THE DILEMMA OF FCPA SELF-REPORTING

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INTRODUCTION

Professor Peter Reilly examines the difficult strategic decision a company faces of whether to disclose voluntarily to the government a potential violation of the Foreign Corrupt Practices Act (FCPA),[1] amidst the backdrop of the government's heightened focus on FCPA enforcement.[2] His excellent article demonstrates how the government enjoys wide flexibility and discretion in carrying out its enforcement activities while providing insufficient direction to companies regarding how to stay within the bounds of the complex statute.[3] The article justifiably criticizes from a business perspective the widely held belief that self-reporting to the government a potential FCPA violation is always in a company's best interests, and it makes a significant contribution to the literature by exploring the interconnected relationships among self-disclosure, accountability, and deterrence under the FCPA.[4]

The following responsive essay discusses new developments that change the contours of the company's decision-making calculus of whether to self-report. It illuminates how a recent policy change adopted by the U.S. Securities and Exchange Commission (SEC) and a policy

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1. Peter R. Reilly, *Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683 (2015).

2. Elkan Abramowitz & Jonathan Sack, *Dilemma of Self-Reporting: The FCPA Experience*, 251 N.Y.L.J. (Jan. 8, 2014), http://www.maglaw.com/publications/articles/00356/_res/id=Attachments/index=0/Dilemma%20of%20Self-Reporting_The%20FCPA%20Experience.pdf.

3. *See* Reilly, *supra* note 1, at 1683. It is a procedurally atypical position for corporate counsel, as counsel must effectively advise their clients on whether to self-report to the government the potential wrongful conduct, not on how best to combat charges in court. David Maria, *We Found Potential FCPA Violations: Do We Self-Report?*, IN-HOUSE DEF. Q. 32 (2015), http://www.shb.com/~/media/files/news/2015/wefoundpotentialfcpaviolationsdoweselfreport.pdf?la=en (describing the resolution of FCPA cases). Interpreting the FCPA brings challenges to academics and practitioners, as scant case law exists in this unique area of criminal law, with most FCPA cases settling. Prosecutors typically resolve FCPA cases by settlement, through non-prosecution agreements, deferred prosecution agreements, or felony pleas. *See id.*; Reilly, *supra* note 1, at 1713.

4. *See* Reilly, *supra* note 1, at 1685–86. A company's analysis of the merits of self-reporting is generally fraught with the frustrations of imperfect information. For any company that may voluntarily disclose a violation, how can it gauge *a priori* the penalties it may likely face if it chooses not disclose the violation that the government may nevertheless discover, or whether the government would have detected the wrongdoing at all? Perfect information in this arena does not exist.

proposal under consideration within the U.S. Department of Justice (DOJ) may alter the self-report decision-making process in the private sector. It also provides additional insight into how other dynamic factors, such as the SEC whistleblower program, are growing in influence and may sway a company's willingness to self-disclose a violation.

I. THE GOVERNMENT CONTINUES ITS CARROT AND STICK APPROACH TO VOLUNTARY SELF-DISCLOSURE

Corporate transnational bribery endures to wreak havoc on economies across the world and shows little signs of abatement.[5] The U.S. government's reactive efforts to bolster FCPA enforcement efforts have in turn yielded "a sea change in enhancing the focus on FCPA compliance issues."[6] Many companies in turn are routinely assessing the effectiveness of their anti-bribery policies, procedures, and programs to ensure compliance with the statute. Their efforts to understand how the government decides to pursue and resolve enforcement actions are met with frustration, due to a lack of transparency and guidance from the government for the commercial sector in these areas. The underlying issue of inadequate government guidance creates decision-making dilemmas for a wide spectrum of businesses assessing their actions, not just the mismanaged, rogue company that may be committing wrongdoing. As SEC chair Mary Jo White has acknowledged, "[e]ven in the best run companies with strong boards, the right tone at the top and robust compliance programs, wrongdoing will almost inevitably occur from time-to-time."[7]

Seemingly in response to these issues, the SEC has reportedly implemented a new internal policy and the DOJ is reportedly considering a draft internal policy, both pertaining to government treatment of voluntary disclosure efforts. The following sections discuss these policies and their implications.

A. *Recent SEC Policy Change: Self-Reporting as Prerequisite for DPA and NPA Eligibility*

Andrew Ceresney, the head of enforcement at the SEC, recently announced a new policy for SEC-regulated companies that addresses the effects of a company's violation non-disclosure. Under the new policy,

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

6. Andrew Ceresney, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 17, 2015), https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

7. Mary Jo White, *A Few Things Directors Should Know About the SEC*, Speech at the Twentieth Annual Stanford Directors' College (June 23, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370542148863#.U6m3C6h2eot.

regulated companies must self-report potential FCPA violations to the SEC in order to qualify for a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA); any company that does not self-report will not be eligible for a DPA or NPA.[8] He has clarified that while self-reporting is a threshold prerequisite for DPA and NPA consideration, the offer of such a favorable disposition in a particular case is not guaranteed.[9] Thus a company could self-report an FCPA violation, but the SEC could in its discretion nevertheless decide not to offer a DPA or NPA to that company.[10]

Ceresney explains the motivation behind this policy change: "I am hopeful that this condition on the decision to recommend a DPA or NPA will further incentivize firms to promptly report FCPA misconduct to the SEC and further emphasize the benefits that come with self-reporting and cooperation."[11] It is unclear how the new SEC policy will function in gray-area cases, such as where a company first becomes aware of an alleged violation when the SEC brings the matter to the company's attention, or where the SEC notifies a company of an alleged violation that the company had been actively investigating but had not yet substantiated.[12] In such cases, the company would be ineligible for a DPA or NPA under a bright-line, no-exceptions application of the policy, despite any other efforts by the company to remediate, self-police and cooperate.[13]

B. *A New DOJ Policy Proposal: Moving Towards an Amnesty Program?*

Amidst private sector worries regarding the unknown consequences

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8. *See* Ceresney, *supra* note 6 ("Towards that end, the Enforcement Division has determined that going forward, a company must self-report misconduct in order to be eligible for the Division to recommend a DPA or NPA to the Commission in an FCPA case."); *see also* Sarah N. Lynch, *SEC Urges Companies to Self-report Possible FCPA Misconduct*, REUTERS (Nov. 17, 2015), http://www.reuters.com/article/us-sec-fcpa-companies-idUSKCN0T62VG20151117. Karen N. Brockmeyer, Chief of the SEC's FCPA Unit, reiterated the existence of this new policy at the 2016 SEC Speaks conference. *See* Vedder Price, Highlights From SEC Speaks 2016: Enforcement and Litigation Trends (Feb. 22, 2016), http://www.vedderprice.com/highlights-from-sec-speaks-2016 ("Importantly, the SEC reiterated its position—stated previously in November 2015—that self-reporting is a prerequisite to DPAs and NPAs.").

9. Ceresney, supra note 6 ("Determinations of how much credit to give an entity for cooperation, including whether to take the extraordinary step of entering into a DPA or NPA, are made by evaluating the broad factors set out by the [SEC] in the Seaboard report.").

10. *Id.*

11. *Id.*

12. *See* Caryn Trombino, *SEC Enforcement: Self-Reporting is Prerequisite to Deferred and Non Prosecution Agreements in FCPA*, WHITE COLLAR BRIEFLY (Nov. 18, 2015), https://www.whitecollarbriefly.com/2015/11/18/sec-enforcement-self-reporting-is-prerequisite-to-deferred-and-non-prosecution-agreements-in-fcpa.

13. *Id*.

of self-reporting, there grows a long-standing desire for a FCPA amnesty program similar to the previous amnesty program that followed adoption of the FCPA in 1977.[14] The DOJ has historically opposed such a program by arguing that it would allow companies to "get a pass" unfairly for their misconduct.[15] Testimony from Deputy Assistant Attorney General Greg Andres before a Senate Judiciary Committee panel in 2010 summarizes this view: "We do not believe that [an FCPA] immunity [program] is appropriate, just as we do not believe that a bank robber could get immunity for disclosing that he robbed a bank."[16]

The Washington Post recently reported that the DOJ is evaluating an internal policy that would function like an FCPA amnesty program. The draft policy would give qualifying companies a "free pass" if they self-report FCPA violations (including identifying culpable employees): "[t]he proposed policy strongly recommends that prosecutors should decline to bring charges against a company that voluntarily discloses violations of the FCPA and cooperates with the government in its investigation — including by furnishing information on employees who may have violated the law."[17] The draft policy contemplates that a declination could be accompanied by a penalty that would function as a disgorgement of profits.[18]

It remains unclear whether the DOJ is likely to adopt this draft policy. Some DOJ officials apparently view the draft policy as letting companies

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14. *See* Abramowitz & Sack, *supra* note 2; JED S. RAKOFF AND JONATHAN S. SACK, FED. CORP. SENTENCING: COMPLIANCE AND MITIGATION 5-10–5-12 (Rev. Ed. 2007); *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the Comm. on the Judiciary*, 111th Cong. 17 (2010) (testimony of Michael Volkov, Partner, Mayer Brown, LLP), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

15. Abramowitz & Sack, *supra* note 2.

16. Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Before the Subcommittee on Crime and Drugs, Senate Committee on the Judiciary (Nov. 30, 2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf. Hilary Russ, *DOJ Says No to Amnesty Program for FCPA Cases*, LAW360, (Nov. 30, 2010), http://www.law360.com/articles/212054/doj-says-no-to-amnesty-program-for-fcpa-cases.

17. Ellen Nakashima, *Justice Department Could Give Firms a Pass on Foreign Bribery if They Confess*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/world/national-security/justice-department-weighs-changes-in-how-it-pursues-foreign-bribery-cases/2015/11/10/95ef0322-87be-11e5-9a07-453018f9a0ec_story.html.

18. *Id*.; Scott Maberry, Lisa Mays & MaryJeanette Dee, *When Voluntary Self-Disclosure Isn't So Voluntary: SEC Says Self-Disclose or Forfeit Non-Prosecution and Deferred Prosecution*, GLOBAL TRADE L. BLOG (Jan. 6, 2016), http://www.globaltradelawblog.com/2016/01/06/when-voluntary-self-disclosure-isnt-so-voluntary-sec-says-self-disclose-or-forfeit-non-prosecution-and-deferred-prosecution/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original ("[T]he DOJ reportedly recently proposed a policy that strongly recommends declinations of criminal prosecution in certain instances of self-disclosure, possibly accompanied by forfeiture of profits from misconduct.").

"off the hook too easily."[19] Moreover, a sticking point appears to be a fairness concern that a company could engage in egregious misconduct, then voluntarily disclose it to the government, cooperate with an investigation, take remedial steps, and take advantage of the amnesty program by receiving a declination.[20] As one source familiar with the draft policy opined, "It means that self-reporting and cooperation would be a ticket out of criminal liability for a company, even if the reported misconduct is serious and substantial."[21]

II. GREATER INCENTIVES FOR COMPANIES TO REPORT WRONGDOING

The new SEC and proposed DOJ policies reflect a government effort, through a stick and carrot approach, respectively, to motivate companies to investigate and report their FCPA wrongdoings.[22] That cooperation is essential to the effectiveness of any government enforcement regime.[23] With the adoption of such policies, the agencies are moving towards more transparency and providing more guidance in how they may proceed to resolve violations.

An FCPA self-report leniency policy could bring significant benefits to the business community and larger society.[24] If adopted, the DOJ policy could motivate companies to self-police more actively their internal operations; it could also reduce the level of FCPA anxiety in the business sector.[25] Moreover, offering the incentive of a NPA could result

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19. Amy Chang, *New DOJ Guidance on Self-Disclosure in FCPA Cases?*, WHITE COLLAR BRIEFLY (Nov. 19, 2015), https://www.whitecollarbriefly.com/2015/11/19/new-doj-guidance-on-self-disclosure-in-fcpa-cases/.

20. Nakashima, *supra* note 17.

21. *Id*.

22. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U.L. REV. 687, 691 (1997) ("[T]he firm must be induced to take direct action to deter agents from committing wrongs, including measures to prevent misconduct and policing measures to detect and sanction it.").

23. *See* Larry D. Thompson, *In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 199, 200 (2014) (arguing that companies need incentives to engage in self-investigation and self-reporting of any bribery they suspect or uncover).

24. *See* Stephen A. Fraser, Note, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. 1009, 1014 (2012) (arguing that "an FCPA amnesty program would most successfully secure the economic and noneconomic interests of the DOJ and cooperating companies.").

25. *See* Geoffrey R. Garinther et al., *Amnesty Under the FCPA?: A Senate Spotlight Focuses Attention on Rising Concerns Regarding the FCPA's Explosive Growth*, FCPA AND ANTI-CORRUPTION NEWS E-LERT (Dec. 2010), https://www.venable.com/files/Publication/54884c89-a5e0-47d5-8464-bfa38f6d0879/Presentation/PublicationAttachment/f3822318-f64e-4adb-bb01-cb4204c52de2/Amnesty_Under_the_FCPA.pdf ("[A] clearly defined amnesty program would alter the landscape, alleviate the growing level of anxiety in the business community, and incentivize effective compliance programs.").

in better overall disclosures and compliance.[26] Hence, the adoption of a self-report leniency program could communicate clearly the benefits of voluntary disclosure, boost agency transparency, motivate companies to strengthen their compliance programs and expenditures, and lower transnational bribery rates, all to the benefit of both the business community and the general public. In response to any criticism that the policy would be too lenient on companies that may have engaged in egregious wrongdoing, the DOJ could place appropriate conditions on the policy to prevent misuse. For instance, leniency could be offered only to those companies with adequate compliance programs, record-keeping, and internal controls, and that lack a pattern of repeat offenses.

The new SEC policy presents to companies a clearer understanding of the concrete and predictable risks of non-disclosure. It sets a clear eligibility standard for companies that conduct adequate investigations and self-report the results: if you want to be considered for a DPA or NPA, you must self-disclose the detected violation.[27] As an offer of a favorable disposition in a particular case is not guaranteed for companies that self-disclose under the current policy, the SEC could boost the effectiveness of the policy by providing more detailed guidance on how the policy will operate in various contexts and on the specific conditions that companies must meet in order to be reasonably assured that they will receive a DPA or NPA offer upon self-reporting a violation.

For companies that weigh the odds and decide not to self-disclose a violation, the odds that government will discover their wrongdoing are growing, particularly due to the strength of the SEC's whistleblower program. The SEC received roughly 4,000 tips in 2015, with numbers increasing annually.[28] This program's success presents a clear risk to companies gambling that the government does not discover the misconduct. As Andrew Ceresney recently explained,

> [The] risk of suffering adverse consequences from a failure to self-report is particularly acute in light of the continued success and expansion of our whistleblower program . . . . The SEC's whistleblower program has changed the calculus for companies considering whether to disclose misconduct to us, knowing that a whistleblower is likely to come forward. Companies that choose not to self-report are thus taking a huge gamble because if we learn of the misconduct

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26. *See* Stephen Dockery, *U.S. Justice Dep't Borrows from Academics for Policy Shift*, WALL ST. J. (Nov. 12, 2015), http://blogs.wsj.com/riskandcompliance/2015/11/12/u-s-justice-dept-borrows-from-academics-for-policy-shift/tab/print/.

27. *See* Maberry et al., *supra* note 18.

28. *See* Perkins Coie LLP, *SEC Speaks 2016: Enforcement Agenda Goes Beyond Disclosure* (Feb. 22, 2016), https://www.perkinscoie.com/en/news-insights/sec-speaks-2016-enforcement-agenda-goes-beyond-disclosure.html.

> through other means, including through a whistleblower, the result will be far worse.[29]

Certain companies have no realistic option of whether to self-report. Under a FINRA Rule requiring members to report certain findings of wrongdoing, companies regulated by FINRA must self-report FCPA misconduct.[30] Moreover, a public company that discovers that a potential violation would constitute material information must disclose to the government such violation.[31]

Even if a company decides to self-report, it must weigh how much information to provide. With penalties for companies that hold back material information, adequate self-disclosure essentially involves its complete and candid disclosure on a matter.[32] It appears by all accounts that self-disclosure should be comprehensive and cooperative in order to be fully rewarded.[33]

CONCLUSION

Professor Reilly's article makes key contributions toward conceptualizing the benefits and risks of self-reporting FCPA violations and the importance of self-reporting in combatting transnational bribery. The recent interagency initiatives to facilitate self-reporting are a starting point to remedy the problematic features of the government's FCPA enforcement approach that Professor Reilly outlines. More public-private sector cooperative work is needed so that companies can more fully understand the clear and concrete advantages and disadvantages in self-reporting and the government can enforce the FCPA more effectively.

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29. Andrew Ceresney, Director, SEC Division of Enforcement, Remarks at 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370543493598.

30. *See* FIN. INDUS. REG. AUTH. R. 4530(b) ("Each member shall promptly report to FINRA, but in any event not later than 30 calendar days, after the member has concluded or reasonably should have concluded that an associated person of the member or the member itself has violated any securities-, insurance-, commodities-, financial- or investment-related laws, rules, regulations or standards of conduct of any domestic or foreign regulatory body or self-regulatory organization.").

31. *See*, *e.g.*, White, *supra* note 7 (discussing disclosure requirements).

32. *Id.* ("Holding back information, perhaps out of a desire to keep options open as the investigation develops, can, in fact, foreclose the opportunity for cooperation credit."). The responsibility generally lies with the board of directors to ensure that management and corporate counsel provide such cooperation with government agencies. *Id*.

33. *See* PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, DOJ AND SEC PRESSURE TEST ACCURACY OF SELF-REPORTING AND COOPERATION IN PTC FCPA SETTLEMENT 6 (2016), https://www.paulweiss.com/media/3374177/29feb16fcpaalert.pdf.