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Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act

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NOTES

Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act

ABSTRACT

Over the last ten years, the Department of Justice (DOJ) has prosecuted an increasing number of Foreign Corrupt Practices Act (FCPA) violations, imposing larger and larger penalties. In fiscal year 2010, the Criminal Division of the DOJ imposed $1 billion in penalties as a result of violations of the FCPA, the largest in FCPA enforcement history.

Most FCPA enforcement actions are brought against corporations for conduct that American law enforcement agencies have difficulty detecting because it occurs outside of the United States. As a result, the DOJ encourages companies to voluntarily disclose FCPA violations, claiming that it will take a more lenient approach to FCPA prosecutions that are self-reported and reward "disclosure and genuine cooperation."

Despite these promises, practitioners and academics have questioned whether a company that voluntarily discloses a potential FCPA violation actually receives a lesser fine than a company whose illegal conduct is discovered by a government investigation. With the likelihood of detection by the DOJ very low and the costs of disclosure very high, these questions have led to suggestions that companies are better off keeping mum. This Note argues that the available evidence about previous FCPA settlements suggests that companies are likely rewarded for their candor and cooperation.

TABLE OF CONTENTS

I. INTRODUCTION

> 41. In or about August 2002, an employee of the Subcontractor . . . delivered a pilot's briefcase containing one million U.S. dollars in one hundred dollar bills to the [Nigerian National Petroleum Company (NNPC)] Official at a hotel in Abuja, Nigeria, for the benefit of a political party in Nigeria.
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> 43. In or about April 2003, an employee of the Subcontractor . . . delivered a vehicle containing Nigerian currency valued at approximately $333,333 to the hotel of the NNPC Official in Abuja, Nigeria, for the benefit of a political party in Nigeria.
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> 46. Between on or about April 1, 2002, and on or about January 12, 2004, employees, agents, and co-conspirators of Snamprogetti willfully aided, abetted, counseled, commanded, induced, procured, and caused the commission of FCPA violations by KBR . . . by aiding and abetting KBR in causing wire transfers of $39.8 million . . . intending that the money would be used, in whole or in part, to pay bribes to Nigerian government officials.[1]

On July 7, 2010, Snamprogetti Netherlands B.V., a Dutch engineering, procurement, and construction (EPC) company, admitted in a deferred prosecution agreement filed in U.S. federal district court that it had violated the Foreign Corrupt Practices Act (FCPA) by causing the pilot's briefcase and the vehicle filled with money to be delivered to a Nigerian government official.[2] For nearly ten years, Snamprogetti had conspired with three other EPC companies to bribe Nigerian officials in order to obtain contracts—worth more than $6 billion—to build liquefied natural gas facilities on Bonny Island, Nigeria.[3] As a result of this conduct, Snamprogetti

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1. Deferred Prosecution Agreement at 34–36, United States v. Snamprogetti Neth. B.V., No. 4:10-cr-00460 (S.D. Tex. July 7, 2010) [hereinafter Snamprogetti Deferred Prosecution Agreement]; *accord* Deferred Prosecution Agreement app. A at 40–41, United States v. Technip S.A., No. 4:10-cr-00439 (S.D. Tex. June 28, 2010) [hereinafter Technip Deferred Prosecution Agreement] (containing the same statement concerning the briefcase and the vehicle).

2. Snamprogetti Deferred Prosecution Agreement, *supra* note 1, at 23, 34–36.

3. Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

and the three other companies agreed to pay hundreds of millions of dollars in criminal penalties.[4]

In the world of white-collar crime prosecution, stories and settlement agreements like Snamprogetti's are not rare.[5] The FCPA prohibits a company or individual from bribing a foreign government official to influence an official act, induce unlawful action, or obtain or retain business.[6] The number of FCPA cases prosecuted by the Department of Justice (DOJ) has been increasing over the past ten years, as have the size of the criminal penalties levied against violators.[7] In fiscal year 2010, the Criminal Division of the DOJ imposed $1 billion in penalties as a result of violations of the FCPA.[8] This was the largest in FCPA enforcement history and half of the total penalties secured as a result of all enforcement actions led by the Criminal Division that year.[9]

Most FCPA enforcement actions are brought against corporations for conduct that occurs outside of the United States.[10] This conduct is often difficult for American law enforcement agencies to detect, and as a result, the DOJ encourages companies to voluntarily disclose the discovery of potential FCPA violations.[11] The DOJ claims to take a more lenient approach to FCPA prosecutions when the conduct is self-reported and to reward "disclosure and genuine cooperation."[12] The DOJ, however, has not issued standards

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4. Deferred Prosecution Agreement at 7, United States v. JGC Corp., No. 4:11-CR-00260 (S.D. Tex. Apr. 6, 2011) [hereinafter JGC Deferred Prosecution Agreement]; Press Release, U.S. Dep't of Justice, *supra* note 3.

5. *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 90 (2010) ("After decades of obscurity, the FCPA now occupies center stage in the federal government's war on white-collar crime.").

6. 15 U.S.C. §§ 78dd-1 to -3 (2006); Bixby, *supra* note 5, at 93–94.

7. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389, 415–16 (2010).

8. Press Release, U.S. Dep't of Justice, Department of Justice Secures More than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-crm-085.html.

9. *Id.*

10. *See* ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 162 (2010) (noting that FCPA investigations and interviews should take place in the foreign country where the conduct occurred); Evan P. Lestelle, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 538 (noting the transnational nature of FCPA proceedings).

11. STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 675 (2d ed. 2010) ("U.S. enforcement officials strongly encourage self-reporting or disclosure by individuals and entities.").

12. Bixby, *supra* note 5, at 115.

or policies that specifically address how voluntary disclosure will be treated during the sentencing process.[13]

Despite these promises, practitioners and academics have questioned whether a company that voluntarily discloses a potential FCPA violation actually receives a lesser fine than a company whose illegal conduct is discovered by a government investigation.[14] Moreover, self-disclosure can cost a company more than just a civil or criminal penalty. The FCPA is often considered a cash cow for Big Law firms, and disclosure—by the company or otherwise—can result in significant legal expenses for outside counsel, wide-ranging internal investigations, and new compliance programs.[15] The low likelihood of being caught coupled with the significant secondary expenses and the perception that self-disclosure does not meaningfully decrease criminal penalties has led to the suggestion that companies are better off cleaning shop and keeping mum about potential FCPA problems.[16]

This Note addresses the question of whether companies that voluntarily disclose potential FCPA violations are treated more leniently by the DOJ than companies that do not. This question matters to companies not only because the answer will impact their financial interests, but also because collateral consequences often accompany the disclosure of illegal conduct.[17] This question also matters to prosecutors because if violators no longer believe it is in their interest to disclose FCPA violations, fewer companies will come forward, making it harder to enforce the FCPA.

Specifically, this Note addresses the question of whether voluntary disclosure leads to more lenient treatment by aggregating the publicly available data about corporate FCPA prosecutions resolved by the DOJ between 2002 and 2011 and then identifying emerging trends and discussing relevant case studies. Part II provides background information about the FCPA, describing the agreements used by the DOJ to resolve FCPA cases and explaining how FCPA fines are determined. Part II also describes the DOJ's

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13. Michael Volkov, *To Disclose or Not Disclose: That Is the Question*, FCPA BLOG (Feb. 2, 2011, 7:18 AM), http://www.fcpablog.com/blog/2011/2/2/to-disclose-or-not-disclose-that-is-the-question.html.

14. Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 397 (2010); Volkov, *supra* note 13.

15. *See* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, at 70 (arguing that government attorneys are "creating a lucrative industry—FCPA defense work—in which they will someday be prime candidates for the cushy assignments").

16. *See* Hinchey, *supra* note 14, at 398 (noting that in some cases "voluntary disclosure involves significant risks that may be less likely to be presented if the company simply responds . . . to FCPA issues internally").

17. TARUN, *supra* note 10, at 182 (stating the disadvantages of voluntary disclosure in FCPA cases).

policy regarding voluntary disclosure in FCPA cases. Part III details the methods used to aggregate data about FCPA settlements, as well as the limitations of those methods, and presents the relevant data. Part IV qualitatively describes the data and identifies emerging trends and presents three case studies. While the question of whether voluntary disclosure leads to more lenient treatment cannot be answered definitively by the information presented here, the emerging trends and case studies this Note identifies suggest that failing to disclose forecloses the possibility of receiving the most lenient treatment.

II. BACKGROUND

Passed in the wake of the Watergate scandal, Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977 to stop the bribery of foreign officials and "to restore public confidence in the integrity of the American business system."[18] As the result of a Securities and Exchange Commission (SEC) investigation in the 1970s, over four hundred American companies ultimately admitted to making these types of payments, which totaled over $300 million.[19] Congress responded by passing the FCPA, which makes it unlawful to pay bribes to foreign government officials to obtain or retain business.[20]

A. *Foreign Corrupt Practices Act: Elements of the Offense*

The FCPA consists of two sets of provisions: the anti-bribery provisions and the books and records and internal control provisions.[21] While violations of the anti-bribery provisions are more commonly enforced, the DOJ has increased its use of the books and records provisions in the last ten years.[22]

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18. U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE TO THE FCPA (2011) [hereinafter U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE], *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf; *see also* H.R. REP. NO. 95-640, at 4–5 (1977); S. REP. NO. 95-114, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101 ("In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet.").

19. H.R. REP. NO. 95-640, at 4 ("More than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties."); Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 134 (2010).

20. 15 U.S.C. §§ 78dd-1 to -3 (2006); Carrington, *supra* note 19, at 134.

21. 15 U.S.C. § 78m(b) (books and records and internal control provisions); *id.* §§ 78dd-1 to -3 (anti-bribery provisions); Koehler, *supra* note 7, at 389.

22. *See* SHEARMAN & STERLING LLP, FCPA DIGEST 93 (2012), *available at* http://www.shearman.com/files/upload/fcpa_digest.pdf (noting that Siemens AG's guilty

1. Anti-Bribery Provision

The anti-bribery provision prohibits those subject to the statute from "corruptly paying or offering 'any thing of value' to a 'foreign official' in order to 'obtain or retain business.'"[23] The FCPA applies to both U.S. and foreign companies and nationals, and the DOJ regularly prosecutes both for violating the statute.[24] The FCPA does not define "anything of value," the legislative history does not provide a clear definition of this element,[25] and the DOJ has not provided formal guidance.[26] However, DOJ enforcement actions provide facts about the "things of value" at issue in those cases. Those things of value have ranged from payments that were under $100 but were numerous and frequent to payments of millions of dollars.[27] In addition, things of value have also ranged from cash-filled briefcases and vehicles[28] to travel expenses that were not related to the business of the company that was paying for them.[29]

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plea in December 2008 was the first time the DOJ had charged a company with criminal violations of the internal controls or books and records provisions); *see, e.g.*, Deferred Prosecution Agreement at 1–2, United States v. Magyar Telekom, PLC, No. 1-11-cr-00597 (E.D. Va. Dec. 29, 2011) [hereinafter Magyar Telekom Deferred Prosecution Agreement] (deferring prosecution of Magyar Telekom for violations of the anti-bribery and books and records provisions); Deferred Prosecution Agreement at 2–3, United States v. Maxwell Techs., Inc., No. 3:11-cr-00329-JM (Jan. 31, 2011) [hereinafter Maxwell Techs. Deferred Prosecution Agreement] (deferring prosecution of Maxwell Technologies for violations of the anti-bribery and books and records provisions); Deferred Prosecution Agreement at 1, app. A, at 3, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. Mar. 24, 2010) [hereinafter Daimler AG Deferred Prosecution Agreement] (deferring prosecution of Daimler AG for violations of the anti-bribery and books and records provisions).

23. Koehler, *supra* note 7, at 394; *see also* 15 U.S.C. §§ 78dd-1 to -3.

24. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a); Koehler, *supra* note 7, at 390; Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1680 (2010) (noting that the FCPA has been used against multinational companies, including foreign issuers cross listed in the United States). The FCPA applies to foreign corporations that list shares on a stock exchange located in the United States or are otherwise required to file reports with the SEC. 15 U.S.C. § 78dd-1 (2006) (applying the FCPA's prohibitions to issuers who register securities pursuant to the Securities Exchange Act).

25. 15 U.S.C. §§ 78dd-1(h), 78dd-2(h), 78dd-3(h); H.R. REP. NO. 95-640 (1977); S. REP. NO. 95-114 , reprinted in 1977 U.S.C.C.A.N. 4098; Koehler, *supra* note 7, at 390.

26. *See* U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE, *supra* note 18, at 3 (stating only that the FCPA prohibits "paying [or] offering . . . anything of value").

27. *See, e.g.*, Information at 24–27, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008) (detailing the various ways in which Siemens made improper payments violating the FCPA).

28. Information at 17–18, United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. Feb. 6, 2009) [hereinafter KBR Information] (identifying the delivery of cash-filled briefcases and vehicles as things of value under the FCPA).

29. *See, e.g.*, Letter from Dennis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Daniel J. Horwitz, Counsel for Comverse Tech., Inc. app. B (Apr. 6, 2011)

A "foreign official" is defined in the FCPA statute as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[30]

It is not controversial that this definition covers foreign heads of state, elected foreign government officials, and employees of foreign government agencies that are analogous to the U.S. Department of Treasury or Department of State.[31] The FCPA's legislative history also indicates that Congress intended to prohibit payments to these kinds of individuals when it enacted the FCPA.[32]

Recent enforcement actions, however, have expanded this understanding of foreign official. The majority of FCPA enforcement actions brought in 2009 identified employees of state-owned or state-controlled enterprises as foreign officials under the theory that their employers are an "instrumentality" of a foreign government.[33] The DOJ has also made statements indicating a broader understanding of foreign official.[34] For example, in November 2009, Lanny Breuer, the Assistant Attorney General for the Criminal Division of the DOJ, told a pharmaceutical industry audience that "doctors, pharmacists, lab technicians and other health professionals who are employed by state-owned facilities" would be considered foreign officials for purposes of the FCPA.[35] Several federal district courts have also recently upheld this broader definition of foreign official.[36]

[hereinafter Comverse Non-Prosecution Agreement], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf (identifying payment of non-business-related travel expenses as things of value under the FCPA).

30. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

31. Koehler, *supra* note 7, at 391.

32. H.R. REP. NO. 95-640, at 4 (1977) (arguing that legislation was needed because American companies had admitted to bribing "high foreign officials in order to secure some type of favorable action by a foreign government"); H.R. REP. NO. 94-831, at 13 (1977) (noting that the House amended the bill to define "foreign official" as "any officer of a foreign government or any department, agency or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government, department, agency or instrumentality"); Koehler, *supra* note 7, at 391.

33. *See, e.g.*, Plea Agreement, United States v. Control Components, Inc., No. 8:09-cr-00162 (C.D. Cal. July 24, 2009) [hereinafter CCI Plea Agreement]; Koehler, *supra* note 7, at 391–92.

34. *See* Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1255 (2008) (quoting Mark F. Mendelsohn, Remarks at the Association of the Bar of the City of New York Conference: FCPA: Complying & Implementing Risk Strategies (Nov. 9, 2007) (audio recording on file with *The Business Lawyer*)) (quoting the Deputy Chief of the DOJ's Fraud Section as saying that "all employees of public entities" are foreign officials).

35. Lanny Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Keynote Address at the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at*

The thing of value must be given to the foreign official in order to "obtain or retain business," which the FCPA statute defines as:

> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such foreign official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[37]

The DOJ has stated that it will interpret this element broadly so that the term includes more than simply awarding or renewing a contract and does not require that business be done with the foreign government.[38] In the most recent Court of Appeals decision to address this issue, the Fifth Circuit interpreted the term "obtain or retain business" in *United States v. Kay* to include payments reducing customs or taxes that create an unfair advantage and assist the payer in obtaining and retaining business.[39]

The FCPA also prohibits indirect payments to government officials. Those subject to the FCPA may not provide anything of value to any person while knowing that all or a portion of the value will be given, directly or indirectly, to a foreign official to obtain or retain business.[40] This element is satisfied when an individual has actual knowledge or "a firm belief that such circumstance exists or that such result is substantially certain to occur" or "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[41]

2. Books and Records and Internal Control Provisions

The second half of the FCPA deals with a company's books and records and internal controls. These provisions apply to entities that have a "class of securities" registered pursuant to the securities laws or are otherwise "required to file reports" pursuant to the securities

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http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.

36. *See, e.g.*, United States v. Aguilar, 783 F. Supp. 2d 1108, 1120 (C.D. Cal. 2011) (finding that an employee of a state-owned company was a foreign official under the FCPA); United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *11 (C.D. Cal. May 18, 2011) (finding that an employee of a state-owned company may be a foreign official under the FCPA, though the government would have to present sufficient evidence at trial that the company was an instrumentality of the state).

37. 15 U.S.C. § 78dd-1.

38. U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE, *supra* note 18, at 3–5.

39. United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).

40. 15 U.S.C. § 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

41. *Id.* § 78dd-3(f)(3)(A)(ii)–(B).

laws.[42] These entities are called issuers and primarily consist of publicly held companies that are traded on a U.S. stock exchange and foreign companies that are listed on a U.S. stock exchange.[43] Under the books and records provision, issuers are required to "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."[44] Finally, the FCPA requires, through its internal controls provision, that issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that (1) management has authorized all transactions and (2) transactions are recorded so that financial statements can be prepared and assets accounted for.[45]

B. *Enforcement of the FCPA*

The FCPA is both a civil and a criminal statute.[46] The DOJ is responsible for all criminal enforcement of the FCPA and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals.[47] The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.[48] While the DOJ's "Lay Person's Guide" to the FCPA states that "[c]onduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws," nearly all FCPA-related actions have been brought by the DOJ or the SEC.[49] This Note focuses on criminal enforcement of the FCPA because the DOJ has encouraged voluntary disclosure in exchange for leniency.[50]

1. Vehicles for Enforcement: Non-Prosecution Agreements, Deferred Prosecution Agreements, and Plea Agreements

Enforcement actions brought by the DOJ against companies usually come in the form of a non-prosecution agreement or a

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42. *Id.* § 78m(b)(2)(A)–(B)(2).
43. Koehler, *supra* note 7, at 395.
44. 15 U.S.C. § 78m(b)(2)(A).
45. *Id.* § 78m(b)(2)(B).
46. *Id.* § 78dd.
47. U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE, *supra* note 18, at 2.
48. *Id.*; Koehler, *supra* note 7, at 395–96.
49. U.S. DEP'T OF JUSTICE, LAY PERSON'S GUIDE, *supra* note 18, at 6.
50. *See* Breuer, *supra* note 35, at 3 (noting that companies that voluntarily disclose will receive a "meaningful credit" in return).

deferred prosecution agreement.[51] In a non-prosecution agreement, the Department agrees not to prosecute the company for its wrongful conduct, usually in exchange for a monetary penalty and changes to the company's compliance policies.[52] In a deferred prosecution agreement, the Department agrees to defer prosecution, and often withholds it completely, as long as the company pays a monetary penalty, enhances its compliance measures, and does not violate the law during the deferral period.[53]

The DOJ frequently opts for this middle ground between indicting a company and bringing no action, using "diversion" or "deferral" agreements to sanction companies that violate the FCPA.[54] The concept of diversion or deferral agreements is borrowed from the prosecution of individuals—usually juveniles or first-time offenders—who are given the opportunity to rehabilitate themselves without the stigma of prosecution.[55] In the FCPA context, these agreements most often come in the form of a deferred prosecution agreement or a non-prosecution agreement.[56] While these agreements have no standard form, they usually impose on the defendant company a combination of the following conditions: (1) an internal investigation; (2) a code of conduct or a compliance program to "prevent or deter violations of the law"; (3) acceptance of responsibility by the corporation; (4) provision of specified information to the government with "full candor and completeness"; (5) waivers of attorney–client and work product privilege; (6) dismissal of employees involved in the misconduct; (7) a continuing duty to cooperate; (8) payment of restitution and/or a fine; and (9) probation with the use of continuing monitors whose duties depend on the remedial measures required of the defendant company.[57]

These types of agreements benefit companies by allowing them to avoid the severe collateral consequences of indictment.[58] In order to comply with this kind of agreement, thereby receiving the benefit of the probationary period, a company usually has to enact substantial internal reforms and cooperate with the government,

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51. 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, 478–79 (2009).

52. Peter Spivack & Sujit Raman, *Regulating the New 'Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163–64 (2008).

53. *Id.*

54. *See, e.g., id.* (defining deferral agreements); Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 451 (2010) (defining diversion agreements).

55. Spivack & Raman, *supra* note 52, at 163.

56. *Id.* at 160; Thomas, *supra* note 54, at 452.

57. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 47 (2010).

58. *Id.*

"effectively helping prosecutors build a case against individual employees."[59] Companies also must often make restitution payments and submit to federal monitoring.[60] If, at the end of the deferral period, the government is satisfied that the company has fulfilled the obligations of the deferred prosecution agreement or non-prosecution agreement, the prosecutor will drop the charges.[61] If the company fails to comply with the agreement, the government reserves the right to prosecute the company for the alleged conduct that served as the basis for the deferred prosecution agreement or non-prosecution agreement.[62] In that scenario, the company's conviction is "virtually a foregone conclusion."[63]

The collapse of Arthur Andersen LLP, Enron's accounting firm, highlighted the need to do something in between charging and not charging a corporate defendant.[64] Even though Arthur Andersen's conviction was eventually overturned by the Supreme Court, the eighty-nine-year-old accounting firm went out of business as a result of the initial indictment.[65] Because of Arthur Andersen's collapse and the other repercussions of Enron's collapse, "the DOJ no longer sees its role in the corporate context as solely that of indicting, prosecuting, and punishing. Instead it is a vehicle effecting widespread structural reform within corrupt corporate cultures."[66]

The DOJ formalized this view—and responded to the collapse of Arthur Anderson—by issuing a memorandum in early 2003 entitled "Principles of Federal Prosecution of Business Organizations."[67] The memo, authored by then-Deputy Attorney General Larry D. Thompson, superseded a memorandum written by the previous Deputy Attorney General, Eric Holder, outlining the various factors prosecutors could consider in deciding whether to proceed against a company with criminal charges.[68] The Thompson Memo, however, added to the Holder Memo by emphasizing that "[t]he main focus of [its] revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" with government

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59. Spivack & Raman, *supra* note 52, at 160.
60. *Id.*
61. *Id.* at 160–61.
62. *Id.* at 161.
63. *Id.* at 161 n.9 (quoting Christopher A. Wray, Assistant Att'y Gen., Criminal Div., Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2005/march/03-09-05wray-remarks-dc.pdf) (internal quotation marks omitted).
64. *See* Thomas, *supra* note 54, at 453 (discussing the extreme repercussions of the indictment of Arthur Andersen).
65. *Id.*
66. *Id.* at 454.
67. Spivack & Raman, *supra* note 52, at 166.
68. *Id.*

investigators and prosecutors.[69] The Holder Memo did not specifically mention deferred prosecution or non-prosecution agreements,[70] and the Thompson Memo added the option of "pretrial diversion" as a reward for a company's cooperation, formalizing the DOJ's recognition of an alternative to the "all-or-nothing choice between indicting (and destroying) a company and giving it a complete 'pass.'"[71] Since then, the use of deferred prosecution and non-prosecution agreements has burgeoned,[72] and by 2008 these agreements had become an "essential component of FCPA enforcement."[73]

2. Penalties in the Statute

The FCPA imposes criminal sanctions on both individuals and corporations. Corporations and other business entities are subject to a fine of up to $2 million; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment of up to five years for violating the FCPA.[74] Under the Alternative Fines Act, penalties for violating the FCPA can be much higher—up to twice the benefit that the defendant sought to obtain by making the corrupt payment.[75] Individuals or companies that are found guilty of violating the FCPA may also be barred from doing business with the federal government.[76]

3. Guidance from the Sentencing Guidelines

The number of FCPA prosecutions and the size of criminal penalties imposed on violators have increased substantially.[77] For example, in 2002 the DOJ prosecuted one corporation, Syncor

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69. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm; *see* Spivack & Raman, *supra* note 52, at 166 (noting that the Thompson Memo and Holder Memo shared a lot in common, but the Thompson Memo added a few "significant" lines).

70. Spivack & Raman, *supra* note 52, at 166. *See generally* Memorandum from Eric Holder, Deputy Att'y Gen., to All Component Heads and U.S. Attorneys (June 6, 1999) [hereinafter Holder Memo], *available at* www.justice.gov/criminal/fraud/...reports/1999/charging-corps.PDF.

71. 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, 1103 (2006). *See generally* Thompson Memo, *supra* note 69.

72. Spivack & Raman, *supra* note 52, at 166.

73. Thomas, *supra* note 54, at 454.

74. 15 U.S.C. § 78dd-1(g), 78dd-2(g), 78dd-3(g); U.S. DEP'T OF JUSTICE, LAY-PERSON'S GUIDE, *supra* note 18, at 5.

75. U.S. DEP'T OF JUSTICE, LAY-PERSON'S GUIDE, *supra* note 18, at 5.

76. *Id.*

77. Bixby, *supra* note 5, at 104–06.

Taiwan, Inc., and imposed a $2 million fine on the company.[78] In contrast, the DOJ entered into twenty-one settlements in 2010 and eleven in 2011,[79] with fines ranging from $1.2 million[80] to $400 million.[81]

The Sentencing Guidelines established by the U.S. Sentencing Commission provide guidelines to determine what penalty a defendant should receive for illegal conduct.[82] The Guidelines provide a formula that takes into account various factors about the defendant and the crime in order to come up with a sentencing range.[83] The Guidelines specify a base offense level that applies to all FCPA violations, but it can be increased by specific characteristics of the conduct at issue.[84] When the defendant is a corporation, the Sentencing Guidelines require that sentences be calculated using the greatest of (1) the value of the unlawful payment; (2) the value of the benefit received or to be received in return for the unlawful payment; or (3) the consequential damages resulting from the unlawful payment.[85]

After determining the base offense level, the range of possible sentences is determined by calculating the defendant's culpability score.[86] The culpability score for a corporate defendant in an FCPA case is determined using the formula in § 8C2.5,[87] which includes the following factors: the size of the organization (number of employees); the level of responsibility that the individuals who participated in, condoned, or willfully ignored the offense had; prior history of criminal conduct; whether the criminal conduct violated a judicial order; whether the organization willfully obstructed or impeded (or attempted to obstruct or impede) the investigation, prosecution, or sentencing of the offense; whether the company had an effective compliance and ethics program; whether the organization unreasonably delayed reporting the offense to the appropriate governmental authorities; whether the employees responsible for the

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78. Plea Agreement at 5, United States v. Syncor Taiwan, Inc., No. 02-1244-svw (C.D. Cal. Dec. 9, 2002) [hereinafter Syncor Plea Agreement].

79. *See infra* Appendix A, Tables 3 & 4.

80. *See* Comverse Non-Prosecution Agreement, *supra* note 29, at 3 (imposing a fine of $1.2 million).

81. *See* United States' Sentencing Memorandum at 16, United States v. BAE Sys. PLC, No. 1:10-cr-035(JDB) (D.D.C. Feb. 22, 2010) [hereinafter BAE Sentencing Memo] (imposing a fine of $400 million).

82. U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(d)(1) (2011); *see also* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW 181, 421 (5th ed. 2010) (describing the effects that changes to the Sentencing Guidelines have had on white-collar prosecution and plea-bargaining).

83. U.S. SENTENCING GUIDELINES MANUAL § 2C1.1.

84. *Id.* § 2C1.1(b).

85. *Id.* § 2C1.1(d)(1).

86. ABRAMS, BEALE & KLEIN, *supra* note 82, at 971–74.

87. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5.

compliance and ethics program reported directly to management, reported the offense before it was discovered outside the organization, promptly reported the offense to appropriate governmental authorities, and no one with operational responsibility participated in the offense; and whether the company self-reported, cooperated in the investigation, and demonstrated acceptance of responsibility.[88]

The base offense level and the culpability score determine the range of possible monetary penalties.[89] While the Guidelines were originally mandatory, after *United States v. Booker* they only serve as a starting point and are advisory.[90] Many FCPA plea agreements, deferred prosecution agreements, and non-prosecution agreements contain a calculation of the Guidelines range, including the base offense level, base fine, and culpability score, as well as a narrative explanation of the factors that influenced the defendant's applicable fine range.[91] These sentencing calculations presumably serve as a starting point for the monetary penalty eventually imposed on corporate FCPA defendants.[92]

4. Ever-Increasing Enforcement

While the DOJ and SEC have long brought enforcement actions against companies and individuals who violated the FCPA, the number of enforcement actions has increased significantly over the past ten years.[93] Between 1978 and 2000, the DOJ and SEC brought an average of three FCPA prosecutions per year, but between 2003 and 2009, they brought an average of five FCPA prosecutions per year and investigated an average of twenty cases per year.[94] In addition, some consider the enforcement efforts during the past decade to be both more far-reaching and more aggressive. As Professor Mike Koehler wrote in 2010, "[i]f the increase in FCPA enforcement over the last decade has taught anything, it is that all companies, in all industries, doing business in all countries face FCPA risk and exposure."[95]

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88. *Id.* § 8C2.5(b).

89. *Id.* § 8C2.6.

90. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding the Sentencing Guidelines to be advisory rather than mandatory).

91. *See, e.g.*, Deferred Prosecution Agreement at 8–11, United States v. ABB Ltd., No. H-10-665 (S.D. Tex. Sept. 29, 2010) [hereinafter ABB Deferred Prosecution Agreement] (containing the calculation methods for determining the Guidelines range and a narrative explanation of influential factors).

92. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.7(a) (explaining how the minimum of the Guidelines fine range is determined).

93. Weiss, *supra* note 51, at 482.

94. *Id.*; *infra* Appendix A, Tables 3 & 4.

95. Koehler, *supra* note 7, at 396.

Practitioners and scholars have attributed this upswing in FCPA enforcement to several different factors, primarily more aggressive tactics by the DOJ and the SEC and the passage of the Sarbanes-Oxley Act.[96] Since 2004, the DOJ has hired new attorneys in the Criminal Division's Fraud Section who focus solely on FCPA cases, and the SEC has also hired hundreds of new employees to work on corporate compliance cases.[97] In addition, the Federal Bureau of Investigation, which investigates violations of the FCPA with the DOJ, created a new unit in 2007 dedicated to conducting only FCPA investigations.[98] During this time period, the DOJ also began utilizing novel theories of liability to prevent corporations from avoiding prosecution under the FCPA.[99] Finally, DOJ officials have publicly stated that FCPA enforcement is a priority.[100] Mark F. Mendelsohn, the then-Deputy Chief of the DOJ's Fraud Section said in 2008 that anti-corruption cases had become "a significant priority in recent years."[101] Mr. Mendelsohn, who was responsible for FCPA prosecutions at the time, further noted that "U.S. companies that are paying bribes to foreign officials are undermining government institutions around the world. It is a hugely destabilizing force."[102]

Some have credited the increase in FCPA prosecutions during the last ten years to the Sarbanes-Oxley Act, which was passed by Congress in 2002.[103] Sarbanes-Oxley was passed in the wake of the collapse of Enron to prevent similar situations from reoccurring.[104] The Act has two main provisions: requirements regarding corporate codes of ethics and requirements mandating reporting procedures for

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96. Bixby, *supra* note 5, at 115–16; Laura E. Kress, *How the Sarbanes-Oxley Act Has Knocked the "SOX" Off the DOJ and SEC and Kept the FCPA on Its Feet*, 10 U. PITT. J. TECH. L. & POL'Y 2 (2009) (arguing that the recent surge in FCPA enforcement "is in part a result of the enactment of the SOX").

97. Bixby, *supra* note 5, at 104.

98. Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf; Bixby, supra note 5, at 104.

99. Justin F. Marceau, *A Little Less Conversation, a Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 285 (2007).

100. Dan Slater, *And the FCPA Party Continues . . .*, WALL ST. J.L. BLOG (Sept. 12, 2008, 9:19 AM), http://blogs.wsj.com/law/2008/09/12/and-the-fcpa-party-continues (reporting statements made by Fraud Section officials).

101. *Id.*

102. *Id.*

103. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7241 (2006)); Bixby, *supra* note 5, at 116; Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703, 705 (2007).

104. Bixby, *supra* note 5, at 116; Prentice, *supra* note 103, at 705.

public companies.[105] The corporate reporting provisions require that corporate accounting records be completely accurate and that the CEO and CFO of publicly held corporations publicly certify all financial statements.[106] These individuals must certify that the company's periodic reports contain no "material misstatement or omissions and 'fairly present' the firm's financial condition and results of operations."[107] Additionally, CEOs and CFOs must affirm that they (1) are responsible for internal controls; (2) have designed the controls to ensure that material information is brought to their attention; (3) have evaluated the effectiveness of the internal controls; (4) have presented in the report their conclusions about the effectiveness of the controls; and (5) have discussed in the report any changes in the internal controls, including any corrective actions.[108] Officers who knowingly certify inaccurate financial statements are subject to criminal penalties under § 906(a) of the Sarbanes-Oxley Act.[109] Management's report must be attested to by the external auditor assessing the reliability of the company's internal financial controls and filed with the SEC.[110] These more stringent internal controls and reporting requirements have made it possible—and more likely—that a company will discover violations of the FCPA and need to take action regarding those violations in order to make the certifications required by the Sarbanes-Oxley Act.[111]

C. *Sleeping with the Enemy: Cooperation in Corporate FCPA Prosecutions*

The reporting and compliance requirements imposed on companies by the Sarbanes-Oxley Act also dramatically increased the number of FCPA cases that were reported to the DOJ and SEC by the violators themselves.[112] Because Sarbanes-Oxley requires corporations to look more closely at their own compliance with federal laws such as the FCPA, they are more likely to discover violations.[113] In turn, those same corporations are also more likely to disclose those

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105. 15 U.S.C. § 7241 (2006); Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, *in* ADVANCED CORPORATE COMPLIANCE AND ETHICS WORKSHOP 73, 98 (Michael E. Horowitz et al. eds., 2009).

106. 15 U.S.C. § 7241; Bixby, *supra* note 5, at 116.

107. Prentice, *supra* note 103, at 705; *see also* 15 U.S.C. § 7241.

108. 15 U.S.C. § 7241(a); Prentice, *supra* note 103, at 705–06.

109. 18 U.S.C. § 1350(c) (2006); Prentice, *supra* note 103, at 706.

110. 15 U.S.C. § 7262(a) (2006); Prentice, *supra* note 103, at 706.

111. Bixby, *supra* note 5, at 116–17.

112. 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. BUS. & ECON. RES. 21, 25–26 (2008).

113. *Id.* at 25.

violations to enforcement agencies because Sarbanes-Oxley also imposes reporting requirements on them.[114]

However, while the Sarbanes-Oxley requirements may be pushing companies in the direction of disclosing, the consequences of self-reporting are both real and significant.[115] Although the DOJ has both officially and unofficially issued statements and policies intended to induce disclosure, the significant fines that have been levied against companies that self-disclosed have led many to ask whether the DOJ is truly sincere when it says—formally and informally—that companies who self-disclose will be rewarded with lesser punishments.[116]

1. DOJ Policy Regarding Self-Disclosure

The first rumblings of an official DOJ policy to reward disclosure and cooperation were heard in the Holder Memo's mention of amnesty or immunity.[117] However, the Holder Memo defined voluntary disclosure of wrongdoing and willingness to cooperate in DOJ investigations to include "the waiver of the corporate attorney–client and work product privileges."[118] The Thompson Memo, issued by the DOJ in 2003, made the principles in the Holder Memo official DOJ policy for prosecutors and applicable in all corporate prosecutions.[119] This created an atmosphere in which officers of corporations believed that they could only avoid indictment by cooperating fully and waiving the attorney–client and work product privileges.[120] In 2004, the policy of rewarding waiver was also incorporated in the Sentencing Guidelines.[121] The commentary to § 8C2.5 was amended to include the comment that "waiver of attorney–client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[122] This transformed the

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114. *Id.*

115. DEMING, *supra* note 11, at 675.

116. Volkov, *supra* note 13.

117. Don R. Berthiaume, *"Just the Facts": Solving the Corporate Privilege Waiver Dilemma*, 46 CRIM. L. BULL. 1, 2 (2010). *See generally* Holder Memo, *supra* note 70.

118. Holder Memo, *supra* note 70, at 3; Berthiaume, *supra* note 117, at 2.

119. Berthiaume, *supra* note 117, at 2. *See generally* Thompson Memo, *supra* note 69.

120. Berthiaume, *supra* note 117, at 2.

121. *Id.*

122. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (2004); Berthiaume, *supra* note 117, at 2. This commentary was later repealed. *Id.*; *see infra* note 125 and accompanying text (describing changes in the DOJ's cooperation policy).

waiver of privilege from merely a consideration in the charging decision to a part of a court's sentencing calculation.[123]

In 2006, the McNulty Memo updated the Thompson Memo to placate critics of the DOJ's policy of disclosure and waiver.[124] This policy had been criticized for tipping the scales too far in favor of the DOJ, and court decisions, a bill introduced but not passed by Congress, and the Sentencing Commission's repeal of the commentary it had added to § 8C2.5 in 2004 highlighted these concerns.[125] The McNulty Memo attempted to provide safeguards by requiring that prosecutors have a legitimate need for the privileged information and seek permission from higher authorities before requesting privileged material from corporations under investigation.[126] The most recent policy on this topic, the Filip Memo, was issued in August 2008.[127] This memo included a more concise cooperation policy:

> The government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials.[128]

The Filip Memo also incorporated these policies directly into the United States Attorney Manual and remains the most recent DOJ policy regarding corporate voluntary disclosure.[129]

2. DOJ Promises Regarding Self-Disclosure

In addition to official DOJ policies meant to induce self-disclosure of corporate criminal conduct, representatives of the Criminal Division and the Fraud Section—the offices responsible for prosecuting violations of the FCPA—have also made public

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123. Berthiaume, *supra* note 117, at 2.

124. *Id.*

125. United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008); Attorney–Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007); Berthiaume, *supra* note 117, at 2.

126. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Dec. 12, 2006), *available at* www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; Berthiaume, *supra* note 117, at 2.

127. Memorandum from Mark R. Filip, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Fed. Prosecution of Bus. Orgs. (Aug. 28, 2008) [hereinafter Filip Memo], *available at* www.justice.gov/dag/readingroom/dag-memo-08282008.pdf; Berthiaume, *supra* note 117, at 3.

128. Filip Memo, *supra* note 127, at 13.

129. *Id.* at 1; Berthiaume, *supra* note 117, at 3; *see* UNITED STATES ATTORNEY'S MANUAL § 9-28.0000 (2008) (Principles of Federal Prosecution of Business Organizations).

statements indicating their willingness to provide leniency in exchange for disclosure.

At an American Bar Association conference on the FCPA in October 2006, then-Assistant Attorney General for the Criminal Division Alice Fisher said, "[I]f you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit."[130] Assistant Attorney General of the Criminal Division Lanny Breuer also said that voluntary disclosure would be appropriately rewarded during an address at the National Forum on the Foreign Corrupt Practices Act in November 2009,[131] and in May 2010 then-Acting Deputy Attorney General Gary Grindler said that companies which had been promised credit would receive that credit for voluntary disclosures and remedial actions.[132] More recently, Charles Duross, the Fraud Section Deputy Chief with responsibility for FCPA prosecutions, told attendees of the World Bribery & Corruption Compliance Forum in September 2010 that with regard to voluntary disclosure, the DOJ "has and will continue to provide meaningful credit for companies that provide voluntary disclosures," and just this month a Fraud Section official mentioned the benefits of voluntary disclosure at Georgetown University Law Center's annual Corporate Counsel Institute.[133]

3. Recent Controversies About Whether to Self-Disclose

Despite the official DOJ policies and unofficial DOJ promises that companies which voluntarily disclose will be rewarded with

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130. Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

131. Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

132. Gary G. Grindler, Acting 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.

133. Jenna Greene, *Agency Officials Say Feds Remain Committed to FCPA Enforcement*, THE BLT: THE BLOG OF LEGALTIMES (Mar. 8, 2012, 3:30 PM), http://legaltimes.typepad.com/blt/2012/03/agency-officials-say-feds-remain-committed-to-fcpa-enforcement.html (reporting on statements made by DOJ and SEC officials related to FCPA enforcement); Mike Koehler, *World Bribery & Corruption Compliance Forum—Comments by U.S. Officials*, FCPA PROFESSOR (Sept. 16, 2010), http://www.fcpaprofessor.com/world-bribery-corruption-compliance-forum-comments-by-u-s-officials (reporting on comments made by DOJ and SEC officials during a panel discussion on voluntary disclosure at the World Bribery & Corruption Compliance Forum).

leniency and credit when investigations into their FCPA violations are resolved, many in the FCPA defense bar question the premise that self-disclosing companies receive lesser penalties than companies that do not disclose.[134] The DOJ has not issued standards or policies that specifically address how a voluntary disclosure will be treated during the sentencing process.[135]

Additionally, most companies do not decide whether to self-disclose based on the assumption that they will be caught if they do not self-disclose. In many situations, the likelihood that conduct violating the FCPA will be discovered is very low.[136] A company can fix the problem and reasonably believe it will never be discovered.[137] Moreover, the costs of self-disclosure—especially when the conduct would not otherwise be detected—are not limited to penalties imposed by the government. The DOJ frequently requires cooperation from the defendant corporation as well as changes to the corporation's compliance program.[138] This can often require engaging outside counsel to conduct tremendously expensive and far-reaching internal investigations and developing and implementing new compliance programs. In many situations, companies consider the likelihood of getting caught, the cost of cooperating with the government, and the potential for a criminal fine when deciding whether to self-disclose, not just the likelihood that the DOJ will live up to its promise of a lesser fine for self-disclosing.

This Note addresses these concerns by surveying the publicly available information about previous FCPA settlements. To determine whether the DOJ rewards self-disclosure with leniency, Part III aggregates data related to the corporate FCPA cases that were resolved between 2002 and 2011 and analyzes that data to identify emerging trends and helpful case studies.

III. DOJ ENFORCEMENT ACTIONS, 2002–2011

Between 2002 and 2011, the DOJ entered into over seventy agreements to resolve FCPA prosecutions.[139] While deferred prosecution and non-prosecution agreements do not have to be filed

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134. Hinchey, *supra* note 14, at 401–05; Volkov, *supra* note 13.

135. Volkov, *supra* note 13.

136. *Id.*

137. *Id.*

138. *See, e.g.*, Hinchey *supra* note 134, at 432 (discussing the DOJ's requirement that corporate defendant CCI implement a compliance program).

139. *See infra* Appendix A, Tables 3 & 4 (listing all dispositions that occurred during this time period). The DOJ sometimes enters into separate agreements with a parent company and its subsidiaries, so even though multiple dispositions have been reached, only one entity has been prosecuted.

with a court,[140] most recent FCPA settlements have been filed in federal district court, and the Criminal Division's Fraud Section has made available on its website all FCPA enforcement actions brought by the DOJ from 1998 to the present.[141] Included on the website are the agreements between the DOJ and the defendant company, press releases issued by the DOJ about the settlements, and any other documents filed with the court, such as criminal informations, sentencing memoranda, or motions for reduced sentences.[142]

A settlement agreement between the DOJ and an FCPA defendant constitutes the complete agreement relating to the conduct at issue[143] and contains the terms of the agreement, including the charges, the amount of the penalty, and any other remedial measures required of the defendant.[144] The agreement also contains a Statement of Facts, which both the DOJ and the defendant agree is "true and accurate,"[145] describing the conduct underlying the agreement. In addition, many recent agreements also include the sentencing calculation, under the appropriate Guidelines, used to determine the monetary penalty imposed on the defendant.[146] These documents comprise the universe of publicly available information about the FCPA cases prosecuted against corporate defendants by the DOJ in the past decade, and all of the information surveyed in this Note came from these documents.

A. *Methodology*

This Note first aggregates the available data about the following aspects of an FCPA settlement between a corporation and the DOJ: type of disposition; amount of the criminal penalty; penalty range as determined by the Sentencing Guidelines; amount of bribes or improper payments; amount of profit or benefit derived from the improper payments; and whether the defendant voluntarily disclosed

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140. *See* Spivack & Raman, *supra* note 52, at 180–81 (noting that some agreements have never been made public); F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 122 n.4 (2007) (noting that many deferred prosecution agreements are not court-filed).

141. *FCPA and Related Enforcement Actions*, DEP'T JUST., http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Mar. 1, 2012).

142. *Id.*

143. *See, e.g.*, Deferred Prosecution Agreement at 22, United States v. Transocean, Inc, No. 10-768 (S.D. Tex. Nov. 4, 2010) [hereinafter Transocean Deferred Prosecution Agreement] (noting that the deferred prosecution agreement sets forth the complete terms of the agreement).

144. *See, e.g.*, *id.* at 11–12 (terms of the agreement).

145. *See, e.g.*, *id.* app. B (statement of the facts).

146. *See, e.g.*, ABB Deferred Prosecution Agreement, *supra* note 91, at 8–11 (laying out the sentencing calculation under the Guidelines for the case).

the illegal conduct to the DOJ.[147] Using the available data, this Note then identifies in Part IV.A emerging enforcement trends.

Within the available data, this Note focuses on two areas: the Guidelines calculation of monetary penalties and the amount of benefit or profit derived by the company as a result of its corrupt payments. To examine the first area, this Note collects the available information about how disclosure and cooperation influenced Guidelines calculations and ultimate sentences. As discussed in Part II.B.3, a prosecutor may decrease the culpability score used in the Guidelines calculation due to the defendant's disclosure and cooperation, and a prosecutor also recommends a specific monetary penalty, given the range of available penalties determined by the Guidelines.[148] Although some settlements did not include a Guidelines calculation,[149] the data collected is still valuable because the fine range is determined by the amount of profit derived from the illegal conduct, which is often available, and deviating from the fine range is the easiest way for prosecutors to exercise discretion.[150] Additionally, because this information tracks what the DOJ has actually done in previous settlements, it is likely to have predictive value for future settlements.

This Note also tracks the amount of benefit or profit derived by a company from its corrupt payments. This amount relates to the penalty imposed on a company that violates the FCPA in several ways. First, the Alternative Fines Act allows the monetary penalty for a violation of the FCPA to be twice the benefit that the defendant sought to obtain by making the corrupt payment.[151] This amount is often used in sentencing because it is often higher than the FCPA statutory maximum of $2 million.[152] Second, as described in Part II.B.2, the amount of benefit derived from the improper payments is used to calculate the base offense level under the Guidelines.[153] While the benefit or profit derived by the defendant company does not determine the criminal penalty that will ultimately be levied, it serves as a starting point for calculating a criminal fine.[154]

Tracking the amount of the fine and the amount of profit or benefit can also show whether the DOJ is rewarding companies that

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147. *See infra* Appendix A, Tables 3 & 4 (aggregating data of settlements both involving disclosure and not involving disclosure).

148. *See supra* Part II.B.3 (discussing the prosecutor's discretion to decrease the culpability score and recommend monetary penalties).

149. *See supra* Part II.B (noting some calculations do not include the Guidelines calculations)

150. U.S. SENTENCING GUIDELINES MANUAL § 8C2.4 (2011).

151. *See supra* Part.II.B.2 (detailing the Alternative Fines Act).

152. *See supra* Part.II.B.2.

153. U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (2011).

154. *See id.* (providing base levels and factors that warrant an increase in those levels).

voluntarily disclose conduct or cooperate with the investigation by imposing a lesser fine. Because similar benefits or profits should result in similar base fines, differences in the penalties ultimately imposed must be due to other factors. Some have criticized the use of profits and fines to compare cases because the amount of profit derived from improper payments is difficult to calculate and not easily available.[155] However, most FCPA settlements include the benefit to the company, either as a specific monetary amount or a possible range of profits, in the documents filed in court.[156] The obvious alternative, the amount of the bribes paid, is equally difficult to calculate.[157] Moreover, the amount of profit derived from illegal activity is also used to determine the penalties levied against companies that commit securities fraud.[158]

While this Note seeks to identify some order in the morass of FCPA settlements, the number of cases which have been settled and the amount of information available about those cases limits the conclusions that one can draw from this information. Because the DOJ only publicizes cases that are resolved by a written agreement between the DOJ and the defendant company, information about cases the DOJ declines entirely is not readily available and may not be publicly available.[159] The number of cases is also small and the number of cases that provide a complete set of data is even smaller. This data set is too small for meaningful statistical analysis, and other studies to evaluate consistency and fairness in sentencing have been exponentially larger.

However, this Note contributes to the scholarship on FCPA enforcement actions by aggregating all of the publicly available data about FCPA settlements and qualitatively describing various FCPA cases. This Note provides a snapshot of the FCPA enforcement landscape as it looks today rather than an empirical or statistical study. By collecting and analyzing the publicly available information about the DOJ's FCPA settlements over the past ten years, this Note is able to identify emerging trends and describe helpful case studies.

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155. Hinchey, *supra* note 14, at 400–01.

156. Plea Agreement at 7–9, United States v. Alliance One Tobacco Osh, No. 4:10-cr-00016 (W.D. Va. Aug. 06, 2010) [hereinafter Alliance One Tobacco Osh Plea Agreement].

157. *See* BAE Sentencing Memo, *supra* note 81, at 9–10 (noting that the number of bribes was so extensive it would be impossible to calculate the total amount); Sentencing Memorandum at 13, United States v. Siemens AG, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008) [hereinafter Siemens Sentencing Memo] (noting that the amount of profit derived from the bribery would be very difficult to calculate).

158. Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347, 352 (2008).

159. *Cf.* SHEARMAN & STERLING LLP, FCPA DIGEST 439–535 (2012), *available at* http://www.shearman.com/files/upload/fcpa_digest.pdf (describing ongoing FCPA investigations based on information gathered from documents filed with the SEC and media reports).

B. *Findings*

This Note aggregates the publicly available information about FCPA settlements in two tables, which are contained in Appendix A. Table 3 contains information about settlements in which the corporate defendant voluntarily disclosed its criminal conduct to the DOJ. Table 4 contains information about FCPA defendants whose prosecution was not the result of a voluntary disclosure by the company. These tables contain all of the publicly available information about these settlements. Data that appears to be missing was not included in the documents created by the DOJ and the defendant company as part of the settlement.

IV. TRENDS AND TAKEAWAYS

While the data that can be gathered from the non-prosecution, deferred prosecution, and plea agreements that the DOJ has entered into since 2002 appears to create only a modest picture of DOJ enforcement, this time period has actually been a period of robust FCPA enforcement in comparison to the first twenty years of the statute's existence.[160] Given this discrete data, these cases reveal the beginning of enforcement trends, especially in cases resolved between 2008 and 2011, which provide the most complete information. While narrowing the temporal focus further reduces the number of cases, over two-thirds of the FCPA cases resolved by the DOJ between 2002 and 2011 were resolved between 2008 and 2011.[161]

A. *Patterns in Settlements and Penalties*

The corporate FCPA cases resolved between 2002 and 2011 suggest four trends in FCPA enforcement. First, many of the cases relate to each other. The DOJ often entered into dispositions with both a parent company and its subsidiary regarding the same underlying conduct.[162] For example, in January and February 2007, the DOJ entered into plea agreements with three subsidiaries of Vetco International, Ltd. and into a deferred prosecution agreement with a fourth.[163] The conduct underlying all four dispositions was the

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160. *See* Koehler, *supra* note 7, at 389 (noting that enforcement from 1977 to 1997 was nearly nonexistent but significantly increased thereafter).

161. *See infra* Appendix A, Tables 3 & 4.

162. *See infra* Appendix A, Tables 3 & 4.

163. Press Release, U.S. 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), *available at* http://www.justice.gov/opa/pr/2007/February/07_crm_075.html.

same: the defendant companies had caused bribes to be paid to customs officials in Nigeria in exchange for preferential treatment during the customs process.[164] In a more recent example, the DOJ entered into a non-prosecution agreement with Alliance One, Inc. and into plea agreements with two of its subsidiaries for bribes that had been paid by those subsidiaries in Kyrgyzstan and Thailand.[165]

Dispositions also relate to each other because they involved similar, but unrelated, conduct by unrelated companies. Between 2007 and 2011, the DOJ reached agreements with several corporations to resolve illegal conduct related to their participation in the UN Oil-for-Food Program.[166] While none of these companies worked together or even in the same industry, they all paid kickbacks to the Iraqi government in order to obtain contracts to sell goods to that government through the UN Oil-for-Food Program.[167] These cases are related because the illegal conduct engaged in by the companies is nearly identical, even though the companies are unconnected.

Finally, dispositions relate when similar conduct is alleged in multiple dispositions because the defendant companies engaged in illegal conduct together or defendants in the same industry engaged in similar illegal conduct. For example, Panalpina Inc., a freight-forwarding company, pleaded guilty to conspiring to violate the FCPA and aiding and abetting violations of the FCPA in November 2010.[168] The conduct underlying Panalpina's plea consisted of paying bribes to

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164. *Id.*

165. Alliance One Tobacco Osh Plea Agreement, *supra* note 156; Plea Agreement, United States v. Alliance One Int'l AG, No. 4:10-cr-00017 (W.D. Va. Aug. 6, 2010) [hereinafter Alliance One Int'l Plea Agreement].

166. *See, e.g.*, Deferred Prosecution Agreement at 3, United States v. York Int'l Corp., No. 07-CR-00253 (D.D.C. Oct. 15, 2007) [hereinafter York Int'l Deferred Prosecution Agreement] (agreeing to $10 million penalty for FCPA violations relating to business conducted under the UN Oil-for-Food program); Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Paul Gerlach, Sidley Austin LLP, Counsel for Novo Nordisk 2–4 (May 6, 2009) [hereinafter Novo Nordisk DPA Letter], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/nordiskn/05-06-09novo-agree.pdf (imposing $9 million penalty relating to business activities conducted under the UN Oil-for-Food Program); Letter from Paul Pelletier, Principal Deputy Chief, Fraud Section, U.S. Dep't of Justice, to Eric Dubelier, Reed Smith LLP, Counsel for Johnson & Johnson 5, 13–14 (Jan. 14, 2011) [hereinafter Johnson & Johnson DPA Letter], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf (imposing fine of $21.4 million for payments to the Iraqi government under the program); *infra* Appendix A, Tables 3 & 4.

167. *See, e.g.*, Novo Nordisk DPA Letter, *supra* note 166, at 15–17 ("From in or about January 2001 through in or about April 2003, Novo obtained and performed approximately €22 million worth of contracts to supply insulin and other medicines pursuant to the OFFP with the State Company for Drugs and Medical Appliances ('Kimadia'), a state-owned company which was part of the Ministry of Health of the government of Iraq.").

168. Plea Agreement, United States v. Panalpina, Inc. at 1, No. 10-cr-765 (S.D. Tex. Nov. 4, 2010) [hereinafter Panalpina Plea Agreement].

Nigerian customs officials on behalf of its customers in order to circumvent local rules and regulations about the import of goods and materials.[169] At the same time, five oil and gas services companies who used Panalpina's services also entered into agreements with the DOJ to resolve investigations of violations of the FCPA,[170] and a sixth company settled with the DOJ approximately nine months later.[171] These cases were related because the defendant companies participated in the illegal conduct together.[172]

The second trend to emerge is that nearly all non-prosecution agreements entered into by the DOJ between 2002 and the present—and all non-prosecution agreements after 2007—involved a company that had voluntarily disclosed a potential violation of the FCPA and cooperated in the subsequent investigation.[173] This is significant because, as described in Part II.B.3, a non-prosecution agreement is the least harsh disposition a company can enter into and carries less of a stigma than either a plea or a deferred prosecution agreement, causing fewer collateral consequences for the company.[174] While several companies that disclosed illegal conduct voluntarily also entered into deferred prosecution and plea agreements,[175] this trend suggests that only companies that voluntarily disclose will receive non-prosecution agreements. Failing to disclose illegal conduct may foreclose the possibility that a company who violates the FCPA could receive a non-prosecution agreement.

Third, most of the companies that received penalties below the fine range prescribed by the Sentencing Guidelines voluntarily disclosed their discovery of potential illegal conduct. Data about the prescribed fine range was available for twenty-two of the companies that voluntarily disclosed illegal conduct.[176] Nine of those companies received penalties that were less than the minimum fine recommended by the Sentencing Guidelines.[177] However, some companies that voluntarily disclosed did not receive penalties reduced below the applicable Guidelines range,[178] and other companies

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169. *Id.* at 3.

170. Press Release, U.S. Dep't of Justice, Oil Services and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

171. JGC Deferred Prosecution Agreement, *supra* note 4, at 1.

172. *Id.*

173. *See infra* Appendix A, Tables 3 & 4.

174. *See supra* Part II.B.1 (describing the three primary vehicles for enforcement).

175. *See, e.g.*, Daimler AG Deferred Prosecution Agreement, *supra* note 22; CCI Plea Agreement, *supra* note 33.

176. *Infra* Appendix A, Table 3.

177. *Infra* Appendix A, Table 3.

178. *See, e.g.*, ABB Deferred Prosecution Agreement, *supra* note 91 (receiving a penalty within the Guidelines range despite having self-disclosed).

received reduced sentences even though their conduct was uncovered by an investigation.[179] But five of the eight companies that received a penalty reduced by more than 30 percent below the recommended Guidelines range disclosed FCPA violations voluntarily.[180] The three companies that did not voluntarily disclose—Innospec, Siemens, and Bridgestone Corporation—received reduced penalties due to extenuating circumstances (Innospec)[181] and "exemplary" or "extraordinary" cooperation (Siemens and Bridgestone Corporation).[182]

Defendant	Date of Settlement	Reduction in Fine
Innospec Inc.	3/17/10	86.11%
Siemens Aktiengesellschaft	12/12/08	66.67%
Pride International, Inc.	11/14/10	55%
Latin Node, Inc.	3/23/09	52.38%
Daimler	3/22/10	48.52%
ABB Inc.	9/29/10	40%
Bridgestone Corporation	10/5/11	37.34%
Control Components, Inc.	7/22/09	34.77%

Table 1[183]

Finally, the DOJ is rewarding companies that provide significant cooperation after an FCPA violation is discovered, especially if the company did not self-disclose. For example, Bridgestone Corporation received a penalty 37.34 percent below the base fine, despite not self-disclosing, because its cooperation was "extraordinary, including conducting an extensive worldwide internal investigation, voluntarily making Japanese and other employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for the United States."[184] Other reductions in penalties for FCPA violations have been attributed to the cooperation provided by the defendant corporation after the violation was brought to the DOJ's attention.[185]

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179. *See, e.g.*, Siemens Sentencing Memo, *supra* note 157, at 18 (receiving a penalty below the Guidelines range despite not self-disclosing).

180. *Infra* Appendix A, Table 3.

181. *See infra* Part IV.B.3 (describing the *Innospec* case).

182. *See* Siemens Sentencing Memo, *supra* note 157, at 18 (attributing the reduced sentence to Siemens's exemplary cooperation in the investigation); Plea Agreement at 17, United States v. Bridgestone Corp., No. 4:11Ocr-00651 (S.D. Tex. Oct. 5, 2011) [hereinafter Bridgestone Plea Agreement] (attributing the reduced sentence to Bridgestone's extraordinary cooperation).

183. *Infra* Appendix A, Tables 3 & 4.

184. Bridgestone Plea Agreement, *supra* note 182, at 17.

185. *See, e.g.*, Magyar Telekom Deferred Prosecution Agreement, *supra* note 22, at 8; Johnson & Johnson DPA Letter, *supra* note 166, at 5.

While the data available about the small number of FCPA settlements since 2002 does not lend itself to statistical analysis, a survey of the settlements resulting from voluntary disclosures and investigations does reveal several trends. Settlements are related, even when the defendants themselves are unconnected. Non-prosecution agreements are primarily used with defendants that have disclosed, and failing to disclose may foreclose this option. Defendants that voluntarily disclose illegal conduct tend to get penalties that were reduced from the Sentencing Guidelines' minimum to a greater degree. Finally, cooperation with the DOJ is rewarded, especially if the company did not self-disclose.

B. *Case Studies*

While no two FCPA cases are exactly alike, past FCPA settlements can be instructive as to how future cases will be resolved. This Note provides a more complete picture of the DOJ's enforcement efforts in the FCPA arena by qualitatively examining three recent cases.

1. *Panalpina, Inc.* and Five Oil Services Companies: The Early Bird Gets the Worm

The first case study involves six companies that engaged in similar illegal conduct that was, in many instances, related. On November 4, 2010, Panalpina World Transport, a freight forwarding company, and five companies in the oil services industry resolved investigations of FCPA violations and agreed to collectively pay a total of $156,565,000 in criminal penalties.[186] The conduct underlying all of these dispositions involved paying bribes to government officials in foreign countries in order to avoid paying customs duties and penalties relating to equipment that the oil services companies brought into the foreign countries for their operations there.[187] The oil services companies paid these bribes directly and through their agents or Panalpina, which made improper payments on behalf of its customers.[188] While all of the companies involved paid fines to resolve these investigations, the fines varied widely in amount and in their relation to the recommended fine range from the Guidelines. The companies involved in this conduct received the following fines:

186. Press Release, U.S. Dep't of Justice, *supra* note 170.
187. *Id.*
188. *Id.*

Company	Disposition	Voluntary Disclosure	Fine Amount (in millions)	Deviation from Guidelines Range
Panalpina World Transport	Plea	NO	$70.56	-3.98%
Shell Nigeria Exploration and Production Company, Ltd.	DPA	NO	$30	-12.28%
Transocean, Inc.	DPA	NO	$13.44	-20%
Tidewater Marine International, Inc.	DPA	YES	$7.35	-30%
Pride International, Inc.	DPA	YES	$32.625	-55%
Noble Corporation	NPA	YES	$2.59	N/A

Table 2[189]

While the DOJ considers many factors when calculating an FCPA penalty using the Sentencing Guidelines and subsequently selecting a specific amount within the prescribed range of fines,[190] the story provided in the agreements between corporate defendants and the DOJ about the defendants' disclosure (or lack thereof) and subsequent cooperation with the investigation may explain why a given fine amount was ultimately selected.

Though three of these companies voluntarily disclosed potentially criminal conduct to the DOJ, they did not all disclose at the same time or for the same reasons. According to the Statement of Facts included in the deferred prosecution agreement between Pride International and the DOJ, Pride discovered evidence of improper payments in 2006 during the course of a continuing internal review, undertook an internal investigation, and voluntarily disclosed the FCPA violations to the DOJ.[191] The conduct for which Pride acknowledged responsibility took place during 2003 through 2004 in Venezuela, India, and Mexico,[192] so this conduct may have ceased by the time it was discovered, and the DOJ noted in its press release about this settlement that "Pride provided information and substantially assisted in the investigation of Panalpina."[193]

189. *Infra* Appendix A, Tables 3 & 4.

190. Hinchey, *supra* note 14, at 407 n.73.

191. Deferred Prosecution Agreement at B-15, United States v. Pride Int'l, No. 4:10-cr-00766 (S.D. Tex. Nov. 4, 2010) [hereinafter Pride Deferred Prosecution Agreement].

192. *Id.* at B-1.

193. Press Release, U.S. Dep't of Justice, *supra* note 170.

Tidewater Marine International also voluntarily disclosed, although there is no specific mention of the disclosure or when it occurred in the Statement of Facts accompanying the deferred prosecution agreement between Tidewater and the DOJ. The agreement mentions, under "Relevant Considerations," that Tidewater "promptly commenced an internal investigation . . . after becoming aware of information indicating potential issues with its Freight Forwarding Agent [Panalpina]" and voluntarily disclosed the conduct underlying the deferred prosecution agreement to the DOJ.[194] In addition, Tidewater admitted to paying bribes through its freight forwarding company as late as 2007.[195]

The third company to voluntarily disclose FCPA violations, Noble Corporation, initiated an internal investigation in May 2007 after learning that a competitor had begun an internal investigation of its import process in Nigeria.[196] According to the non-prosecution agreement between Noble and the DOJ, Noble immediately retained outside counsel to review their operations in Nigeria and told the DOJ about its investigation a month later, in June 2007.[197] In addition, the DOJ specifically mentioned in the press release about these settlements that the "non-prosecution agreement recognizes Noble's early voluntary disclosure."[198]

The three other companies that settled because of their participation in this conduct did not disclose their FCPA violations to the DOJ, although they did subsequently cooperate in the DOJ's investigation. Transocean promptly began an internal investigation after becoming aware of information showing problems with their freight forwarding company and cooperated with the DOJ's investigation.[199] Royal Dutch Shell also cooperated with the DOJ's investigation.[200] Finally, Panalpina World Transport received a small reduction in its penalty, but the DOJ filed a motion for downward departure because of Panalpina's "exemplary cooperation" and

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194. Deferred Prosecution Agreement at 4, United States v. Tidewater Marine Int'l, No. 4:10-cr-00770 (S.D. Tex. Nov. 4, 2010) [hereinafter Tidewater Deferred Prosecution Agreement].

195. *Id.* at B-23.

196. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Marc Spearing, Baker Botts LLP, Counsel for Noble Corp. app. A at A15 (Nov. 4, 2010) [hereinafter Noble Corp. NPA Letter] (outlining the agreed upon details of the non-prosecution agreement).

197. *Id.*

198. Press Release, U.S. Dep't of Justice, *supra* note 170.

199. Transocean Deferred Prosecution Agreement, *supra* note 143, at 4.

200. Deferred Prosecution Agreement at 4, United States v. Shell Nigeria Exploration and Prod. Co. Ltd., No. 4:10-cr-00767 (S.D. Tex. Nov. 4, 2010) [hereinafter SNEPCO Deferred Prosecution Agreement].

"comprehensive" internal investigation that provided information about third parties who had participated in the bribe scheme.[201]

While five of the companies involved in this scheme received fines that were below the Guidelines minimum, those who received the largest reductions voluntarily disclosed their misconduct to the DOJ. The Guidelines calculation with respect to Noble Corporation was not provided, so it is not known whether the fine Noble received was less than the minimum suggested by the Guidelines. However, the fact that Noble received a non-prosecution agreement—unlike any of the other companies—and had to pay a fine that was significantly lower than that imposed on any other company, implies that the DOJ did take Noble's voluntary disclosure into account. In addition, the evidence provided in the agreements between Pride, Tidewater, and the DOJ implies that Pride, which received a 55 percent reduction, may have been more forthcoming and cooperative than Tidewater, which received a 30 percent reduction. While this case does not show definitively that the DOJ rewards companies that self-disclose, it at least suggests the inference that the DOJ takes seriously voluntary disclosure and genuine cooperation undertaken by FCPA defendants.

2. *Control Components, Inc.*: Criminals Among Us

Control Components, Inc. (CCI), a California company that pleaded guilty to violating the FCPA in July 2007,[202] stands out for the high number of former employees who have been prosecuted for violations of the FCPA. CCI manufactures service control valves that are used in the power generation industry and made approximately 236 improper payments in thirty-six different countries between 1998 and 2007.[203] CCI's senior management instructed its salespeople to cultivate "friends-in-camp" who were employed by the state-owned businesses with which CCI did business.[204] These friends-in-camp usually had the power to award contracts to CCI or to dictate the technical specifications of an order so that CCI would be the favored bidder.[205] In exchange for helping CCI win a contract, the friend-in-camp would receive a corrupt payment.[206] In all, CCI made $6,854,763 worth of improper payments that resulted in $46,526,294 worth of net profits.[207]

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201. Government's Motion for Downward Departure, United States v. Panalpina, Inc., at 4, No. 10-cr-765 (S.D. Tex. Dec. 7, 2010).

202. Government's Sentencing Memorandum at 5–6, United States v. Control Components, Inc., No. 8:09-cr-00162 (C.D. Cal. July 24, 2009) [hereinafter CCI Sentencing Memo].

203. *Id.* at 4.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 5.

The Sentencing Memorandum that the DOJ filed in conjunction with CCI's plea agreement highlights the assistance that CCI provided.[208] The DOJ first noted that CCI voluntarily disclosed to the DOJ that information had come to light suggesting that CCI had made corrupt payments in connection with sales orders.[209] The Sentencing Memorandum also highlights that CCI's cooperation "substantially assisted" the DOJ in prosecuting CCI employees.[210] Both the former director of worldwide factory sales and the former finance director pleaded guilty in 2009 to conspiracy to violate the FCPA, and both agreed to cooperate with the ongoing investigation.[211] Six more former senior CCI executives, including the former CEO and the second-highest ranking executive at the company, were also indicted for FCPA and Travel Act violations.[212] The Sentencing Memorandum also notes CCI's "extensive" remedial efforts.[213] "CCI's internal investigation and uncovering of the extensive criminal conduct led to the termination or resignation of 31 employees, including its entire Middle East sales team and over half of its finance department."[214] Finally, CCI reviewed all of its agency relationships and terminated thirty-five of them.[215]

As a result of pleading guilty, CCI agreed to pay an $18.2 million penalty, which is 34.77 percent below the minimum fine recommended by the Sentencing Guidelines.[216] The DOJ acknowledged this reduction in the Sentencing Memorandum, stating that "the factors mentioned . . . in this memorandum represent mitigating circumstances of a 'kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission.'"[217] While the government considered CCI's voluntary disclosure, the emphasis in the Sentencing Memorandum on individual prosecutions and CCI's remedial actions implies that the DOJ also based the reduction in CCI's penalty, at least in part, on CCI's assistance in holding individual employees accountable for criminal conduct.

3. *Innospec, Inc.*: The Economy Has Got You Down

Innospec, Inc., the world's only manufacturer of the gasoline additive tetraethyl lead (TEL), received the largest reduction in

208. *Id.* at 8.
209. *Id.*
210. *Id.* at 9.
211. *Id.*
212. *Id.* at 9–10.
213. *Id.* at 10.
214. *Id.*
215. *Id.* at 11.
216. *Infra* Appendix A, Tables 3 & 4.
217. CCI Sentencing Memo, *supra* note 202, at 8.

penalty of any company to resolve an FCPA case between 2002 and 2011.[218] In its deferred prosecution agreement, Innospec admitted to paying kickbacks to the Iraqi government in connection with the UN Oil-for-Food Program; paying bribes to Iraqi officials after the Oil-for-Food Program; bribing Indonesian officials to secure contracts to sell TEL; and trading with Cuba.[219] The DOJ ultimately imposed a fine 86.11 percent below the minimum fine recommended by the Sentencing Guidelines.

Innospec did not voluntarily disclose its illegal conduct to the DOJ, and according to the Sentencing Memorandum filed with the court in this case, "Innospec's cooperation here was not timely, nor was it initially thorough."[220] Despite this, the DOJ drastically reduced Innospec's imposed penalty because of Innospec's inability to pay a significant fine and the penalties to be paid to other enforcement agencies.[221] The DOJ noted that the Guidelines allow a penalty below the range if the reduction is necessary to avoid "substantially jeopardizing the continued viability of the organization."[222] A $101.5 million fine, the minimum prescribed by the Guidelines, would jeopardize Innospec's continued viability because, among other things, its pension fund would experience a $85 million shortfall; it would be unable to remediate environmental damage it had caused; and it would be forced to close facilities around the world, resulting in dozens of employees losing their jobs.[223] The Sentencing Memorandum also notes that three other agencies—the SEC, the Office of Foreign Assets Control, and the United Kingdom's Serious Fraud Office—sought penalties from Innospec for this conduct.[224] As a result of these considerations, the DOJ reduced Innospec's fine to $14.1 million and included payment plans for both fixed and contingent payments.[225] Innospec is the only company since 2002 to receive a reduced penalty for this reason or any other reason not related to disclosure or cooperation.[226]

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218. *Infra* Appendix A, Tables 3 & 4.

219. Press Release, U.S. Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

220. Government's Sentencing Memorandum at 19, United States v. Innospec Inc., No. 1:10-cr-00061 (D.D.C. Mar. 18, 2010) [hereinafter Innospec Sentencing Memo].

221. *Id.* at 13–16.

222. *Id.* at 13.

223. *Id.* at 13.

224. *Id.* at 16–17.

225. *Id.* at 14–15.

226. *See infra* Appendix A, Tables 3 & 4.

V. CONCLUSION

While the FCPA settlements entered into by the DOJ since 2002 do not have the predictive power of an explicit DOJ policy or sentencing formula, they do suggest that self-disclosure and cooperation are valuable. The DOJ is successfully prosecuting related cases, suggesting that all companies whose misconduct is similar or intertwined—not just the forthcoming—will be prosecuted under the FCPA. For the companies that were prosecuted during the last decade, not disclosing wrongdoing seemingly foreclosed the option of a non-prosecution agreement and the greatest reductions in sentences. Significant cooperation can help to mitigate a potential penalty, but that also is an expense.

Ultimately, self-disclosure is almost certainly valuable, particularly for a company that thinks its misdeeds are likely to be discovered. While a company's likelihood of being caught is fact-dependent and beyond the scope of this Note, companies should base their decisions to disclose largely on that. If a company's conduct is likely to be discovered—because it is similar or intertwined with that of another company or will need to be reported under Sarbanes-Oxley—the value of self-disclosure is the possibility of a non-prosecution agreement and the ability to argue for the greatest possible fine reduction. While these findings may not satisfy the practitioners and scholars who believe the DOJ is not living up to its promise to reward companies that voluntarily disclose criminal conduct, the data analyzed in this Note indicates that at least for some corporate defendants, self-disclosure has value.

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Appendix A

Table 3: Settlements Involving Voluntary Disclosures

Company	Date	Fine (in millions)	Range (in millions)	Deviation from Guidelines Range	Disposition	Profits (in millions)	Bribes (in millions)
Deutsche Telekom AG[227]	12/29/11	$4.36			NPA		
Magyar Telekom, Plc.[228]	12/29/11	$59.6	$72.5–$145	-17.79%	DPA		
Aon Corporation[229]	12/20/11	$1.764			NPA	$1.8402	
Armor Holdings, Inc.[230]	07/13/11	$10.29			NPA	$1	Over $0.2
Tenaris S.A.[231]	05/17/11	$3.5			NPA	$0.4786	
Johnson and Johnson (DePuy)[232]	04/08/11	$21.4	$28.5–$57	-24.91%	DPA		
Comverse Technology, Inc.[233]	04/06/11	$1.2			NPA	$1.25 in adjusted operating income	$0.536
Tyson Foods, Inc.[234]	02/10/11	$4	$5.04–$10.08	-20.63%	DPA	$0.88	$0.35
Maxwell Technologies, Inc.[235]	01/31/11	$8	$10.5–$20	-23.81%	DPA	Benefit received of $2.5–$7	$2.7891
RAE Systems[236]	12/10/10	$1.7			NPA		
Noble Corporation[237]	11/04/10	2.59			NPA		

227. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Mary Jo White & Jonathan R. Tuttle, Debevoise & Plimpton LLP, Counsels for Deutsche Telekom AG 2 (Dec. 9, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/deutsche-telekom/2011-12-29-deustche-telekom-npa.pdf.

228. Magyar Telekom Deferred Prosecution Agreement, *supra* note 22, at 8.

229. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Laurence A. Urgenson & Craig S. Primis, Kirkland & Ellis, Counsels for Aon Corporation 2 (Dec. 20, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/aon/2011-12-20-aon-final-executed-npa.pdf.

230. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Roger M. Witten & Kimberly Parker, Wilmer Cutler Pickering Hale & Dorr, Counsels for Armor Holdings, Inc. app. A at 2 (July 13, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/armor/07-31-11armor-holdings.pdf.

231. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Robert J. Giuffra, Sullivan & Cromwell LLP, Counsel for Tenaris S.A. app. A at A2 (Mar. 14, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tenaris-sa/2011-03-14-tenaris.pdf.

232. Johnson & Johnson DPA Letter, *supra* note 166, at 2.

233. Comverse Non-Prosecution Agreement, *supra* note 29, app. A at 7.

234. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Laurence Urgenson, Kirkland & Ellis LLP, Counsel for Tyson Foods, Inc. at 4–5, 17 (Feb. 4, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tyson-foods/02-10-11tyson_foods_dpa.pdf.

235. Maxwell Techs. Deferred Prosecution Agreement, *supra* note 22, at 6–7, 23.

236. Press Release, U.S. Dep't of Justice, RAE Systems Agrees to Pay $1.7 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 10, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1428.html.

Company	Date	Fine (in millions)	Range (in millions)	Deviation from Guidelines Range	Disposition	Profits (in millions)	Bribes (in millions)
Pride International, Inc.[238]	11/04/10	$32.625	$72.5–$145	-55%	DPA		
Tidewater Marine International, Inc.[239]	11/04/10	$7.35	$10.5–$21	-30%	DPA		
ABB Inc.[240]	09/29/10	$17.1	$28.5–$57	-40%	Plea		
ABB Ltd. – Jordan[241]	09/29/10	$1.9	$1.92–$3.2	-1.04%	DPA		
Alliance One Tobacco Osh[242]	08/06/10	$4.2	$4.2–$8.4	0%	Plea	$4.8	$2.9678
Alliance One International, Inc.[243]	08/06/10				NPA		
Alliance One International AG[244]	08/06/10	$5.25	$4.2–$8.4	25%	Plea	$7	$1.2391
Universal Corporation[245]	08/06/10				NPA		
Universal Leaf Tabacos Ltda.[246]	08/06/10	$4.4	$6.3–$12.6	-30%	Plea	$2.3729	$0.6978
Daimler AG[247]	03/22/10	$93.6	$192.9–$385.8	-48.52%	DPA		
UTStarcom Inc.[248]	12/31/09	$1.5			NPA		$7
Helmerich & Payne Inc.[249]	09/30/09	$1			NPA	$0.204	$0.173

237. Noble Corp. NPA Letter, *supra* note 196, at 3.

238. Pride Deferred Prosecution Agreement, *supra* note 191, at 10.

239. Tidewater Deferred Prosecution Agreement, *supra* note 194, at 10–11.

240. Plea Agreement at 12, United States v. ABB Inc., No. 4:10-CR-664 (S.D. Tex. Sept. 29, 2010).

241. ABB Deferred Prosecution Agreement, *supra* note 91, at 11–12.

242. Alliance One Tobacco Osh Plea Agreement, *supra* note 156, at 9–10.

243. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Edward J. Fuhr, Hunton & Williams LLP, Counsel for Alliance One Int'l (Aug. 6, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-npa.pdf.

244. Alliance One Int'l Plea Agreement, *supra* note 165, at 8–9.

245. Letter from Denis J. McInerney, Chief, Fraud Section, U.S. Dep't of Justice, to Patrick R. Hanes, Williams Mullen, Counsel for Universal Corp. 2 (Aug. 6, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/universal-corp/08-03-10universal-corp-npa.pdf.

246. Plea Agreement at 9, United States v. Universal Leaf Tabacos Ltda., No. 3:10-CR-00225-REP (E.D. Va. Aug. 6, 2010).

247. Daimler AG Deferred Prosecution Agreement, *supra* note 22, at 6–7.

248. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Leo Cunningham, Wilson Sonsini Goodrich & Rosati, Counsel for UTStarcom, Inc. 2 (Dec. 31, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/utstarcom-inc/12-31-09utstarcom-agree.pdf.

249. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Kimberly A. Parker, Wilmer Cutler Pickering Hale & Dorr LLP, Counsel for Helmerich & Payne, Inc. 2 (July 30, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/helmerich-payne/06-29-09helmerich-agree.pdf.

Company	Date	Fine (in millions)	Range (in millions)	Deviation from Guidelines Range	Disposition	Profits (in millions)	Bribes (in millions)
Control Components, Inc.[250]	07/22/09	$18.2	$27.9–$55.8	-34.77%	Plea	$46.5	$6.85
Latin Node, Inc.[251]	03/23/09	$2	$4.2–$8.4	-52.38%	Plea		$2.2505
Aibel Group Ltd.[252]	11/21/08	$4.2	$2.1–$4.2	100% /Maximum fine	Plea		
Faro Technologies, Inc.[253]	06/05/08	$1.1			NPA	$1.4	$0.4445
AGA Medical Corporation[254]	06/03/08	$2			DPA	$13.5	
Willbros Group, Inc.[255]	05/04/08	$22			DPA		
Westinghouse Air Brake Technologies Corporation[256]	02/14/08	$0.3			NPA		
York International Corporation[257]	10/01/07	$10			DPA	$10.7	$1.224
Paradigm B.V.[258]	09/24/07	$1			NPA		
Baker Hughes Services International, Inc.[259]	04/11/07	$11	$19–$38		Plea	$19	$4.1
Vetco Gray Controls Inc. et al[260]	01/05/07	$6	$4.2–$8.4	42.86%	Plea		$2.1

250. CCI Plea Agreement, *supra* note 33, at 11.

251. Plea Agreement at 5–8, United States v. Latin Node, Inc., No. 09-CR-20239-PCH (S.D. Fla. Apr. 3, 2009).

252. Press Release, U.S. 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), *available at* http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html.

253. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Gregory S. Bruch, Willkie Farr & Gallagher LLP, Counsel for Faro Techs. 3 (June 5, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/faro-tech-inc/06-03-08faro-agree.pdf.

254. Deferred Prosecution Agreement at 6, United States v. AGA Med. Corp., No. 08-CR-172-JMR (D. Minn. June 3, 2008).

255. Deferred Prosecution Agreement at 9, United States v. Willbros Grp., Inc., No. 08-CR-287 (S.D. Tex. May 14, 2008).

256. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Eric A. Dubelier, Reed Smith LLP, Counsel for Westinghouse Air Brake Techs., Inc. 2 (Feb. 8, 2008).

257. York Int'l Deferred Prosecution Agreement, *supra* note 166, at 2.

258. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Saul M. Pilchen, Skadden Arps Slate Meagher & Flom LLP, Counsel for Paradigm B.V. (Sept. 21, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/paradigm/09-21-07paradigm-agree.pdf.

259. Plea Agreement at 8–12, United States v. Baker Hughes Servs. Int'l, Inc., No. 07-CR-129 (S.D. Tex. Apr. 11, 2007).

260. Plea Agreement at 7–10, United States v. Vetco Gray Controls Inc., No. 07-CR-004 (S.D. Tex. Feb. 6, 2007).

Company	Date	Fine (in millions)	Range (in millions)	Deviation from Guidelines Range	Disposition	Profits (in millions)	Bribes (in millions)
Vetco Gray Controls Limited[261]	01/05/07	$8	$6.3–$12.6	26.98%	Plea		$2.1
Vetco Gray UK Limited[262]	01/05/07	$12	$12.6–$25.2	-4.76%	Plea		$2.1
Aibel Group Ltd.[263]	01/05/07	$0			DPA		
Schnitzer Steel Industries[264]	10/16/06	$0			DPA		
SSI International Far East Ltd.[265]	10/10/06	$7.5			Plea		
DPC (Tianjin) Co. Ltd.[266]	05/20/05	$2			Plea		$1.6
Titan Corporation[267]	03/01/05	$13	$6.825–$13.65	90.48%/ 4.76% below maximum	Plea	Between $2.5 and $7	Over $2
Micrus Corporation[268]	02/28/05	$0.45			NPA		$0.105
Monsanto Company[269]	01/06/05	$1			DPA		$0.05
InVision Technologies, Inc.[270]	12/03/04	$0.8			NPA		
ABB Vetco Gray UK Ltd.[271]	06/22/04	$5.25	$3.5673–$7.1347	47.17%	Plea	$5.9456	
ABB Vetco Gray Inc., et al[272]	06/22/04	$5.25	$3.5673–$7.1347	47.17%	Plea	$5.9456	
Syncor Taiwan, Inc.[273]	12/05/02	$2			Plea		

261. *Id.*

262. *Id.*

263. Plea Agreement at 7–9, United States v. Aibel Grp. Ltd., No. 07-CR-005 (S.D. Tex. Feb. 6, 2008).

264. Deferred Prosecution Agreement, United States v. Schnitzer Steel Indus., No. 06-CR-398 (D. Or. Oct. 16, 2006).

265. Plea Agreement at 3–4, United States v. SSI Int'l Far E. Ltd., No. 06-CR-398 (D. Or. Oct. 10, 2006).

266. Plea Agreement at 5, United States v. DPC (Tianjin) Co. Ltd., No. 05-CR-482 (C.D. Cal. May 20, 2005).

267. Plea Agreement at 6–13, 25, United States v. Titan Corp., No. 05-CR-314-BEN (S.D. Cal. Mar. 1, 2005).

268. Press Release, U.S. Dep't of Justice, Micrus Corporation Enters into Agreement to Resolve Foreign Corrupt Practices Act Liability (Mar. 2, 2005), *available at* http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm.

269. Deferred Prosecution Agreement at 9, United States v. Monsanto Co., No. 05-CR-008-ESH (D.D.C. Jan. 6, 2005).

270. Press Release, U.S. Dep't of Justice, InVision Technologies Enters into Agreement with the United States (Dec. 6, 2004), available at http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm.

271. Plea Agreement at 7–11, ABB Vetco Gray, Inc., No. 04-CR-279 (S.D. Tex. July 6, 2004).

272. *Id.*

273. Syncor Plea Agreement, *supra* note 78, at 6–8.

Table 4: Settlements Not Involving Voluntary Disclosure

Company	Date	Fine (in millions)	Range (in millions)	Variance	Disposition	Profits (in millions)	Bribes (in millions)
Bridgestone Corporation[274]	10/05/11	$28	$39.9–$79.8	-37.34	Plea	$17.1037	
JGC Corporation[275]	04/06/11	$218.8	$312.6–$625.2	-30%	DPA	Contracts worth $6,000	
Alcatel-Lucent[276]	12/27/10	$92	$86.58–$173.16	6.26%	DPA	$48.1	
Alcatel-Lucent France[277]	12/27/10	$1.5			Plea		
Panalpina World Transport[278]	11/04/10	$70.56	$72.8–$145.6	-3.98%	Plea		$49
Shell Nigeria Exploration and Production Company, Ltd.[279]	11/04/10	$30	$34.2–$68.4	-12.28%	DPA		
Transocean Inc.[280]	11/04/10	$13.44	$16.8–$33.6	-20%	DPA		
Snamprogetti Netherlands B.V[281]	07/07/10	$240	$300–$600	-20%	DPA	Contracts worth $6,000	$180
Technip S.A[282]	06/28/10	$240.	$318.4–$636.8	-25%	DPA	Contracts worth $6,000	$182
Innospec Inc.[283]	03/17/10	$14.1	$101.5–$203	-86.11%	Plea		
BAE Systems Plc[284]	02/04/10	$400	$360–$400	11% Maximum	Plea	$200	Over $200
AGCO Limited[285]	09/30/09	$1.6			DPA		$0.5532
Novo Nordisk A/S[286]	05/11/09	$9			DPA		
Kellogg Brown & Root LLC[287]	02/06/09	$402	$376.8–$753.6	6.69%	Plea	235.5	
Fiat[288]	12/22/08	$7			DPA	€46.1	$4.358

274. Bridgestone Plea Agreement, *supra* note 182, at 14–18, .

275. JGC Deferred Prosecution Agreement, *supra* note 4, at 7, 10.

276. Deferred Prosecution Agreement at 7, United States v. Alcatel-Lucent, S.A., No. 10-CR-20907-PAS (S.D. Fla. Feb. 22, 2010).

277. *See* Plea Agreement at 8, United States v. Alcatel-Lucent Fr., S.A., No. 10-CR-20906-PAS (S.D. Fla. Feb. 22, 2010) (applying the statutory maximum rather than the Alternative Fines Act to determine the penalty because calculating the fine under the Alternative Fines Act would be too cumbersome).

278. Panalpina Plea Agreement, *supra* note 168, at 14–15.

279. SNEPCO Deferred Prosecution Agreement, *supra* note 200, at 4.

280. Transocean Deferred Prosecution Agreement, *supra* note 143, at 22.

281. Snamprogetti Deferred Prosecution Agreement, *supra* note 1, at 34–35.

282. Technip Deferred Prosecution Agreement, *supra* note 1, at 40–41.

283. Innospec Sentencing Memo, *supra* note 220, at 19.

284. BAE Sentencing Memo, *supra* note 81, at 16.

285. Deferred Prosecution Agreement at 2, United States v. AGCO Ltd., No. 09-CR-249-RJL (D.D.C. Sept. 30, 2009).

286. Novo Nordisk DPA Letter, supra note 166, at 2.

287. KBR Information, *supra* note 28, 9–18.

288. Deferred Prosecution Agreement at 2, United States v. Fiat S.P.A., No. 08-CV-0221 (D.D.C. Dec. 22, 2008).

Company	Date	Fine (in millions)	Range (in millions)	Variance	Disposition	Profits (in millions)	Bribes (in millions)
Siemens Aktiengesellschaft[289]	12/12/08	$450	$1,350–$2.700	-66.67%	Plea/DPA	$843.5	$805.5
Volvo Construction Equipment, AB[290]	03/20/08	$7			DPA	$13.8	$1.3
Renault[291]	03/20/08				DPA	€61	$4.8
Flowserve Pompes SAS[292]	02/21/08	$4			DPA		$0.6047
Lucent Technologies, Inc[293]	12/21/07	$1			NPA		
Akzo Nobel N.V.[294]	12/20/07	$0			NPA		
Ingersoll-Rand Italian SpA[295]	10/31/07	$2.5			DPA		$0.6
Textron Inc.[296]	08/23/07	$1.15			NPA		
Statoil, ASA[297]	10/13/06	$7.5			DPA		$5

289. Siemens Sentencing Memo, *supra* note 157, at 13.

290. Deferred Prosecution Agreement at 2, United States v. Volvo Constr. Equip., AB, 08-CR-069-RJL (D.D.C. Mar. 18, 2008).

291. *Id.* at 10.

292. Deferred Prosecution Agreement at 2, United States v. Flowserve Pompes SAS, No. 08-CR-035-RJL (D.D.C. Feb. 21, 2008).

293. Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Martin J. Weinstein, Wilkie Farr & Gallagher LLP, Counsel for Lucent Techs., Inc. 2 (Nov. 14, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech/11-14-07lucent-agree.pdf.

294. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to John L. Hardiman, Sullivan & Cromwell LLP, Counsel for Akzo-Nobel 2 (Dec. 20, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/akzo-noble/12-20-07akzo-noble-agree.pdf.

295. Deferred Prosecution Agreement at 2, United States v. Ingersoll-Rand Italiana SpA, No. 07-CR-294-RJL (D.D.C. Nov. 14, 2007).

296. Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't of Justice, to Timothy L. Dickinson, Paul Hastings Janofsky & Walker, Counsel for Textron Inc. (Aug. 21, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/textron-inc/08-21-07textron-agree.pdf.

297. Deferred Prosecution Agreement at 14–15, United States v. Statoil, ASA, No. 06-CR-960 (S.D.N.Y. Oct. 11, 2006).

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