

ON MAXIMIZING DETERRENCE PER DOLLAR

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INTRODUCTION

Professor Peter Reilly addresses concerns¹ that practitioners in this space have privately and publicly debated for years. What exactly is cooperation credit? Can we quantify it? The government promises that self-reporting is in our self-interest, but the government's interest in saying so is obvious enough. What evidence can the government provide? Having participated in these conversations myself, I can attest to the prevalence of outside counsel advising companies to self-report, all the while aware of their recommendation's uncertain basis. Companies often accept the advice begrudgingly, and understandably so.

The difficulty of measuring this credit is somewhat ironic, given the government's dependence on cooperation. As this essay will show, our modern enforcement regime, which has four components—the internal or independent investigation, voluntary disclosure, cooperation credit, and a negotiated settlement²—is the government's method of maximizing general deterrence with finite resources. Ensuring that defendant companies see sufficient incentive to self-report is therefore critical to advancing the policy goals that inhere in anti-bribery enforcement.

Hence the value of Professor Reilly's critique. He argues that the government “must provide greater transparency regarding *specific* and *calculable* benefits that can be achieved through self-reporting and cooperation”³ in FCPA settlements. And indeed, it may be powerful evidence of his argument's force that very recently, the government has taken measures to do that very thing. Put another way, Professor Reilly's is an idea whose time has come.

This Essay provides both background and foreground to Professor Reilly's article. It first explains the role of self-reporting and cooperation in anti-bribery enforcement, suggesting that the government is essentially seeking to adjust both the numerator and denominator of a ratio that might be called Deterrence Per Dollar. This Essay will then describe and endorse Professor Reilly's critique of FCPA enforcement,

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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, 1683 (2015).

2. Andy Spalding, *Andy Spalding on Brazil's Third Pillar: The Clean Companies Act*, THE FCPA BLOG (July 25, 2016), <http://www.fcablog.com/blog/2016/7/25/andy-spalding-on-brazils-third-pillar-the-clean-companies-ac.html>.

3. Reilly, *supra* note 1, at 1683.

and show how the government seems to have recently responded to that critique with a flurry of important reforms. Finally, I briefly discuss the prospects of adopting additional reforms, and conclude by sounding a hopeful note that these would likewise command Professor Reilly's support.

I. WHY SELF-REPORTING?

The government's incentive for recommending self-reporting may be underappreciated. The more superficial explanation holds that the government is trying to get someone else to do its work: Rather than conducting its own investigation, it can just pressure the defendant to do so. This way of thinking is true as far as it goes, but the real reason runs deeper.

An enforcement agency of course begins with a limited budget. The agency's ultimate aim is general deterrence—preventing would-be offenders from committing a similar crime. Accordingly, the government is trying to get maximal deterrence on a constrained budget. It seeks the greatest deterrence “bang for the buck.” This figure might be best expressed as a ratio: deterrence per dollar (DPD). An enforcement agency seeks to maximize this ratio, getting as much deterrence as possible for the dollars it has available.

Efforts to increase deterrence can then be understood as tinkering with either half of this ratio. The government may seek to increase the numerator, while keeping the denominator constant. That is, it might find ways to improve general deterrence without increasing its budget, rendering enforcement more efficient. Or, it may on occasion find its denominator increased, in which case it has an increased budget. With an increased denominator comes an expectation that the additional enforcement efforts this money will buy will at least keep the ratio constant. Each of these—increasing deterrence either with or without increasing the budget—will happen from time to time in an enforcement agency's history. But irrespective of the denominator (the budget's size), the government seeks to maximize DPD.

In the FCPA space, if not in white-collar enforcement generally, the government has relied on two principal methods to maximize DPD. The first is the four-part enforcement regime referenced above.⁴ The government expects a corporate defendant to pay for its own investigation, voluntarily disclose the findings, and cooperate with any further investigation. To incentivize this behavior, the government offers a reduced sentence (the cooperation credit) which it can guarantee by promising a negotiated settlement in the form of a deferred or non-prosecution agreement (hence avoiding the costs and unpredictability of

4. See *supra* note 2 and accompanying text.

trial). The defendant company will have financed an investigation—either internal or independent—and turn over its findings to the enforcement agency. The government will typically investigate further—and expect the defendant to cooperate with that investigation—but the government will rely heavily on the company’s report.⁵ This procedure was formalized in the U.S. Sentencing Commission’s adoption of the Organizational Guidelines in 1991, and, as Professor Reilly chronicles, through a subsequent series of memos and policy statements by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC).⁶

If cooperation credit means anything at all, it means that the government has reduced the penalty and, so the critique goes, reduced the penalty’s deterrent value. But the government has to believe that the increased deterrence gained from the defendant’s investigation and self-reporting is greater than the lost deterrence of the cooperation credit. That is, self-disclosure is, or is assumed to be, a deterrence net gain. Because the government is spared the resource-intensive investigation and prosecution, self-reporting spreads the government’s limited resources among many more defendants than would conventional prosecution.

But there is a second, and perhaps less appreciated, instrument in the government’s arsenal for increasing deterrence: incentivizing the adoption of compliance programs. Compliance is variously defined as an “alignment between the[] organization’s behavior and professed values”⁷ or “the processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms—which can include either the requirements of laws or regulations or the internal rules of the organization.”⁸ Compliance as a matter of practice has erupted in the last two decades or so, leading Sean Griffith to announce that “American corporations have witnessed the dawn of a new era of compliance.”⁹

Compliance might be understood as a kind of preemptive deterrence.¹⁰ Unlike the above-described four-part enforcement regime,

5. See Reilly, *supra* note 1, at 1723.

6. See Reilly, *supra* note 1, at 1692–1700.

7. Matt Kelly, Nicole Sandford, & Thomas Rollauer, *2014 Compliance Trends Survey*, IN FOCUS, 1, 7 (2014), deloitte.wsj.com/riskandcompliance/files/2014/06/Compliance_Week_Compliance_Survey_20141.pdf.

8. GEOFFREY P. MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 3 (2014).

9. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016).

10. See, e.g., Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in *PROSECUTORS IN THE BOARDROOM*:

which is of course inherently punitive, compliance is preventative. The government has devised multiple ways for incentivizing companies to adopt these preventative programs. The first, in 1991, was the adoption of the U.S. Sentencing Commission's Sentencing Guidelines for Organizations.¹¹ The Organizational Guidelines included both a penalty mitigation for the implementation of an effective compliance program and an increase in criminal penalties generally (thus augmenting the value of the penalty mitigation).¹² Then in 1999 came the DOJ's famous Holder Memorandum, which committed prosecutors to considering the "existence and adequacy of the corporation's compliance program"¹³ in deciding whether to indict corporations. Shortly thereafter, and in the wake of the accounting scandals of the early 2000s, the DOJ began relying heavily on deferred prosecution and non-prosecution agreements, which often require new compliance procedures of the defendant corporation.¹⁴ Details of these programs, when provided in the settlement documents, become an additional medium for articulating the government's views on effective compliance. Finally, the government will occasionally publish guidance documents such as the DOJ's and SEC's *Resource Guide to the Foreign Corrupt Practices Act*.¹⁵

We have learned in recent years, however, that the U.S. commitment to promoting compliance has its limits. Just as Professor Reilly notes, a groundswell of commentary began to emerge around 2005 that advocated for the formal statutory adoption of a compliance defense: Where the defendant can demonstrate that it had in place, at the time of the violation, an up-to-standard compliance program, and that the defendant followed that program in good faith, the defendant would not be liable for the misconduct of employees acting in contravention of that compliance program.¹⁶ This movement was buttressed by the United Kingdom's adoption of a limited compliance defense as part of its Bribery Act of 2010.¹⁷ This movement's principal lobby group

USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 71 (Anthony S. Barkow & Rachel E. Barkow eds., N.Y.U. Press 2011).

11. Griffith, *supra* note 9, at 2084 (citing Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 839 (1994)).

12. *See id.* at 2084–85.

13. Memorandum from Deputy Attorney Gen. to All Component Heads & U.S. Attorneys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.

14. *See* Griffith, *supra* note 9, at 2088.

15. SEC & DOJ, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 12, 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

16. *See* Reilly, *supra* note 1, at 1728 n.244.

17. Bribery Act 2010, c. 7, § 2 (UK), http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

would become the U.S. Chamber of Commerce, which authored a white paper and began an aggressive lobbying and PR campaign.¹⁸ Though the DOJ resisted the proposal,¹⁹ current events of the time would ultimately wield the sword that felled the Chamber's movement. In 2012, the *New York Times* ran an expose that detailed an alleged widespread bribery scheme at Wal-Mart in Mexico.²⁰ The story became a media feeding frenzy, effectively ending (or at least stalling indefinitely) any effort to enact a law that could be construed as weakening the FCPA.

There will be no statutory compliance defense to the FCPA in the foreseeable future. But the effort to increase incentives to self-report is alive and well, both among commentators pleading for reforms—not least of which is Professor Reilly himself—and the government, which recently demonstrated that it has been paying attention.

II. PROFESSOR REILLY SPEAKS; THE DOJ LISTENS

Professor Reilly asks two questions. First, what is a company's present incentive to self-report? And if that incentive is weak—which he most assuredly believes—what can the government do to strengthen it? He concludes what many companies have believed for years, whether their outside counsel concurred or not: that in many circumstances it may be in a company's self-interest to not self-report; let the government detect a crime the good old-fashioned way. But as a matter of policy, Professor Reilly finds this state of affairs unsatisfactory. Accordingly, he urges the government to make the incentives to self-report stronger, more specific, and more reliable. He, too, wants the government to maximize its DPD.

Professor Reilly makes the case anew by comparing a number of big-ticket FCPA settlements, some of which involved self-reporting while others did not.²¹ His review of these cases again confirms what Stephen Choi and Kevin Davis found in one 2011 study,²² and Bruce

18. Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, 1, 7, 11–14 (2011), www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpc.pdf.

19. *The Foreign Corrupt Practices Panel at the 2012 National Lawyers Convention*, 51 AM. CRIM. L. REV. 433, 447–48 (2014).

20. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0.

21. See Reilly, *supra* note 1, at 1700–1710.

22. Reilly, *supra* note 1, at 1709–10 (citing Stephen J. Choi & Kevin Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 20 (Public Law and Legal Theory Research Paper Series, Working Paper No. 12-35, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487).

Hinchey found in another:²³ the absence of any basis in the published FCPA settlements for the claim that penalties are in fact reduced when defendants voluntarily disclose.²⁴ Professor Reilly therefore makes a plea for additional and more specific incentives to self-disclose. As it turns out, the DOJ seems to have heard him.

In the last year, the DOJ has taken a series of dramatic steps to increase deterrence. In some cases, it has adopted new methods, seeking to increase the DPD's numerator. In others it has seen its budget grow considerably, thus increasing the denominator (with an expectation that the numerator will likewise increase proportionally).²⁵ But will these measures address Professor Reilly's concern, and significantly increase self-reporting?

The first occurred in September 2015 when the Deputy Attorney General released a memo, now known as the "Yates Memo," that announced a dramatic new focus on individual liability for corporate wrongdoing.²⁶ With a declared intention to "fully leverage its resources,"²⁷ or in other words, maximize DPD, the DOJ announced six changes to policy,²⁸ each of which was incorporated into the U.S. Attorneys Manual.²⁹ First, a company will not receive cooperation credit unless it provides to the DOJ "all relevant facts relating to the individuals responsible for the misconduct."³⁰ The company must identify all individuals regardless of their position in the company and provide all relevant information.³¹ Second, both criminal and civil corporate investigations should focus on individuals from the start of the investigation.³² Third, the attorneys handling the civil and criminal investigations should communicate with each other regularly.³³ In the FCPA context, this would typically mean the DOJ and SEC attorneys. Fourth, corporate resolutions—meaning deferred prosecution and non-prosecution agreements—will not provide protection from liability for

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

24. *Id.* at 1703, 1709.

25. *DOJ Asks for \$1.1 Billion Increase for Enforcement Components in FY 2017 Budget*, FISHER BROYLES, <https://www.fisherbroyles.com/doj-asks-for-1-1-billion-increase-for-enforcement-components-in-fy-2017-budget/> (last visited July 31, 2016).

26. Memorandum from Sally Quillian Yates, Deputy Attorney Gen. to the Assistant Attorney General, Antitrust Div., et al., (Sept. 9, 2015), www.justice.gov/dag/file/769036/download.

27. *Id.* at 2.

28. *Id.*

29. *Id.* at 3.

30. *Id.* at 2.

31. *Id.* at 3.

32. *Id.* at 4.

33. *Id.*

individuals within the company.³⁴ Fifth, the corporate resolutions should not occur without a “clear plan” to resolve individual cases before the statute of limitations expires.³⁵ Finally, civil lawyers should decide whether to prosecute individuals based on factors other than an ability to pay a penalty.³⁶

The Yates Memo attempts to increase DPD’s numerator. That is, the government apparently believes that these individual prosecutions will improve deterrence. But scholars are not in agreement on this point. The movement to hold individuals accountable finds its original scholarly support in the work of Jennifer Arlen. Her seminal 1994 article, *The Potentially Perverse Effects of Corporate Criminal Liability*,³⁷ criticized the view—widely accepted at the time—that imposing strict vicarious liability on corporations for employee misconduct will invariably reduce corporate crime.³⁸ She starts from the premise that many forms of corporate crime—such as securities fraud, government procurement fraud, or some environmental crimes—are difficult for the government to detect,³⁹ and that the government therefore needs the corporation to investigate and sanction internal misconduct.⁴⁰ However, Arlen shows that strict vicarious liability will sometimes incentivize corporations to spend less on internal policing.⁴¹ She therefore has advocated adjustments to corporate criminal liability that will better incentivize the corporate defendant to investigate and self-report, thus providing to the government the evidence it needs to prosecute individuals.⁴² However, in response to the recent chorus of pleadings for further individual liability, Sam Buell will argue in a forthcoming book that corporate liability, while imperfect, may be the best of all available regimes and the proper focus of enforcement resources.⁴³

But focusing on individual prosecutions has an obvious downside, which the government recognizes: They are more resource-intensive than settling with corporations, and by a factor of several. The Yates Memo thus likely could not have issued without a second important change. In April of 2016 the DOJ announced an increase in enforcement

34. *Id.* at 5.

35. *Id.* at 6.

36. *Id.*

37. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994).

38. *Id.* at 833–34.

39. *Id.* at 835.

40. *See id.*

41. *See id.* at 836.

42. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

43. SAM BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA’S CORPORATE AGE* (W.W. Norton & Co. forthcoming Aug. 2016).

resources. Ten prosecutors were added to the Fraud Section's FCPA Unit, an increase of "more than 50%. . . ."44 So too did the FBI create three "new squads of special agents devoted to FCPA investigations and prosecutions."⁴⁵ This increase in resources allows the government to implement the Yates Memo without diverting resources away from the self-disclosure regime and thus keep that high-deterrence practice in tact.

The DOJ has increased its resources in an additional way. In November 2015, the DOJ Fraud Section hired a full-time compliance expert, Hui Chen. The DOJ's expressed purpose in retaining Chen is to provide "expert guidance" to prosecutors as they evaluate the compliance programs that were in place at the time the misconduct occurred.⁴⁶ She will help the DOJ develop benchmarks for compliance programs and, to this end, communicate with stakeholders.⁴⁷ Similarly, when the resolution of a case includes requiring enhanced compliance measures, Chen will be involved in evaluating those measures.⁴⁸

The third recent policy shift was likewise announced in April 2016, when the DOJ Fraud Section released a memo, styled the *Enforcement Plan and Guidance*.⁴⁹ In addition to the increase in resources described above, the memo announced the DOJ's unique Pilot Program. The pilot program provides specific, quantified penalty reductions in exchange for various degrees of disclosure, cooperation, and remediation.⁵⁰ Where the company cooperates and remediates to the DOJ's satisfaction, but did not voluntarily disclose, it will receive "at most" a 25% reduction of the Sentencing Guidelines fine range.⁵¹ However, where the company has met all three requirements—voluntary disclosure, cooperation, and remediation—the DOJ "may provide up to a 50% reduction" off the bottom end of the Sentencing Guidelines fine range and generally will not require the appointment of a monitor.⁵²

Here, finally, the DOJ tacitly responds to Professor Reilly's critique head-on. The Pilot Program is plainly an attempt to make the benefits of

44. Memorandum from Andrew Weissmann, Chief, Fraud Section, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* 1 (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download> [hereinafter Weissmann Memo].

45. *Id.*

46. See Press Release, DOJ, New Compliance Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

47. *Id.*

48. *Id.*

49. Weissmann Memo, *supra* note 44.

50. Remediation generally means adopting a compliance program, disciplining employees, and related compliance measures. See *id.* at 8.

51. *Id.*

52. *Id.*

self-disclosure more “specific and calculable.”⁵³ But it was not, and is not, the most visionary of proposals for increasing deterrence.

III. THE JACOBSON DECLINATION PROPOSAL

Since as far back as April of 2012, an attractive alternative has been on the table which constitutes a kind of compromise between a statutory defense and the current Pilot Program. Billy Jacobson, former second-in-command prosecutor at the DOJ’s Fraud Unit and now a partner at Orrick, Herrington & Sutcliffe, first floated his proposal in an April 2012 issue of *Bloomberg’s Criminal Law Reporter*.⁵⁴ Jacobson proposes that rather than a formal statutory amendment, the Fraud Unit exercise its prosecutorial prosecution and adopt a policy of not bringing FCPA-related criminal charges if the company can demonstrate that it satisfied five criteria. Those criteria are: 1) voluntary disclosure of the violation, 2) no participation in the illegal conduct by senior management, 3) full cooperation with the government, including providing evidence and other information against employees, directors, and agents of the company, 4) remedial measures to prevent future violations, including disciplining culpable employees and adopting improved internal controls and anti-corruption training, and 5) having adopted a strong compliance program before the illegal conduct occurred.⁵⁵

Shortly after Jacobson’s article was published, the *New York Times* ran its abovementioned expose on Wal-Mart’s alleged bribery in Mexico.⁵⁶ Having sounded the death knell for any statutory amendment, Jacobson’s proposal of a more informal policy became all the more attractive. Three years later, in November of 2015, the *Washington Post* reported that the DOJ Fraud Section was considering a proposal that sounded quite similar to Jacobson’s.⁵⁷ But alas, the DOJ elected instead to try its Pilot Program. Jacobson argued on *The FCPA Blog* that the program was a “step forward” but “falls short of accomplishing its intended goal and certainly is not the bold policy pronouncement for which many were hoping.”⁵⁸ He explains that this is true in several ways. First, it only puts a number on a practice that was already well-

53. Riley, *supra* note 1.

54. Billy Jacobson, *No Legislation Necessary: A Five-Part Test to Negate Corporate Criminal Liability in FCPA Cases*, 91 BLOOMBERG CRIM. L. REV. 77 (2012).

55. *Id.*

56. Barstow, *supra* note 20.

57. 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.

58. Billy Jacobson, *Billy Jacobson on the New FCPA Guidance: DOJ Swings and Misses*, THE FCPA BLOG (Apr. 7, 2016), <http://www.fcablog.com/blog/2016/4/7/billy-jacobson-on-the-new-fcpa-guidance-doj-swings-and-misse.html>.

established: providing reduced penalties in exchange for disclosure, cooperation, and remediation. Second, even this informal policy leaves the DOJ “ample room to avoid according the full benefit.”⁵⁹ It provides that the agency “may” provide the reduction and will “consider” a declination. But ultimately, the fundamental problem with the Pilot Program is that it “does not go nearly as far as it could have in serving the goals of law enforcement, while also providing more certainty to companies.”⁶⁰ Jacobson’s proposal, by contrast, would both better serve the interests both of law enforcement and of companies. His five-part test for granting a declination would “virtually guarantee[]” an increase in voluntary disclosures, thereby allowing companies to go after both companies and individuals (thus advancing the goals of the Yates Memo).⁶¹ So too would his proposal provide companies with added incentives to adopt rigorous compliance programs: It would provide companies the assurance that they would not be prosecuted if “they did everything the government wanted them to do” by adopting such programs.⁶²

Jacobson convincingly makes the case that his proposal would in no way weaken or dilute the FCPA, but instead advance its purposes by incentivizing compliance and increasing deterrence. It represents an alignment of interests between the government and the private sector. The critical question thus becomes: Is the DOJ still listening?

IV. CONCLUSION: WHAT WOULD REILLY DO?

When the Pilot Program ends in April 2017, the DOJ will consider anew the available options for increasing what we are here calling Deterrence Per Dollar. The FCPA bar, and industry organizations, will organize to convince the DOJ that it can and should go further to enhance enforcement. Academics, including the author of this essay, will likely join the effort. Will Professor Reilly? Given his plea for more specific and calculable self-reporting incentives, one can only hope.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*