SELF-REPORTING AND THE UNCERTAIN ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

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Professor Peter Reilly's article, *Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*,[1] adds to a growing body of scholarly works on the Foreign Corrupt Practices Act (FCPA).[2] Over the span of four decades, the FCPA grew from an obscure

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1. 67 FLA. L. REV. 1683 (2015).

2. *See, e.g.*, Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137 (2010) (criticizing the use of deferred and non-prosecution agreements in FCPA enforcement and proposing a legislative fix); Steven J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* (N.Y.U. Pub. Law and Legal Theory, Working Paper No. 340, 2014), http://lsr.nellco.org/nyu_plltwp/340 (examining FCPA enforcement patterns and the distribution of FCPA enforcement actions across countries); Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 350 (2011) (arguing that "it is not clear that the uncertainty related to prosecutorial discretion" in FCPA enforcement results in "greater compliance"); David Hess, *Combating Corruption Through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure*, 21 MINN. J. INT'L L. 42 (2012) (discussing how anti-bribery enforcement can be improved to provide strong incentives for companies to disclose information required under the Global Reporting Initiative and other corporate social responsibility initiatives); David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307 (2008) (proposing a new approach to FCPA enforcement that requires the appointment of an independent monitor that has direct obligations to the enforcement agencies); Rebecca Koch, Note, *The Foreign Corrupt Practices Act: Heavy on the Grease and Light on the Guidance*, 28 B.C. INT'L & COMP. L. REV. 379 (2005) (discussing the grease payment exception under the FCPA); Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010) (advocating subjecting FCPA enforcement actions to greater judicial scrutiny); Matthew W. Muma, Note, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337 (2014) (proposing to amend the FCPA to require in-country State Department employees to provide country-specific guidance on who is a bona fide "foreign official" under the FCPA); Steven Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997) (arguing that the FCPA should be abolished and replaced with strong domestic anti-bribery legislation); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689 (2000) (arguing that the FCPA plays a significant role in expanding the global free market and fostering democracy); Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393 (2013) (arguing against strict corporate vicarious liability for FCPA violations); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010) (arguing that anti-bribery legislation as presently enforced functions as de facto economic sanctions against emerging markets); Jennifer Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861 (2001) (discussing ambiguities in the FCPA); Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L

anti-bribery statute into a law that sees frequent, high-stake enforcement actions.[3] The enforcement of the FCPA, however, has been highly uncertain, thanks to an array of factors including ambiguities in the law's key provisions,[4] the frequent use of resolution vehicles that are subject to little judicial scrutiny and do not result in precedent,[5] and the lack of clear guidance from enforcement agencies.[6]

Professor Reilly's article contributes to the public discourse on the FCPA by highlighting one particular aspect of the law where its enforcement is uncertain: the doubtful benefit of self-reporting. After comparing cases where defendant companies self-reported FCPA violations with cases where defendant companies failed to self-report, Professor Reilly concluded that self-reporting does not appear to be a significant factor in determining the monetary penalties for FCPA violations.[7] Professor Reilly observes that "voluntary disclosure does not guarantee a reduction in monetary penalties," nor does failure to self-report "preclude a corporation from receiving a reduction in monetary

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L. & BUS. 325 (2013) (proposing transferring proceeds from FCPA enforcement to host countries where bribery takes place conditional on the host government's cooperation with the FCPA investigation); Charles B. Weinograd, Note, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L L. 509 (2010) (discussing the "routine governmental action" exception under the FCPA); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011) (criticizing the FCPA's lack of clarity); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781 (2011) (discussing how the FCPA should address bribe solicitation and extortion); Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (using FCPA enforcement as a case study of regulators' incentives to expand the market demand for their post-government services).

3. *See* Zheng, *supra* note 2, at 1288–89 (discussing the FCPA's "uneven pace of enforcement").

4. *See* Brooks, *supra* note 2, at 142–47 (discussing ambiguities in the FCPA's knowledge requirement, the definitions of "foreign officials" and "corrupt payment," and exceptions under the FCPA); Koch, *supra* note 2, at 389–92 (discussing ambiguities in the grease payment exception under the FCPA); Muma, *supra* note 2, at 1342–45 (discussing ambiguities in the definitions of "instrumentality" and "foreign officials" under the FCPA); Sivachenko, *supra* note 2, at 400–11 (discussing the broad and uncertain scope of the FCPA); Taylor, *supra* note 2, at 871–78 (discussing ambiguities in the intent and knowledge requirements and the exceptions and defenses under the FCPA); Weinograd, *supra* note 2, at 514–16 (discussing ambiguities in the routine governmental action exception under the FCPA).

5. *See* Brooks, *supra* note 2, at 154–58 (arguing that the use of non-prosecution agreements and deferred prosecution agreements hinders the development of the FCPA as it prevents the development of case law); Yockey, *supra* note 2, at 825 (discussing the use of non-prosecution agreements, deferred prosecution agreements, pleas, and settlements in FCPA enforcement).

6. *See* Taylor, *supra* note 2, at 878–79 (discussing the lack of standards or guidelines by which to determine whether conduct is prohibited under the FCPA); Westbrook, *supra* note 2, at 563–65 (discussing the lack of guidance from the DOJ and the SEC as to FCPA enforcement).

7. Reilly, *supra* note 1, at 1703–10.

penalties."[8] Professor Reilly then examines in detail the FCPA investigation into Ralph Lauren Corporation, a case in which the defendant corporation is widely believed to have benefited from self-reporting its misconduct to the SEC.[9] Professor Reilly points to the significant ongoing obligations the SEC imposed on Ralph Lauren and expresses doubts that Ralph Lauren reaped any benefits from cooperating with the SEC.[10] Finally, Professor Reilly analyzes the calculations on the part of the defendant company that affects its decisions as to whether or not to self-report.[11] Professor Reilly argues that "[a]lthough the risks associated with voluntary disclosure tend to be concrete and predictable, the rewards have been largely uncertain."[12] Professor Reilly concludes his article by calling for the federal government to provide more guidance on the benefits of self-reporting.[13]

Professor Reilly's thesis, while straightforward, is predicated on an implicit assumption that uncertainty in FCPA enforcement is undesirable. Professor Reilly makes a compelling argument that when the misconduct *has already* taken place, the defendant company may choose not to self-report the misconduct if the benefits of self-reporting are unclear. But from an ex ante point of view, the uncertainty surrounding the benefits of self-reporting, along with uncertainty in FCPA enforcement in general, may indeed induce potential defendant companies to comply with the FCPA in the first place. It is conceivable that a risk-averse business entity may be more likely to institute compliance programs and choose not to commit a misconduct when the legal sanctions for the misconduct are uncertain. Legal scholars have argued that such effects may exist in general criminal law contexts.[14] To what extent there is a similar effect

8. *Id.* at 1709 (emphasis in original).

9. *Id.* at 1711–17.

10. *Id.* at 1715–16.

11. *Id.* at 1717–25.

12. *Id.* at 1725.

13. *Id*. at 1730 ("[I]t is the federal government—whether through Congress or through the DOJ and SEC—that has the power, the ability, and the *responsibility* to provide the necessary guidance.").

14. *See generally* Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004) (reporting outcomes of an experimental study showing that the greater the uncertainty regarding the size of the fine or the chance of being caught, the more unlikely participants were to take the action); Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 MICH. L. REV. 467 (2008) (arguing that individuals treat guesses concerning the future differently than guesses concerning the past and uncertainty could be exploited to generate optimal deterrence); Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276 (1999) (arguing that criminals prefer a scheme in which the size of the sentence is uncertain while the probability of detection and conviction is certain).

in FCPA enforcement is a question that deserves more discussions.[15] In this sense, Professor Reilly's analysis would have better differentiated itself from previous studies on the FCPA had it not simply assumed that less uncertainty is better.

Even assuming that the lack of guidance on the benefits of self-reporting is a problem, it is not entirely clear what the solution to the problem will be. Professor Reilly's proposal to solve the problem is greater guidance—but the question is greater guidance in what form? As Professor Reilly himself acknowledges, "self-reporting is only one of numerous factors influencing whether and how the government decides to pursue a given FCPA matter."[16] It is not feasible, therefore, for the government to provide greater guidance in the form of a one-size-fits-all numerical formula. Professor Reilly hints that the benefits of self-reporting should be "quantified and linked to specific factors involved in DOJ and SEC decision-making."[17] But by definition, such quantified, case-specific guidance can only be given after the facts and therefore cannot function as "guidance" to the defendant company at the time when it is deciding whether or not to self-report. One possibility, though, is for the enforcement agencies to provide some guidance on what the outcome of a specific case would have been had there been no self-reporting. Such information will be of little value to guide the defendant company's conduct in that specific case, but will offer guidance to future defendant companies for their future conduct. Professor Reilly could elaborate on whether he contemplates this or some other kind of guidance.

15. So far, only one of the many studies on the FCPA explores this question. *See* Giudice, *supra* note 2, at 374–77 (arguing that it is unclear how and to what extent the uncertainty in FCPA enforcement will help deter violations).

16. Reilly, *supra* note 1, at 1731.

17. *Id.* at 1726.