionality of specific terms in the act.[298] While judicial review of these positions and other FCPA ambiguities could bring clarity, it is unlikely that companies will diverge from the

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[293] Richard L. Cassin, *More Enforcement, Less Justice*, THE FCPA BLOG (May 27, 2010), http://www.fcpablog.com/blog/2010/5/27/more-enforcement-less-justice.html.
[294] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 589 (2004).
[295] *See* U.S. Sentencing Comm'n Ad Hoc Advisory Group, *Report on the Organizational Sentencing Guidelines 8*, *available at* http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf.
[296] United States v. Hilton Hotel Corp., 467 F.2d 1000 (9th Cir. 1972).
[297] United States v. Ionia Management S.A., 555 F.3d 303, 310 (2nd Cir. 2009).
[298] Joel M. Cohen et al., *Under the FCPA, Who is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1263-66 (2008) (discussing the merits of a vagueness claim and recent successes and failures).

current, less-risky trend to settle.[299] The fact is that a trial may only present another variable, because there is always the possibility that a fact finder may not be sympathetic to a company's compliance efforts. A judge may even view the Justice Department's current system of deferred prosecution agreements as inadequate, as seen recently in the UK.[300]

C. Creating a Cost Distinction for Good Corporate Actors through Credit

The need for proportionate penalties in the voluntary disclosure arena has long been recognized.[301] The key problem with recent enforcement trends is that the benefits for voluntarily disclosure appear to have been inconsistent and disproportionate.[302] Specifically, the problem with disproportionate fines lies in the similarities between the amounts of fines that voluntarily and involuntarily disclosing companies have faced.[303]

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[299] *See* Jonathan N. Halpern & Laura B. Herring, *FCPA Crackdown Tests Anti-bribery Compliance*, OIL & GAS J., May 3, 2010, http://www.ogj.com/index/article-display.articles.oil-gas-journal.volume-108.Issue-16.general-interest.fcpa-crackdown_tests.QP129867.dcmp=rss.page=1.html (noting that for a company "to resist settlement and allow the court to decide liability issues creates a risk of provoking felony charges against the company. Inviting an indictment to vindicate a company's legal arguments can understandably generate devastating risks for the company"); s*ee also* Reid Jonkers, *Recent Trends in FCPA Enforcement*, 4 ENVT'L & ENERGY L. & POL'Y J. 297, 299 (2009) (noting that companies are keen to settle FCPA violations when faced with money laundering charges as well).

[300] Nick Clark, *Judge Attacks SFO Deal with Innospec*, THE INDEP., Mar. 27, 2010, http://www.independent.co.uk/news/business/news/judge-attacks-sfo-deal-with-innospec-1928636.html (citing Lord Justice Thomas as stating that the amount of fines agreed to by the SFO was "inadequate").

[301] *See* Packard et al., *supra* note 261 (stating that a voluntary disclosure program can be effective only if there are "inducements that assure skeptical contractors they will not suffer greater sanctions by coming forward").

[302] *Cf.* Voluntary and Involuntary Disclosure Tables, *supra* Part II.D.5. The current enforcement inconsistencies have lead to some strong criticism. One author urges that "[c]onsistency and predictability are not matters of grace granted to corporate citizens at the government's pleasure; the government owes consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues, and to management and directors who want to . . . [comply] in these circumstances." James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1237 (2007). The apparent disproportion between voluntary and involuntary disclosures seen here is not the norm nor the ideal in self-policing scenarios. *See* Robert Innes, *Self-Reporting in Optimal Law Enforcement When Violators Have Heterogeneous Probabilities of Apprehension*, 29 J. Legal Stud. 287, 299 (2000) (stating that "the optimal fine to nonreporters will typically be higher in a self-reporting regime, permitting the achievement of requisite deterrence with less government enforcement effort").

[303] *See* Roger Bowles et al., *Forfeiture of Illegal Gain: An Economic Perspective*, 25 OXFORD J. LEGAL STUD. 275, 276 (2005) (opining that potential disgorgement penalties alone are not sufficient to deter

The time has come for the government to encourage and appropriately reward voluntary disclosure by granting substantially more credit towards punishment to companies that voluntarily disclose FCPA violations.[304] By granting credit, the government will not necessarily waive violations for corporations that do not have robust anti-bribery programs in place.[305] Granting substantial credit to companies that self disclose could be modeled on amnesty or leniency programs in the tax and antitrust arenas. Essentially, amnesty programs are a means of bringing actors into compliance with the law in exchange for a promise not to prosecute.[306] In the tax arena, amnesty programs have been hailed as effective not only at spurring compliance but also at collecting otherwise unpaid taxes.[307] In the antitrust arena, amnesty programs have also been an effective means of avoiding over-deterrence from disproportionately high penalties.[308]

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violators). The next logical step then is to question why disgorgement penalties are imposed in voluntary disclosure scenarios if they fail to deter the underlying conduct in non-disclosure scenarios.

[304] *See* Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud, 94 Va. L. Rev. 1295*, 1352-53 (2008) (arguing that an actor will only self disclose when "the expected penalty of continued lying (probability P of detection multiplied by the sanction, S) exceeds the costs of amnesty").

[305] Consider a recent Ernst & Young survey that indicates there will likely be no shortage of companies willing to ignore clear guidelines. *See* Ernst & Young, *European Fraud Survey 2009* (2009) http://www2.eycom.ch/publications/items/fraud_eu_2009/European_Fraud_Survey.pdf (discussing survey results that showed that management in European businesses were more likely than employees to condone bribery in these difficult economic times); *see also* Deloitte LLP, *Deloitte Online Poll: Most Respondents Expect FCPA Violations to Increase in Coming Years*, Sept. 14, 2009, http://www.deloitte.com/view/en_US/us/Services/Financial-Advisory-Services/2ac94a5e7c8a3210VgnVCM200000bb42f00aRCRD.htm (survey results noting nearly thirty-five percent of participants "still have no comprehensive FCPA compliance program in place").

[306] Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 693-95 (2007) (discussing the use of amnesty programs in various scenarios).

[307] *Id* at 696 (highlighting successful international tax amnesty programs). However, some have questioned the effectiveness of amnesty programs as deterrence. For example, one author points out that compliance with an amnesty program may mean more government scrutiny in the future and thereby cause companies to be reluctant to volunteer. *See* Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535, 574 (1991). While a legitimate concern, this would probably not have a dramatic impact on an FCPA credit program because companies that choose to voluntarily disclose under such a program would likely be required to take remedial action and impose compliance programs that tend to negate concerns about future investigations.

[308] *See* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 716 (2001) (highlighting the concern "that higher-than-optimal penalties will induce corporations to incur excessive costs in an attempt to avoid these high fines").

Just as in the tax arena, a simple program could be established regarding FCPA enforcement that offers a promise not to prosecute and that grants substantial credit to companies that voluntarily disclose and take remedial actions. Specifically, such a program could have a fixed fine-to-bribe ratio of 1:1 for self-disclosing companies, a fine along the lines of what Latin Node faced. While some antitrust amnesty programs only reward the first to cooperate, an FCPA credit program should be offered to all voluntarily disclosing companies that meet the remedial requirements. Establishing a fixed credit program that grants criminal amnesty with a proportionate fine would also help to avoid overdeterrence and other self-monitoring costs.[309] Such a program would amount to more than a slap on the wrist and would also be a fair and consistent means of penalizing past misconduct while encouraging compliance.

D. Negating the Impact of Multijurisdictional Liability

As countries refine their anti-bribery laws, companies can probably expect an increase in both cooperation between countries and multijurisdictional investigations.[310] In the early stages of the recent, increased FCPA enforcement activity some merely speculated that foreign countries were cooperating with the DOJ in its investigations.[311]

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[309] *See* Robert Innes, *Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement*, 17 J.L. ECON. & ORG. 239, 241 (2001) (contending that "[b]y setting a self-reporting sanction exactly equal to the average penalty that a violator otherwise faces, including the violator's cost of optimal avoidance, the government can induce self-reporting without reducing deterrence—that is, without reducing the incentives that individuals have to refrain from criminal conduct. The added bonus is that self-reporting violators have no incentive to engage in any avoidance activity; avoidance costs are thereby saved"). By making fines more proportionate, enforcement agencies may also increase the likelihood that companies that are not required to report violations will choose to self-disclose. *See generally* Weismann, *supra* note 15, at 627 (contending that current self-governance alone is insufficient to spur change in non-issuing companies).
[310] *See* Jonathan N. Rosen & Luis A. Perez, SHOOK, HARDY & BACON, *Managing FCPA Issues in an International Era: Trends, Challenges and Implications Arising from Global Anticorruption Enforcement Actions*, www.shb.com/attorneys/Perez/ManagingFCPAIssues.pdf; *see also* Neil Mirehandani & Rebecca Huntsman*, New World*, THE LAW., Nov 19, 2007, at 28 (stating that the DOJ has been willing to bring cases against companies that have already faced similar charges in another jurisdiction).
[311] William F. Pendergast et al., *Recent FCPA Enforcement Activities*, STAY CURRENT, Nov. 2006, at 3, http://www.paulhastings.com/assets/publications/600.pdf?wt.mc_ID=600.pdf.

Given the elaborate cooperation between Germany and the United States on the Siemens case, there is little doubt remaining that multinational cooperation is here to stay.[312] Along with the increase in multijurisdictional enforcement actions come concerns that companies may be punished twice for the same behavior, thereby resulting in a form of international double jeopardy.

While cooperation between countries may be increasing, there is some question still as to whether this will lead to increased multijurisdictional penalties.[313] In fact, some have pointed out that public prosecutors may suffer from "bandwagon syndrome" where they prefer to wait and see if other countries have success before prosecuting a potential defendant.[314] For example, in the Siemens case, once the United States and Germany had reached a settlement, many other countries subsequently filed charges against the company as well.[315] Companies should be concerned about increased exposure to penalties resulting from a single violation despite the fact that some countries, including some industrialized countries, have been somewhat relaxed in their enforcement in the past.[316] While some recent international efforts, such as the British anti-bribery law, may change this, questions remain over other countries' mixed efforts in combating bribery.[317]

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[312] Siemens Settlement, *supra* note 84.
[313] *See* Roger M. Witten & Jay Holtmeier, *A Spiraling Caseload under the Foreign Corrupt Practices Act*, 241 N.Y. L.J. S4, (Feb. 2009) (discussing the trends in recent international enforcement).
[314] Vega, *supra* note 191, at 454. *But see* Leslie Benton et al., *International Legal Developments in Review: 2007 Public International Law*, 42 INT'L LAW. 709 (2008), *available at* http://meetings.abanet.org/webupload/commupload/IC700600/sitesofinterest_files/YIR2007.pdf (listing both international enforcement actions and statutory developments).
[315] Vega, *supra* note 191, at 454-55 (identifying "Bangladesh, China, Greece, Hungary, Indonesia, Israel, Italy, Liechtenstein, Nigeria, Norway, Russia, and Switzerland" as countries that began corruption investigations of Siemens after the company's settlements with the United States and Germany.)
[316] *See* Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. Times, Nov. 25, 2007, at BU1. (identifying England and Japan as notorious for relaxed enforcement).
[317] *See* David L. Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective than the U.S. Foreign Corrupt Practices Act*, 11 PAC. RIM L. & POL'Y J. 209, 228 (2002). This opinion may be outdated given Japan's recent anti-bribery enforcements. See *4 Japanese executives arrested over ODA bribes*, THE DAILY YOMIURI, Nov. 12, 2008, *available at*

Nevertheless, multijurisdictional liability is in its infancy and many questions remain about the amount of credit, if any, that a company can expect to receive for any fines it has paid in another jurisdiction for the same misconduct.[318] For example, consider the recent anti-bribery developments in the UK.[319] There, the Serious Fraud Office (SFO) expects to be notified at the same time as the DOJ when a voluntary disclosure also falls within its jurisdiction.[320] However, the SFO remains vague regarding what credit would be given in these "global settlement" scenarios.[321] These ambiguities are further complicated by the fact that courts have cast serious doubt on the SFO's authority even to settle these types of cases in the first place.[322] If there is ambiguity as to how a sophisticated industrial country such as the UK will treat a multijurisdictional settlement, what can a company expect from an emerging world power like Brazil?[323]

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http://www.asianewsnet.net/news.php?id=620&sec=1. *But see* ERNST & YOUNG, *10th Global Fraud Survey: Corruption or Compliance — Weighing the Costs* 7 (2008) http://www.ey.com/publication/vwluassets/weighing_the_costs_of_corruption_or_compliance:_10th_global_fraud_survey/$file/ey_10th_global_fraud_survey.pdf (concluding from extensive international data that in the past two years Japan "led all regions with some 72% of respondents experiencing recent bribery or corruption") [hereinafter 10th Fraud Survey]. Still, FCPA inspired enforcements may be the trend; even countries like Iraq and Bahrain now have large investigations in the works. *See* Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act – Inspired Civil Actions*, THE ADVOCATE, Mar./Apr. 2009, at 22.

[318] For example, in February 2010, Mutual Legal Assistance treaties between the United States and the European Union were ratified. These treaties, which had been negotiated for nearly a decade, seek to modernize cooperation between prosecutors in the two continents through increased access to evidence and updated extradition rules. *See* Press Release, U.S. Dep't of Justice, U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force (Feb. 1, 2010), http://www.justice.gov/opa/pr/2010/February/10-opa-108.html.

[319] Bribery Act, *supra* note 249.

[320] Serious Fraud Office, *supra* note 200. Perhaps even more intriguing is the jurisdictional scope of the UK's Bribery Act, which appears to extend far beyond the FCPA. *See* BAKER BOTTS, *New U.K. Bribery Act Stricter than FCPA, Can Apply Worldwide*, May 17, 2010, http://www.bakerbotts.com/file_upload/2010MayNewUKBriberyActStricterThanFCPAJump.htm.

[321] Serious Fraud Office, *supra* note 200, at 5.

[322] Clark, *supra* note 300, at 1 (citing Lord Justice Thomas as stating, "I have concluded that the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again").

[323] *See* Weiss, *supra* note 219, at 502. Despite ambiguities, the potential for multijurisdictional liability in emerging markets is a real concern. Even countries with notoriously corrupt acquisitions systems are

Multijurisdictional double jeopardy also does not appear to be resolved through treaties, as is the case in the Inter-American Convention Against Corruption.[324] In comparison however, the European Union appears to discourage international double jeopardy. The recent passage of the Lisbon Treaty, which entered into force on December 1, 2009, may reinforce this by giving deference to European Court of Human Rights holdings against multiple punishments for the same violation.[325] The African Union appears to follow a similar approach to the Europeans by discouraging double jeopardy.[326]

How international settlements have played out in the past may offer clues as to what to expect in the future. In a recent case against Azko Nobel, the DOJ gave the company credit for fines paid to the Dutch authorities.[327] This case also serves as an example of international cooperation because the Dutch Public Prosecutor assisted the DOJ's investigation.[328] Similarly, Statoil was also permitted to deduct what it had already paid to Norway from a fine owed to the United States for the same misconduct.[329]

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beginning to participate in corruption investigations. *See* Iriekpen Davidson, *Halliburton - FG Asks U.S. to Name Indicted Citizens*, ALLAFRICA.COM, Mar. 30, 2009, http://allafrica.com/stories/200903300002.html. In situations like this, some even question whether a company can expect to receive similar safeguards to those found in the U.S. Constitution. *See* Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 710 (2003).

[324] *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 288 (1998). In fact, some speculate that current treaties are making FCPA violations more difficult to conceal, thereby possibly increasing voluntary disclosures. *See* Pendergast et al., *supra* note 311, at 3.

[325] Jacques Bourgeois et al., *The Lisbon Treaty: The Next Steps Forward for Europe*, WILMER HALE, Dec 3, 2009, *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9321. The complete text of the Lisbon Treaty is *available at* European Comm'n Official J., C 306/2 of 17.12.2007, at 1, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML.

[326] African Union Convention on Preventing and Combating Corruption art. 13(1)(d), July 11, 2003, 43 I.L.M. 5, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%C20Combating% 20Corruption.pdf. How discouraging double jeopardy will play out in relation to Nigeria's recent efforts against Halliburton remain to be seen. *See* Davidson, *supra* note 323.

[327] *See* Akzo Nobel Settlement, *supra* note 125.

[328] *Id*.

[329] *See* Statoil SEC Settlement, *supra* note 99.

Because these two companies were credited for fines paid to other countries, they appear to give some reassurance that the United States will not fine a company a second time for the same behavior. However, the DOJ's vague statements about multijurisdictional double jeopardy offer little solace.[330] In 2007 Mark Mendelsohn, then-deputy chief of the fraud section at the DOJ, stated that the United States simply did not recognize the concept of "international double jeopardy."[331] In addition to concerns about fines, other concerns remain regarding which country takes precedence in a settlement action and which country may impose compliance monitors.[332] The fact that these and other concerns remain unanswered has a direct impact on business confidence.[333]

Companies need clear and consistent standards to appropriately plan and evaluate risk. One way to resolve these inconsistencies could be through a treaty that grants proportional credit for the amount of a foreign fine.[334] Taking such a clear approach would limit a potentially ad hoc international response to an FCPA violation.[335] Likewise, a treaty with such a provision would also ease corporate concern that anti-

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[330] *See Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORP. CRIME REP. 36, (Sept. 16, 2008), http://www.corporatecrimereporter.com/mendelsohn091608.htm (quoting Mr. Mendelsohn as saying that as a "discretionary matter" the DOJ pays attention to other foreign settlements but that "doesn't necessarily mean [the DOJ is] going to defer to that jurisdiction").

[331] Gibson 2008 Review, *supra* note 77. However, while speaking at an American Bar Association event, Mr. Mendelsohn did acknowledge that the DOJ would "take into account" any other fines levied before making a decision. *Id.*

[332] Laurence A. Urgenson et al., *New Bumps and Tolls Along the Road to FCPA Settlements*, 17 No. 3 BUS. CRIMES BULL. 1 (Nov. 2009) (highlighting uncertainties in multijurisdictional enforcements).

[333] One author has forcefully concluded that the "vagueness of the FCPA, the current trend in government enforcement actions, and the lack of clear guidance by which U.S. businesses can legally operate, renders the Act unworkable in China's current climate of corruption." Eric M. Pedersen, *The Foreign Corrupt Practices Act and its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, (2008). *But see* F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 34, 79 (2010) (concluding that avoiding FCPA violations in China is possible but even with robust compliance programs it remains "undoubtedly challenging").

[334] *See* Weiss, *supra* note 219, at 502 (highlighting the use of treaties as a means to avoid international double jeopardy).

[335] *Id*. Given current international trends, it is not unreasonable to foresee a scenario where a small-to medium-sized company, despite voluntary disclosure, could face bankruptcy due to concurrent fines from many nations.

corruption measures are a fair means of combating bribery rather than a hidden tax.[336] Given the success that the United States has seen in leading other countries and entities towards anti-bribery measures, it is likely that a resolute push towards fair uniform punishment would also be well received.

Concern about potential double jeopardy could also be eased if the DOJ would, as a matter of clear policy, always agree to deduct from the total fine to be levied whatever amount had already been paid in a foreign settlement.[337] This type of agreement would set an international standard against over-deterrence and demonstrate that the U.S. justice system is concerned more with seeing a proportionate fine levied than with increased government revenues.[338] Such agreements could even be tempered by factors that took into consideration the company's primary place of business and location of the misconduct's damage.[339] In the event that a company was fined more than the DOJ would have imposed, the United States should not impose an additional fine because to do so would be fundamentally unfair and contrary to American notions of legal equality.[340]

E. Improving the Organizational Sentencing Guidelines

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[336] *See* Joseph Rosenbloom, *Here Come the Payoff Police,* THE AM. LAW., May 17, 2010, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202457704533&hbxlogin=1&loginloop=oo (discussing the self-reinforcing cycle of monetary success in FCPA enforcements). Similarly, the SFO is seeking to use fine penalties to supplement its own budget. *See* Dan Atkinson, *Serious Fraud Office May Get to Hold on to Its Court Winnings*, DAILY MAIL, Mar. 27, 2010, http://www.dailymail.co.uk/money/article-1261175/Serious-Fraud-Office-hold-court-winnings.html.

[337] The Justice Department likely would contend that such an action might lead to a passive or deferential prosecutorial role in the international arena. *See Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, *supra* note 330.

[338] Weiss, *supra* note 219, at 502-503 (discussing concerns about overdeterrence and treaties regarding multijurisdictional liability). Mr. Weiss also points out "that the primary concern with regulation is decreasing beneficial private activity and distorting market incentives." *Id*. at 505.

[339] The SFO for example sets aside some of its penalties to benefit the victims of corruption. *See* Serious Fraud Office, *infra* note 364.

[340] When establishing an optimal penalty intended to dissuade bribery, penalties need to be tempered by fairness and proportionality. *See* Craig M. Boise, *Playing with "Monopoly Money": Phony Profits, Fraud Penalties and Equity*, 90 MINN. L. REV. 144, 204-05 (2005).

The Organizational Sentencing Guidelines have had a tremendous impact on business decisions, in part because they allow for a fine reduction where a company cooperates with investigations, utilizes a compliance program and accepts responsibility.[341] By one estimate the difference in corporate behavior can result in "an 80:1 swing in what a company may have to pay in federal fines, depending on whether it had good ethics and compliance programs."[342] However, despite the ability to bring clarity to many of the lingering corporate concerns regarding the adequacy of compliance programs, the Organizational Sentencing Guidelines remain vague in their suggestions.[343] The ambiguities in the standards may result in the unintended consequence of contributing to ambiguity in results.[344] For example some criticize current FCPA enforcement trends as inept at actually curbing corruption but potent at discouraging foreign investment.[345] Because the Organizational Sentencing Guidelines fail to clarify, companies were forced to return to a reliance on seemingly patchwork statements from

[341] *See* Sentencing Guidelines *supra* note 40, at § 8B2.1. Alternatively, an increase in fines can result where a company actively pursued the illegal misconduct in question. *Id*. at § 8C2.
[342] Paul Fiorelli et al., *Why Comply? Organizational Guidelines Offer a Safe Harbor in the Storm*, 1776 PLI/CORP 111, 114 (2009).
[343] *See* Sentencing Guidelines, *supra* note 40, at § 8B2.1(a)(2) (corporations were charged with creating compliance programs that were "reasonably designed, implemented, and enforced so that the program [was] generally effective in preventing and detecting criminal conduct").
[344] *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 879 (2001) (asserting that the creation of a uniform standard would increase international corporate efficiency and decrease anxiety); *see also* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 85-88 (reasoning that employees are currently incentivized to ignore ethical violations that appear ambiguous).
[345] *See* Christopher J. Skousen & Charlotte J. Wright, *How Successful is the FCPA at Combating Fraud: The Case of U.S. and Non-U.S. Oil and Gas Companies*. 28 PETROLEUM ACCT. & FIN. MGMT. J. 31 (Apr. 2009) (opining that in the oil and gas arena, the FCPA has not been effective in reducing corruption despite massive compliance expenditures by corporations); *see also* Scott Johnson, *Cracking Down in Africa*, NEWSWEEK, Oct. 19, 2009, at 11 (contending that "rather than end corruption, greater U.S. enforcement--however noble its intentions--may just ensure that Africa takes its business elsewhere").

sources within the DOJ.[346] Unfortunately, these statements also offered little additional concrete guidance.[347]

In the four decades since the FCPA was enacted, the DOJ has not issued any regulations defining key terms and has refused to do so.[348] To date the only official general resource available regarding the FCPA is the *Lay Person's Guide to the FCPA*.[349] While internal guidelines are sometimes provided, they are infrequent and often vague.[350] In addition to these sources, the DOJ also utilizes an opinion request procedure whereby companies can submit specific questions for review.[351] In recent years the DOJ has issued a number of opinions on various subjects; however, the opinions issued are not binding and only create a "rebuttable presumption" that such conduct is legal under the FCPA.[352] Another problem with these opinions is that they are often extremely fact-

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[346] *See* Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L.REV. 949, 965-66 (2009) (alleging that Organizational Sentencing Guidelines reforms fell short and were "overshadowed by DOJ's internal charging guidelines").

[347] *See* U.S. Attorney's Manual, Principles of Federal Prosecution of Business Organizations § 9-28.1200 (2008), http://www.usdoj.gov/opa/documents/ corp-charging-guidelines.pdf; *see also*, Mike Koehler, *The Holder Memo and FCPA Enforcement*, FCPA PROFESSOR (June 2, 2010), *http://fcpaprofessor.blogspot.com/2010/06/holder-memo-and-fcpa-enforcement.html* (noting drastic inconsistencies between guidance from Attorney General Eric Holder and recent DOJ FCPA enforcements).

[348] *See* Lucinda A. Low, *Ethics, Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws*, 5 ROCKY MTN. MIN. L. INST. 3 (2005); Howell, *supra* note 283, at 6. At least one author believes that the FCPA is intentionally left vague. *See* Doty, *supra* note 302, at 1238-39.

[349] Lay-Person's Guide, *supra* note 9.

[350] For example, the OECD recently published a twelve-point guide to help companies in their compliance efforts. OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010) *available at* www.oecd.org/dataoecd/5/51/44884389.pdf. In response to these specific recommendations, a DOJ authority announced at a public conference that he approved of them in principle, but the DOJ has not made any public endorsement since that time. *See* Melissa K. Aguilar, *OECD Anti-Bribery Guide as Path to FCPA Compliance*, COMPLIANCE WEEK, Mar. 30, 2010, *http://www.complianceweek.com/article/5866/oecd-anti-bribery-guide-as-path-to-fcpa-compliance.* Complaints about vague interpretations of anti-corruption laws are not unique to the FCPA. Interpretations of the newly enacted British Bribery Act by government officials in the UK have also been criticized as uncertain and inconsistent. *See* Alexandra A. Wrage, *TRACE UK Anti-Bribery Symposium*, WRAGEBLOG.ORG, May 28, 2010, *available at* http://wrageblog.org/2010/05/28/trace-uk-anti-bribery-symposium/.

[351] 15 U.S.C § 78dd-1(e).

[352] *Id.*

specific.[353] If the DOJ determines that the information submitted is not sufficient, they can "request" additional information from a company.[354] Given these shortcomings in the opinion request process, there is little mystery why it is not very popular.[355]

In response to these and other concerns, the U.S. Sentencing Commission appears to be making some progress towards clarifying what actions will qualify a company for penalty credit.[356] For example, the U.S. Sentencing Commission clarified what type of reporting structure is required to reduce potential penalties.[357] Another proposed change would require hiring outside compliance reviewers as part of the remedial process.[358] Nevertheless, many of the most pressing issues remain unaddressed. For example, the FCPA does not specify the procedures companies should use in maintaining their books and records.[359] Likewise, no specific or detailed standards exist for what constitutes adequate internal controls.[360]

Some of the most promising advances toward tangible compliance program credit are still in the comment phase. For example, the U.S. Sentencing Commission sought comment as to whether to include a reduction in penalty if: a company's compliance officer was sufficiently independent to report directly to the board of directors; the

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[353] *See* Opinion Procedure Release, Dep't of Justice, No. 10-01, Apr. 19, 2010, (including eight points of detailed facts before discussing the DOJ's opinion).
[354] 28 C.F.R. § 80.7.
[355] *See* Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 702-03 (2009); *See also*, Mark Miller, *FCPA Opinion Procedure: DOJ's Speed Improves,* THE NAT. L. J., Aug. 4, 2008, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423431500&slreturn=1&hbxlogin=1 (stating that, without sufficient staff, the opinion procedure "will never become more than marginal").
[356] Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525 (proposed Jan 21, 2010) [hereinafter Proposed Sentencing Guidelines].
[357] *See* Sentencing Guidelines, *supra* note 40, at § 8C2.5(f)(3)(C)(i).
[358] *See* Stephen Fishbein & Danforth Newcomb, *Advisers Reduce FCPA Risk*, CORP. COUNSEL, May 26, 2010, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202458742540.
[359] R. Christopher Cook, *The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations* (Mar. 2006), http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3210.
[360] *Id.*

compliance program was able to detect a violation before an outside source; or a violation was promptly reported to an outside source.[361] The ethics community strongly supports the U.S. Sentencing Commission's consideration of these issues.[362]

The Organizational Sentencing Guidelines remain a potent medium for improving the voluntary disclosure process under the FCPA.[363] The Organizational Sentencing Guidelines could be improved in two important ways. First, the guidelines could be improved by clarifying the standards for what specific ethical conduct qualifies a company for a reduction in penalties.[364] Second, the guidelines could further incentivize good behavior by reducing the severity of penalties faced by companies with robust compliance programs that voluntarily disclose FCPA violations.[365]

By being specific with standards companies will likely be incentivized to take those additional steps toward eliminating corruption.[366] Interestingly, during the late 1980s, the DOJ believed that uniform guidelines would only "unduly restrict

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[361] Proposed Sentencing Guidelines, *supra* note 356, at 3535.
[362] *See* Letter from Jeffery M. Kaplan & Rebecca Walker to U.S. Sentencing Comm'n, at 3 (Mar. 9, 2010) *available at* http://www.ussc.gov/pubcom_201003/KaplanWalker-Chapter8.pdf (last visited June 2, 2010) (praising the U.S. Sentencing Commission's issue for comment regarding organizations receiving a "three level mitigation for an effective compliance" when high level personnel are involved in the misconduct); *see also* Letter from Ethics and Compliance Officer Ass'n to U.S. Sentencing Comm'n at 2 (Mar. 22, 2010) (noting results from a member survey that found "overwhelming support [for] this idea" if the U.S. Sentencing Commission would "clarify what 'direct reporting authority' means").
[363] *See* Keith T. Darcy & Jeffrey M. Kaplan, *The U.S. Sentencing Guidelines' Unfinished Business*, MAIN JUSTICE, May 13, 2010, (noting the negative effect that the "absence of public cases of ethics and compliance program credit" has had on the efforts companies put into their compliance programs).
[364] One author has called for similar changes, albeit through a regulation with the Securities and Exchange Commission. *See* Doty, *supra* note 302, at 1234. Nevertheless, real change may more likely come from the U.S. Sentencing Commission, given the Commission's recent efforts to clarify compliance requirements.
[365] While not as critical, another improvement the U.S. Sentencing Commission should seriously consider is using fine revenue to establish a victim's assistance fund, as has been done in the UK. *See* Press Release, Serious Fraud Office, *BAE Systems plc*, Feb. 5, 2010, http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx (relating a British settlement order establishing a fund "for the benefit of the people of Tanzania").
[366] *See* Ronald E. Berenbeim & Jeffrey M. Kaplan, *Ethics and Compliance Enforcement Decisions – the Information Gap*, WALLSTREETLAWYER.COM, Oct. 2009, *available at* Westlaw 13 No. 10 GLWSLAW 9 (discussing a corporate survey where an overwhelming majority of respondents desired more information about ethics program credit in order to improve their own compliance).

businesses."[367] Today, however, the DOJ would likely contend that if it were to identify all of the compliance mechanisms necessary to keep a company safe from prosecutions companies might enact only those minimum requirements and do nothing more.[368] While concern about companies doing as little possible to comply may be reasonable in other situations, that concern is unfounded with regards to improving FCPA enforcement of voluntary disclosures.[369] Most companies are genuinely interested in improving their compliance programs.[370] In fact, a company that is willing to voluntarily disclose an FCPA violation likely is adhering already to the minimum requirements found in the Organizational Sentencing Guidelines, prosecutor statements and other international resources.[371]

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[367] *See* Longobardi, *supra* note 282, at 493.

[368] Research on the subject seems to suggest the opposite. *See* Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. ECON. & ORG. 45, 62 (2008) (concluding that companies "are more likely to self-report violations when they are subject to frequent inspections and targeted by focused compliance initiatives").

[369] A company that has a compliance program only on paper or does not even meet other minimum compliance standards currently advocated by the DOJ is unlikely to open itself up to an investigation only to reveal its lapses.

[370] *See, e.g.,* Ernst & Young, *11th Global Fraud Survey: Driving Ethical Growth - New Markets, New Challenges* 14, 2010, http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf (concluding from survey results that only 28% of in-house legal counsel "feel that their organization is very well-prepared to undertake a major fraud or bribery investigation") [hereinafter 11th Fraud Survey]; Alexandra A. Wrage, *An FCPA Pūpū Platter*, WRAGEBLOG.ORG (Dec. 17, 2010), http://wrageblog.org/2009/12/17/an-fcpa-pupu-platter/ (identifying upcoming FCPA trials as good news for "companies and individuals craving more guidance and clarification in the interpretation of the FCPA"); *see also*, David Benyon, *UK Bribery Act Broader than FCPA, but More Guidelines Needed*, RISK.NET, May 24, 2010, *available at* http://www.risk.net/operational-risk-and-regulation/news/1650016/uk-bribery-act-broader-fcpa-guidelines (citing "strong industry desire for more guidelines" regarding British anti-corruption measures).

[371] Consider for example the case of DynCorp International Inc., a company that was quick to voluntarily disclose payments it alleges were only to expedite the receipt of visas for employees, actions that may not even have amounted to an FCPA violation. *See* August Cole, *DynCorp Says It May Have Broken U.S. Law*, WALL ST. J., Nov. 19, 2009, *available at* http://online.wsj.com/article/SB10001424052748704533904574543974050882150.html; *see also*, Richard L. Cassin, *Dyncorp Reports Payments, Removes Compliance Officer*, THE FCPA BLOG (NOV. 29, 2009), http://www.fcpablog.com/blog/2009/11/30/dyncorp-reports-payments-removes-compliance-officer.html (questioning the need for a voluntary disclosure in this scenario given the FCPA allows for expedited payments for routine government actions).

In addition, more comprehensive guidelines could also have the unintended consequence of making settlements all the more likely given the fact that more transparency would create a large behavioral divide between companies that comply with said guidance and those that do not.[372] Thus, the U.S. Sentencing Commission has the ability to reshape dramatically the anti-bribery landscape simply by being more forthright in its expectations and specific in its stated standards. Another benefit to giving companies thorough guidance is that the enforcement focus will remain on the perpetrators of bribery more than the company.[373]

In addition to publishing more specific behavioral standards, the U.S. Sentencing Commission could also achieve better clarity by refining how it promotes ethics. One suggestion is that the ethical standards include a section that links managerial compensation with how much management focuses on internal ethical standards.[374]

The guidelines themselves could also be improved by simply reducing the amount of total penalties a voluntarily disclosing actor could face by at least half.[375] This simple refinement would send an unequivocal message to the corporate community that voluntary disclosures will be more appropriately rewarded. Such a reduction would also bring the apparent 2.45 fine-to-bribe ratio for voluntary disclosure down to a level below

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[372] For example, there does not appear to be a shortage of companies that have not implemented basic DOJ compliance advice. *See* 11th Fraud Survey, *supra* note 370, at 2 (citing expansive international survey results that "[m]ore than half of all respondents outside of North America do not have a documented response plan involving parts of the business with investigative skills" to handle FCPA concerns.).

[373] *See* Thomas J. Miceli & Kathleen Segerson, *Punishing the Innocent Along with the Guilty: The Economics of Individual Versus Group Punishment*, 36 J. LEGAL STUD. 81, 81 (2007) (proposing that while group punishment may be attractive, it is less effective than individual punishment).

[374] *See* Paul Fiorelli et al., *Why Comply? Organizational Guidelines Offer a Safe Harbor in the Storm*, 1776 PLI/CORP 111, 133 (2009).

[375] While calls to eliminate overdeterrence through a reduction in corporate fines are not new, a specific reduction, like the one proposed, would send a clear message that fines will no longer appear disproportionate to the conduct. *See, e.g.,* Philip A. Wellner, Effective Compliance Programs and Corporate Criminal Prosecutions, 27 CARDOZO L. REV. 497, 521 (2005) (mentioning a reduction in fines as one possible avenue to reforming the Organizational Sentencing Guidelines).

what non-disclosing companies seem to face. This bold standard could be qualified of course by a requirement that a company in question meet specific compliance standards. Having such a caveat for specific ethical behavior, however, would not reduce the potency of the new incentive. On the contrary, companies would be more forthcoming if they were assured that their program was in line with the stated specific ethical requirements for FCPA compliance.

Many companies are eager to comply with the FCPA not only to avoid potential penalties but because they see bribery as bad for business and their customers and harmful to all people.[376] Thus, additional specificity in the guidelines coupled with credit towards any penalties would rally businesses toward a unified compliance goal. After all, if the purpose of the FCPA is to curb corruption then the government should take appropriate steps to make compliance not only desirable but also predictable for companies that want to come clean.[377]

VI. The Future of FCPA Enforcement and Conclusion

It is difficult to predict what changes will come to FCPA enforcement in the coming years. The purpose of this article is to demonstrate inconsistencies in current

[376] For example, a major accounting firm concluded a recent expansive international ethics survey by stating: "Promoting ethical behavior in your organization — making a difference — is not just about staying on the right side of the law. It's good business." *See* 10th Fraud Survey, *supra* note 317, at 21.

[377] Some have questioned whether the recent increase in FCPA enforcements is due, in part, to the government's income potential. *See* Mike Koehler, *Is the FCPA a Government Cash Cow?*, FCPA PROFESSOR (May 21, 2010), *http://fcpaprofessor.blogspot.com/2010/05/is-fcpa-government-cash-cow.html* (discussing recent DOJ and SEC personnel as stating the FCPA was "lucrative" and "profitable"). Furthermore, some have questioned the motives of current FCPA enforcement in light of personal incentives for the DOJ attorneys who prosecute these cases. *See* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business And Enriches Insiders*, FORBES, May 24, 2010, *available at http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket_print.html* (pointing out that DOJ attorneys are "creating a lucrative industry--FCPA defense work--in which they will someday be prime candidates for the cushy assignments"). *Accord*, Ashby Jones, *Is the FCPA Just a Full-Employment Act for the Private Bar?*, WALL ST. J., May 7, 2010, http://blogs.wsj.com/law/2010/05/07/the-fcpa-little-more-than-a-full-employment-act-for-the-private-bar/.

FCPA enforcement and suggest some changes that could remedy those shortcomings. Whether some of the suggestions set forth above and other ideas for making FCPA enforcement more proportionate and fair will be implemented remains to be seen. Given the enormous settlements in recent years and increased investigations, FCPA enforcement will likely continue to be refined slowly rather than with sweeping reform.[378] If recent reforms are any prediction, future reform will probably come as other countries and organizations implement more focused approaches at combating corruption and the United States follows by adopting those approaches.[379] In the meantime, companies facing potential FCPA investigation and prosecution will only be able to rely on current and past trends to make business predictions.

It is also difficult to predict the number of investigations in which enforcement agencies will be involved in the future. Currently, the number of cases that are under investigation at the DOJ represents a dramatic increase over previous years.[380] Nevertheless, there may not have been a corresponding increase in staff to handle those cases.[381] This problem is not new; many began pointing out years ago that the DOJ

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[378] However, dramatic reform may result from new legislation regarding whistleblowers. *See* Bethany L. Hengsbach, *Proposed Whistleblower Provision Could Dramatically Increase FCPA Risk*, Sheppard Mullin Richter & Hampton LLP, May 19, 2010, http://www.governmentcontractslawblog.com/2010/05/articles/fcpa/proposed-whistleblower-provision-could-dramatically-increase-fcpa-risk/?utm_medium=email&utm_source=Emailmarketingsoftware&utm_content=44498351&utm_campaign=GovernmentContractsLawBlog&utm_term=ProposedWhistleblowerProvisionCouldDramaticallyIncreaseFCPARisk; *see also* Mike Koehler, *The Financial Reform Bill's Whistleblower Provisions And The FCPA*, FCPA PROFESSOR (July 20, 2010), http://fcpaprofessor.blogspot.com/search/label/Whistleblowers (discussing the scope and potential impact of new whistleblower provisions on the FCPA).

[379] *See* Fox, *supra* note 217 (noting that change to the FCPA, in terms of grease payments, often comes on a case-by-case basis).

[380] *See, e.g.,* Leary, *supra* note 44.

[381] Richard L. Cassin, *Feds Call Time Out*, THE FCPA BLOG (May 20, 2010), http://www.fcpablog.com/blog/2010/5/20/feds-call-time-out.html (proposing that the number of FCPA settlements may be at a lull due to the DOJ's inability to handle the influx of cases from recent years). *But see* Ed Rial, *Beyond Reproach: Why Compliance with Anti-Corruption Laws is Increasingly Critical for Multinational Businesses*, DELOITTE REV. Issue 4 (2009) (contending that "U.S. authorities have significantly increased staff dedicated to FCPA enforcement").

lacked the resources to enforce and investigate the small number of cases it then faced. This disparity has caused one author to conclude, "DOJ and SEC have only reached the low hanging fruit of this deeply rooted problem."[382] Thus, the volume of investigations currently underway may be more than enforcement agencies can promptly handle. For example, during the first half of 2010 there were very few FCPA settlements. Some speculate that this either represents a shift in enforcement policy or reveals that the DOJ has overextended itself.[383] However, during the same time period the DOJ conducted the largest FCPA sting operation to date against law enforcement and military equipment manufacturers and vendors at the Shot-Show convention.[384] The Shot-Show arrests may be a signal from the DOJ that FCPA compliance and investigations are no longer limited to large companies.[385] Whether FCPA enforcement will continue to focus on individuals in such a fashion remains to be seen.[386]

A. Likely Future Changes to FCPA Enforcement

While the rate of FCPA enforcement against individuals remains to be seen, other changes to the FCPA appear likely. For example, the only current exception to the FCPA is what is known as facilitation payments.[387] A facilitation payment is one where a fee is paid to expedite services that would have been completed even without the payment.[388] Because many other jurisdictions do not allow facilitation payments, many multinational corporations avoid the practice altogether so as not to create any confusion among

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[382] Vega, *supra* note 191, at 441.
[383] *See* Cassin, *supra* note 381.
[384] DOJ Shot-Show Statement, *supra* note 285.
[385] *See* Bethany L. Hengsbach, *Emerging FCPA Enforcement Strategy* 1, LAW360, Feb. 16, 2010.
[386] *See,* Shearman & Sterling LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977* (March 4, 2010*),* www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf (discussing the recent increase in actions against individuals).
[387] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
[388] *See* Lay-Person's Guide, *supra* note 9, at 4.

employees regarding where such payments are acceptable.[389] The recent British anti-bribery act appears to have captured popular international sentiment regarding shunning facilitation payments. Companies can reasonably expect facilitation payments to be completely done away with in the future.

Given the increase in international efforts to curb corruption, there is also a strong possibility that these efforts will become more uniform. The success of the FCPA and SOX in shaping corporate behavior, for example, has led some to suggest that those standards should be implemented more broadly as uniform international standards.[390] The OECD Convention also serves as another example of the push towards anti-corruption uniformity. As more countries become members, their laws will also become much more similar. One benefit to uniformity is that as more countries adopt similar robust anti-bribery regulations, transaction costs will be carried by more corporations and the playing field will become more level.[391]

B. Whether the FCPA Will Continue to Be Needed in Light of Other Anti-Corruption Laws

With the spread of anti-corruption measures around the globe, it might be asked whether the FCPA will become obsolete or unnecessary. The Justice Department has made it clear that it perceives the FCPA and similar anti-corruption endeavors as a means

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[389] *See* David M. Howard & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?* 4, Dechert LLP, April 2009, http://www.dechert.com/practiceareas/practiceareas.jsp?pg=lawyer_publications_detail&pa_id=36&id=11878 (noting the "practical difficulties of implementing policies that allow for facilitating payments but not other forms of bribery" all but make such policies nonexistent).

[390] *See* Timothy W. Schmidt, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120 (2009).

[391] OECD WORKING GROUP ON BRIBERY, Anti-Corruption: OECD Welcomes Slovak Move to Make Firms Liable for Foreign Bribery, June 26, 2010, http://www.oecd.org/document/33/0,3343,en_2649_34855_45521313_1_1_1_37447,00.html (citing OECD Secretary-General Angel Gurría's comments that more international anti-corruption measures "create a level playing field for firms competing internationally").

of leveling the playing field for American businesses overseas.[392] In addition, the DOJ sees the FCPA as a foreign policy tool. The argument is that by setting an ethical standard for businesses with American ties, the United States can preserve the "fair functioning of international markets."[393] Concerns about foreign policy and international perception do not appear unwarranted. For example, the United Kingdom's current anti-bribery law resulted as an "indirect consequence of the BAE case and the damage done to the UK's international reputation by the government's handling of it."[394] With these concerns in mind, the DOJ will likely continue its increased enforcement of the FCPA.

C. Conclusion

Nearly thirty years ago genuine values-based concerns about how corporations conducted business led Congress to enact the FCPA.[395] Just as in that era, the heart of the fight against public corruption today lies in concerns about equality. Despite promises that voluntary disclosure will result in "meaningful credit" and that cooperation will result in "a meaningful benefit" to companies, the published cases studied in this article tend to show that this is simply not the case.[396] Unfortunately, recent enforcement of the FCPA has often resulted in apparent unfair and inconsistent results for companies trying to come clean. In order to achieve the equal playing field that the FCPA was set out to achieve, seemingly disproportionate fines and a lack of consistent and clear guidance

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[392] George Anthony "Tony" Smith, Weinberg Wheeler Hudgins Gunn & Dial LLC, *The Foreign Corrupt Practices Act: Leveling the Foreign Playing Field*, July 6, 2009, http://www.wwhgd.com/assets/attachments/Foreign_Corrupt_Practices.pdf (citing the DOJ efforts to level the playing field).
[393] *Id.*
[394] Afua Hirsch, *New Bribery Law Puts Overseas Payments Under Scrutiny*, GARDIAN (Apr. 2010), *available at* http://www.guardian.co.uk/uk/2010/apr/11/law-bribery-bae-overseas.
[395] *See, e.g.,* Kenneth W. Abbott, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141 (2002).
[396] Breuer Pharmaceutical Speech, *supra* note 80, at 3.

must give way to an enforcement regime that is predictable and completely transparent in its expectations.