
The Mystery[†] of Declinations Under the Foreign Corrupt Practices Act: A Proposal to Incentivize Compliance

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[†] Cf. *A Mammoth Guilt Trip*, ECONOMIST, Aug. 30, 2014, at 21, 23, <http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt> (noting “So how does a legal process without an open trial operate? The kind answer is ‘mysteriously;’ a harsher one might be ‘coercively’”).

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INTRODUCTION

The Foreign Corrupt Practices Act (“FCPA”)¹ criminalized “corruptly” paying “anything of value” to a “foreign official” “in obtaining or retaining business” by others “while in the territory of the United States,” as well as the failure of an “issuer” to keep accurate books and records.² Under the FCPA, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) investigate alleged wrongdoing and determine whether it is appropriate to indict, go to trial, plea bargain, enter into a deferred prosecution agreement (“DPA”) or non-prosecution agreement (“NPA”), or issue a declination.³ Unfortunately for businesses, the government has not publically disclosed information about declinations, the most favorable outcome.⁴

We argue that public policy would be well-served if the government offered timely information about the parameters of its decisions to decline further enforcement action. Obviously, details about the parties involved would be confidential unless self-disclosed, but the data would surely offer guidance to businesses attempting to comply with federal law while trying to decide whether or not to self-report findings of wrongdoing. This conundrum and the calculus of that decision are the basis for this article.⁵

¹ 15 U.S.C. §§ 78dd-1 to -3 (2012).

² §§ 78dd-1(a), -3(a).

³ A declination might be defined simply as a decision by the DOJ or SEC to decline to bring an enforcement action under the FCPA. However, as will be discussed, this definition fails to fully capture what a declination is. See *infra* Part III.A.

⁴ See *infra* Part III.

⁵ Cf. *A Mammoth Guilt Trip*, ECONOMIST (Aug. 30, 2014), <http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt> (“So how does a legal process without an open trial operate? The kind answer is ‘mysteriously’ . . .”). The article also reports that “In January this year two senators, Elizabeth Warren and Tom Coburn, proposed a ‘Truth in Settlements Act,’ which would require fuller disclosure about settlement terms. In February[,] Better Markets, an advocacy organization that claims to promote transparency and accountability in financial markets, filed a suit in a federal court in Washington, D.C., asking the Justice Department to explain the reasoning behind a \$13 billion settlement with JPMorgan Chase in 2013, one of many in which it is involved. Better Markets and Ms[.] Warren both revel in bashing banks. But many bankers say they actually support these measures, which they hope would expose double standards for crime and the intellectual sloppiness of a populist regulatory system championed by politicians like Ms[.] Warren.” *Id.* Furthermore, it reports that “Chief executives now say it would be simply irresponsible for them to run the risk of an indictment and trial. The result is ‘regulation through prosecution[,]’ argues James Copland of the Manhattan Institute, a think-tank.” *Id.* For more information on Copland’s research, see James R. Copland, *Regulation by Prosecution: The Problems with Treating*

As a preliminary matter, we submit that the notion of “regulation though prosecution” without review and transparency is prejudicial to business and does not achieve the objective of having clear law to deter the proscribed activity.⁶ As one counsel has noted: “Voluntary self-disclosure is a business decision What are the costs and the benefits? Right now[,] it’s a guessing game.”⁷ To make matters more difficult, determining the contours of the FCPA itself can be a guessing game because the statute covers a broad range of activities. As the court in *United States v. Kay* stated:

[W]e cannot hold as a matter of law that Congress meant to limit the FCPA’s applicability to cover only bribes that lead directly to the award or renewal of contracts. Instead, we hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage. In 1977, Congress was motivated to prohibit rampant foreign bribery by domestic business entities, but nevertheless understood the pragmatic need to exclude innocuous grease payments from the scope of its proposals. The FCPA’s legislative history instructs that Congress was concerned about both the kind of bribery that leads to discrete contractual arrangements and the kind that

Corporations as Criminals, CIV. JUST. REP. Dec. 2010, at 9-11.

⁶ See *The Criminalisation of American Business*, ECONOMIST (Aug. 28, 2014, 8:03 AM), <http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion> (“Perhaps the most destructive part of it all is the secrecy and opacity. The public never finds out the full facts of the case, nor discovers which specific people — with souls and bodies — were to blame. Since the cases never go to court, precedent is not established, so it is unclear what exactly is illegal. That enables future shakedowns, but hurts the rule of law and imposes enormous costs. Nor is it clear how the regulatory booty is being carved up.”); cf. *Plucking the Goose*, ECONOMIST (Feb. 20, 2014, 3:58 PM), <http://www.economist.com/news/leaders/21596937-western-governments-are-still-over-regulating-companies-their-economies-will-pay> (“It isn’t just taxation that has the rich-world companies hissing these days, but rhetoric and regulation as well.”).

⁷ Rachel Louise Ensign, *Why Companies Might Opt to Self-Report Potential Bribery Issues*, WALL ST. J. (Nov. 2, 2014, 7:33 PM ET), <http://www.wsj.com/articles/why-companies-might-opt-to-self-report-potential-bribery-issues-1414974824>; see also *Decoding FCPA Enforcement: The U.S. Government Issues Comprehensive Guidance on the Foreign Corrupt Practices Act*, GIBSON DUNN (Nov. 19, 2012), <http://www.gibsondunn.com/publications/pages/DecodingFCPAEnforcement-USGovernment-ComprehensiveGuidance.aspx> (discussing self-disclosure credit in the resolution of an FCPA case).

more generally helps a domestic payor obtain or retain business for some person in a foreign country; and that Congress was aware that this type includes illicit payments made to officials to obtain favorable but unlawful tax treatment.”⁸

Even businesses that are trying to comply with the law find the environment challenging.⁹ We note with bemusement that none other than Lanny Breuer, the former Chief of the DOJ Criminal Division who moved into private practice, is on the record as stating:

Yet it is not clear, given the consequences of disclosure that companies are always best served by disclosing. In the anticorruption area, for instance, it may sometimes be preferable for a company to fully investigate the issue and fix the problem that led to the violation without disclosing it to the Justice Department.¹⁰

This article will explore the history of declinations and its relationship with disclosure. In Part I, we consider the question of

⁸ *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2000) (reversing the dismissal of the indictment argued by Philip Urofsky) (“Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. Finally, Congress’s intention to implement the Convention, a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled, further supports our determination of the extent of the FCPA’s scope. Thus, in diametric opposition to the district court, we conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA’s proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It still must be shown that the bribery was intended to produce an effect — here, through tax savings — that would ‘assist in obtaining or retaining business.’”), *aff’d*, 513 F.3d 432 (5th Cir. 2007).

⁹ At the 2015 UC Davis Law Review Symposium (*Corruption and Compliance: Promoting Integrity in a Global Economy*), Walmart Global Chief Compliance Officer Jay Jorgensen discussed Walmart’s compliance efforts, which included \$100 million spent reorganizing the corporate structure, training, and incorporating new technology. See Thomas Lee, *Top Walmart Official Says Retailer Strives to Prevent Corruption*, SF GATE (Jan. 26, 2015, 3:51 PM), <http://www.sfgate.com/business/article/Top-Walmart-official-says-retailer-strives-to-6041490.php>. To read Jorgensen’s remarks, see Jay T. Jorgensen & C. Kevin Marshall, *UC Davis Law Review Symposium “Corruption and Compliance: Promoting Integrity in a Global Economy,” Keynote by Jay Jorgensen*, 49 UC DAVIS L. REV. 425 (2015).

¹⁰ Lanny Breuer & Peter Lichtenbaum, *Your International Compliance Playbook*, CORP. COUNS. (Jan. 5, 2015), <http://www.corpcounsel.com/id=1202679208006/Your-International-Compliance-Playbook?slreturn=20150424032415>.

whether or not businesses should self-report to the government by examining the current enforcement environment under the FCPA and, briefly, the United Kingdom Bribery Act (“UKBA”). We also consider the role of whistleblower bounties, which are certainly a significant factor in proactive compliance and self-reporting decision-making by businesses.

In Part II, we address the costs of corruption in the context of the business decision at hand. While it is obvious that corruption undermines the economic fabric of any society, we posit that the opaque nature of the U.S. government’s decisions with respect to declinations makes the cost of compliance to business an ancillary “cost of corruption.”

Part III considers the practice of declinations by the government and how this informs a business’s calculation of whether to self-disclose internal findings of wrongdoing. Finally, in Part IV, we offer a simple proposal we believe will promote transparency and accountability in both business and government, thereby furthering public policy goals without compromising enforcement. Specifically, we call for regular and complete declination disclosures by the SEC and DOJ. The Conclusion reiterates clear steps to improve enforcement efficacy and transparency.

Our proposal will take the guessing out of the equation and provide businesses with needed information to truly encourage disclosure. The recently approved Attorney General, Loretta Lynch, has concurred that it is possible for the DOJ to do more in this area. In response to a question during the course of her nomination, she stated that as Attorney General she:

look[s] forward to . . . actively pursuing and implementing means by which declinations and other information about the decision to prosecute, or not, can be responsibly and appropriately shared.¹¹

This candid comment by the new Attorney General offers some hope for a change in business as usual. Figure 1 illustrates how a change in this policy, releasing declination information on a regular basis and increasing transparency, could have an impact on compliance and reducing bribery and corruption.¹²

¹¹ Mike Koehler, *Senate Remains Interested in FCPA Issues*, FCPA PROFESSOR (Feb. 12, 2015) [hereinafter *Senate Remains Interested*], <http://www.fcpaprofessor.com/senate-remains-interested-in-fcpa-issues> (emphasis added).

¹² See Anne H. Lippitt, Note, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 98 VA. L. REV. 1893 (2013) (analyzing a data set to look at the impact of

The significance of such a potential global lessening of both grand and petty corruption is non-trivial. Economic progress in developing countries is less likely to be undermined by corruption, fewer poorly-made products will be sourced because of bribes, and terrorism will be less well financed by these sources of underground payments.¹³ The payoff from such a measure is too beneficial to simply dismiss. Furthermore, businesses could operate more efficiently, control costs, and, because of more certainty, would not have to resort to unfettered investigations that “boil the ocean;” obviously, this all would positively affect the balance sheet.¹⁴

enforcement on the reduction in corruption).

¹³ Richard N. Dean, Baker & McKenzie Partner, Address at Public Law Institute (“PLI”) Conference: Planning and Conducting Cost-Effective FCPA Investigations (May 4–5, 2015) (notes on file with authors) (concluding his presentation by linking the connection between bribery and corruption and terrorism making reference to the role of bribery in facilitating the terrorist attack on the school in Beslan, Chechnya); Martin Longman, *Terrorism, Crime, and Corruption*, WASH. MONTHLY: POL. ANIMAL (Jan. 14, 2015, 10:40 AM), http://www.washingtonmonthly.com/political-animal-a/2015_01/terrorism_crime_and_corruption053717.php; see also LOUISE SHELLEY, *DIRTY ENTANGLEMENTS: CORRUPTION, CRIME AND TERRORISM*, 39, 42 (2014) (discussing terrorism and corruption in the Beslan massacre). For a discussion of the cost of corruption generally, see *infra* Part II.

¹⁴ See Leslie R. Caldwell, Assistant Attorney Gen., Address at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014) [hereinafter Caldwell Remarks] (transcript available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st>) (“So, in addition to promptly disclosing the conduct to us, I also encourage you to conduct a thorough internal investigation and to share with us the facts you uncover in that investigation. We do not expect you to boil the ocean in conducting your investigation but in order to receive full credit for cooperation, we do expect you to conduct a thorough, appropriately tailored investigation of the misconduct.”).

Figure 1: Impact of Proposed Policy Change to Reveal Anonymized Declinations Regularly.



I. THE ENFORCEMENT ENVIRONMENT

This Section considers the current rules and practices governing FCPA enforcement. It then compares the enforcement climate in the United States to that in the United Kingdom. Finally, it considers how laws other than the FCPA influence a company's decision to self-report FCPA violations to the government.

A. *Foreign Corrupt Practices Act and Enforcement*

As is well understood, the FCPA requires publicly traded companies to maintain a complete and transparent set of books and records that reflect proper accounting of all payments made in business transactions. None of these payments may legally reflect an effort to incentivize a "foreign official"¹⁵ to enhance the bottom line. In other

¹⁵ 15 U.S.C. § 78dd-1(a) (2012). This term is further defined as "any officer or employee or a foreign government or any department, agency, or instrumentality thereof." See *United States v. Esquenazi*, 752 F.3d 912, 920 (11th Cir. 2014). The meaning of "instrumentality" was explored and given a broad reach sufficient to include a foreign state-owned business as though it were an agency of the government, as well as its employees. *Id.* at 920-27.

words, since 1977, U.S. companies and individuals may not give anything “of value . . . in obtaining or retaining business.”¹⁶ In 1998, this prohibition was extended to include “foreign firms and persons that take any act in furtherance of such a corrupt payment while in the United States.”¹⁷ In order to accomplish this legal requirement, the company must implement appropriate business practices, understood to be “a system of internal accounting controls”¹⁸ Thus, the FCPA is a two-pronged approach to criminalizing bribery: It imposes fines and possible imprisonment for either bribing or for violating the accounting requirements, or both.¹⁹

By amendment in 1988, the FCPA recognizes an exception for “facilitating . . . payments” to expedite or otherwise promote the processing of properly obtained business transactions.²⁰ Also known as “grease” payments, this exception has proved to be a thorny defense; any such payment must not only meet specific statutory requirements, but also be properly recorded as such.²¹ Over the past ten years, and especially since the enactment of the UKBA, many businesses have officially abandoned the use of facilitation payments in favor of “zero tolerance” policies against offering incentives of any kind to foreign officials.²²

Enforcement of the FCPA rests with both the SEC and the DOJ, and each can take action, “separately or jointly, against individuals and companies.”²³ Note that under the statute, companies and individuals are subject to very serious sanctions:

¹⁶ 15 U.S.C. § 78dd-1(a).

¹⁷ Harvey L. Pitt, *The FCPA — Best Practices for a New Climate*, COMPLIANCE WEEK 1 (Apr. 24, 2007), <http://www.kaloramapartners.com/wp-content/uploads/sites/70/2013/09/2007-04-24-CW-The-FCPA-Best-Practices-for-a-New-Climate.pdf>.

¹⁸ 15 U.S.C. § 78m(b)(2)(A)–(B).

¹⁹ *See id.* § 78ff(c).

²⁰ *Id.* § 78dd-1(b).

²¹ *See* U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 112 n.176 (Nov. 14, 2012) [hereinafter RESOURCE GUIDE], *available at* <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> (“These payments, however, must be accurately reflected in the company’s books and records so that the company and its management are aware of the payments and can assure that the payments were properly made under the circumstances.”).

²² *See* Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT’L COMP. L. REV. 111, 157-58 (2013) [hereinafter *Not a Bribe*].

²³ Brandon Kenney, *The Cost to Businesses from Anti-Corruption Enforcement*, REG BLOG (Sept. 16, 2014), <http://www.regblog.org/2014/09/16/16-kenney-costs-of-fcpa>.

Companies that violate the FCPA are subject to fines of up to \$2 million; and individuals making corrupt payments may be fined up to \$100,000 and imprisoned up to five years. Under the Alternative Fines Act, the fines may actually be much higher — up to twice the benefit that the defendant(s) sought to obtain by making the corrupt payment(s). Fines imposed on individuals may *not* be paid by their employers or principals. In addition, the FCPA can lead to criminal sanctions for individual officers, directors, employees and agents.²⁴

Indeed, the numbers regularly add up to many multiples of \$2 million because the Alternative Fines Act is most often used to determine the fine, and the DOJ also relies on “the advisory U.S. Sentencing Guidelines . . . to calculate an advisory penalty range.”²⁵ The Sentencing Guidelines provide a scheme for calculating points based on elements of the FCPA offense and the benefit received, while crediting efforts to implement and enforce an effective compliance program with the requisite elements.²⁶ Former Assistant U.S. Attorney Michael Volkov offers a useful illustration of the DOJ calculations in a hypothetical FCPA case and demonstrates how a \$10 million dollar benefit could result in proposed fines that fall within a range of \$58 million and \$116 trillion, which then provides the basis for settlement negotiations.²⁷

According to the SEC’s website, “In 2010, the SEC’s Enforcement Division created a specialized unit to further enhance its enforcement of the FCPA”²⁸ As of October 18, 2015, nine companies appear on the agency’s list of 2015 enforcement actions as having paid a total of \$113.7 million to settle charges.²⁹ Research reveals that corporations paid about \$1.25 billion to the DOJ to settle FCPA actions in 2014 alone,³⁰ while the SEC added about \$327 million to its

²⁴ Pitt, *supra* note 17.

²⁵ Mike Koehler, *FCPA 101*, FCPA PROFESSOR (2014), <http://www.fcprofessor.com/fcpa-101#q17> (citing U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8 (2010)).

²⁶ See Michael Volkov, *Get Your Tutsi Fruits: Calculating FCPA Fines Under the Sentencing Guidelines*, VOLKOV LAW (Apr. 28, 2014), <http://blog.volkovlaw.com/2014/04/get-your-tutsi-fruitsi-calculating-fcpa-fines-under-the-sentencing-guidelines/>.

²⁷ *Id.*

²⁸ SEC Enforcement Actions: FCPA Cases, U.S. SEC. & EXCHANGE COMMISSION (2015) <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

²⁹ *Id.*

³⁰ Mike Koehler, *A Snapshot of the Foreign Corrupt Practices Act*, SANTA CLARA J. INT’L L. (forthcoming 2015) (manuscript at 3), available at <http://papers.ssrn.com/sol3/>

ledgers that year.³¹ This number is the largest since 2010 and, interestingly, represents the resolution of only ten cases.³²

1. The “Broken Windows” Approach to FCPA Enforcement

In late 2013, SEC Chair Mary Jo White suggested that the SEC was adopting a policy of “pursuing all types of violations of our federal securities laws, big and small”³³ and compared it to the “broken windows” approach to reducing crime adopted by New York City in the 1990s.³⁴ Of note is the fact that, in 2014, the SEC investigated two companies for improper payments that were much lower than has been usually the case in FCPA cases.³⁵

In keeping with that approach, recent enforcement actions have gone beyond corporate fines to reach the individuals involved.³⁶ In remarks on November 17, 2014, Assistant Attorney General Leslie R. Caldwell stated:

As our enforcement actions demonstrate, we are focusing our attention on bribes of consequence — ones that fundamentally undermine confidence in the markets and governments. And our record of success in these prosecutions has allowed us to

papers.cfm?abstract_id=2584661&download=yes. Professor Koehler has collected and published data on DOJ and SEC enforcement actions under the FCPA on an annual basis for many years. For similar 2013 numbers, see *id.* at 8-9; for a “snapshot” of government FCPA enforcement since 2007, see *id.* at 7-12.

³¹ *Id.* at 5-6.

³² Greg Deis et al., *FCPA Trends from the Last 6 Months*, LAW360 (Jan. 21, 2015), <http://www.law360.com/articles/613089/fcpa-trends-from-the-last-6-months>.

³³ Mary Jo White, Chairwoman, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013) [hereinafter White Remarks] (transcript available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539872100>).

³⁴ See *id.* (citing George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (March 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (“They [New York City Mayor Rudy Giuliani and Police Commissioner Bill Bratton] essentially declared that no infraction was too small to be uncovered and punished The theory is that when a window is broken and someone fixes it — it is a sign that disorder will not be tolerated. But, when a broken window is not fixed, it is a signal that no one cares, and so breaking more windows costs nothing.”)).

³⁵ Deis, *supra* note 32.

³⁶ See Mike Koehler, *A Focus on DOJ FCPA Individual Prosecutions*, FCPA PROFESSOR (Jan. 20, 2014), <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-2> (enforcement against individuals has significantly increased since 2008. As of January 2014, the DOJ had charged almost ninety individuals in the six year period of 2008-2014, while “between 1978 and 1999, the DOJ charged 38 individuals with FCPA criminal offenses”).

show — rather than just tell — corporate executives that if they participate in a scheme to improperly influence a foreign official, they will personally risk the very real prospect of going to prison.³⁷

Note that there is a perception that the DOJ is focused on enforcing the FCPA “as a broader foreign policy tool, rather than merely as a device meant to punish and deter corporations that engage in anti-competitive overseas conduct.”³⁸ Commentary on this so-called “Caldwell Doctrine” suggests the possibility that the focus of enforcement might include not only the size of the bribes, but also “the degree to which the bribes might have negatively impacted the overall ‘fairness’ of the foreign country’s political and economic systems vis-à-vis the foreign country’s own citizenry.”³⁹

2. Compliance Programs as a Factor in FCPA Enforcement

Compliance programs were conceived and introduced as an element of the Federal Sentencing Guidelines in 1990 as Congress intended to fashion a “carrot and stick” approach to corporate self-regulation.⁴⁰ It set forth seven elements of an “effective ethics and compliance program” that, if implemented, could significantly affect the financial risk of a business subject to government regulatory oversight.⁴¹ This

³⁷ Caldwell Remarks, *supra* note 14.

³⁸ Aaron Katz, *What the ‘Caldwell Doctrine’ Means for FCPA Enforcement*, LAW360 (Nov. 6, 2014), http://www.law360.com/articles/594029/what-the-caldwell-doctrine-means-for-fcpa-enforcement?article_related_content=1.

³⁹ *Id.*; see also Andy Spalding, *In Defense of the Caldwell Doctrine*, FCPA BLOG (Oct. 29, 2014, 7:08 AM), <http://www.fcpablog.com/blog/2014/10/29/in-defense-of-the-caldwell-doctrine.html>.

⁴⁰ ETHICS RESOURCE CENTER, THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS: EXECUTIVE SUMMARY 4 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcseminar/4_1_ethical_issues_you_need.pdf.

⁴¹ See U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8B2.1(a)(1)–(2) to (b)(3)–(7) (2015). The seven elements are:

- (1) exercise due diligence to prevent and detect criminal conduct; and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. . . .
- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

scheme received a significant judicial stamp of approval in *Caremark*, in which the court gave the corporate Board of Directors substantial credit for their efforts to implement a compliance program in a shareholder action for lack of meaningful oversight.⁴²

The government considers the existence of a robust and meaningful compliance program when deciding whether or not to take the next enforcement action against a company. Andrew Ceresny, Director of the SEC Division of Enforcement, has explicitly stated:

Nothing situates a company better to avoid FCPA issues than a robust FCPA compliance program

Of course, it is critical for such programs to be real programs The best companies would put the compliance

(4)(A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps —

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

⁴² See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 963, 970-72 (Del. Ch. 1996). By today's standards, those efforts were truly substandard.

program ahead of business interests and allow decisions to be made to ensure compliance with the law, no matter the business consequences. It is that sort of attitude that is the measure of whether such programs will be successful.⁴³

In this same vein, the Resource Guide to the FCPA (“Guide”),⁴⁴ published in 2012 by the DOJ and the SEC, lists a number of factors that influence when parties are charged.⁴⁵ The Guide also has a section on declinations that lists six anonymized cases when the agencies declined to prosecute.⁴⁶ The commentary notes that strong remedial actions — firing responsible employees, withdrawing a bid, reorganizing the compliance program, instituting in-person training, and conducting timely and thorough investigations, uncovering only small payments, and demonstrating full cooperation — all contribute to the decision.⁴⁷

3. Self-reporting and Cooperation in FCPA Enforcement

Both the DOJ and the SEC have publicly highlighted the importance of self-reporting and cooperation as elements of FCPA enforcement. In a keynote address in November of 2014, Assistant Attorney General Caldwell reiterated the global costs of corruption,⁴⁸ while emphasizing the increasing cooperation and communication between the anti-corruption enforcement authorities around the world.⁴⁹ She not only emphasized the DOJ’s record of developing robust cases, pointing to

⁴³ Andrew Ceresney, *Remarks at 31st International Conference on the Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM’N (Nov. 19, 2014) [hereinafter Ceresney, *Remarks*], <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598>.

⁴⁴ See generally RESOURCE GUIDE, *supra* note 21, at 53 (listing nine factors that are considered in conducting an investigation, determining whether to charge a corporation).

⁴⁵ See *infra* Part III.B.

⁴⁶ See RESOURCE GUIDE, *supra* note 21, at 77-79. For more on declinations to prosecute, see Sue Reisinger, *DOJ’s New Duck*, CORP. COUNS. (Sept. 1, 2014), <http://www.law.com/sites/articles/2014/08/30/dojs-new-duck/?slreturn=20150815004152>; *infra* Part III.C.3.

⁴⁷ See RESOURCE GUIDE, *supra* note 21, at 52-60.

⁴⁸ See Caldwell Remarks, *supra* note 14 (“The World Bank estimates that more than \$1 trillion is paid every year in bribes, which amounts to about 3 percent of the world economy.”); see also *infra* Part II.

⁴⁹ Caldwell Remarks, *supra* note 14 (“[W]e increasingly find ourselves shoulder-to-shoulder with law enforcement and regulatory authorities in other countries. . . . And make no mistake, this international approach has dramatically advanced our efforts to uncover, punish and deter foreign corruption.”).

the role of “whistleblowers and international cooperation”⁵⁰ in so doing, but she also highlighted the importance of self-disclosure, noting that prosecutors “should consider ‘the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents’ in deciding how to proceed in a corporate investigation.”⁵¹

According to Caldwell, critical elements of effective self-disclosure include timeliness and a thorough internal investigation⁵² that includes relevant information being communicated to the DOJ, most especially data relevant to the particular individuals involved. “She emphasized that cooperation has real benefits in terms of charging decisions, methods of disposition (often in the form of deferred prosecution agreements, non-prosecution agreements and declinations rather than guilty pleas) and penalties.”⁵³

The SEC’s prosecution of hydrocarbon company PetroTiger stands as the example of the benefits to a company of choosing the avenue of prompt and robust self-disclosure. The official news release did not describe the company’s cooperation,⁵⁴ but Ms. Caldwell did: “Petro-Tiger [sic] is a fine example of the kind of cooperation we expect. The company self-reported and fully disclosed the relevant facts to us, even

⁵⁰ *Id.*

⁵¹ See *id.* (quoting U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.300(A)(4) (2008)). Caldwell’s remarks seem to build upon those offered by Principal Deputy Assistant Attorney General Marshall L. Miller at the Global Investigation Review Program a few months earlier, during which he specifically referred to the publicly announced declination with respect to Morgan Stanley. See Marshall L. Miller, *Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program*, U.S. DEP’T OF JUSTICE (Sept. 17, 2014), <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>; see also Mike Koehler, *How the DOJ Can Better Achieve Its FCPA Policy Objectives*, FCPA PROFESSOR (Sept. 24, 2014), <http://www.fcpaprofessor.com/how-the-doj-can-better-achieve-its-fcpa-policy-objectives> (commenting on Miller’s speech and calling for a FCPA Compliance Defense).

⁵² See Caldwell Remarks, *supra* note 14 (“We do not expect you to boil the ocean in conducting your investigation but in order to receive full credit for cooperation, we do expect you to conduct a thorough, appropriately tailored investigation of the misconduct.”).

⁵³ *DOJ and SEC Officials Focus on Enforcement, Self-Reporting and Compliance at International FCPA Conference*, AKIN GUMP STRAUSS HAUER & FELD, LLP (Nov. 24, 2014), <http://www.akingump.com/en/news-insights/doj-and-sec-officials-focus-on-enforcement-self-reporting-and.html>.

⁵⁴ See *Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company*, U.S. DEP’T OF JUSTICE (Jan. 6, 2014), <http://www.justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company>.

though those facts implicated two CEOs and a top in-house counsel. Petro-Tiger [sic] itself has not been charged.”⁵⁵

Note that although former Co-CEO Knut Hammarskjold and former general counsel Gregory Weisman pled guilty to violating the FCPA, former Co-CEO Joseph Sigelman chose to go to trial on, among other allegations, charges of bribing a Columbian official to obtain a \$39 million oil contract.⁵⁶ His case has made headlines with respect to another element of self-reporting and cooperation: the willingness of certain individuals to assist the government. Here, Sigelman’s former general counsel, George Weisman, turned informant and secretly video recorded certain conversations that have been ruled to be about business strategy and therefore not protected by any attorney-client privilege.⁵⁷

Similarly, the SEC has made much of the value of self-reporting the accounting requirements of the FCPA. For example, in announcing its very first NPA in 2013, the SEC stated that its decision not to sue Ralph Lauren recognized the company’s “prompt reporting of the violations on its own initiative,” its thorough disclosures, “and its extensive, thorough and real-time cooperation with the SEC’s investigation.”⁵⁸

In 2015 remarks, Director of the SEC Division of Enforcement Andrew Ceresney pointed out that while “[t]here has been lot of discussion recently about the advisability of self-reporting FCPA misconduct to the SEC . . . I think any company that does the calculus will realize that self-reporting is always in the company’s best interest.”⁵⁹ Specific examples include the agency’s settlement with

⁵⁵ Caldwell Remarks, *supra* note 14.

⁵⁶ Joel Schectman, *PetroTiger CEO Going to Trial for FCPA Charges*, WALL ST. J. (May 12, 2014), <http://blogs.wsj.com/riskandcompliance/2014/05/12/petrotiger-ceo-going-to-trial-for-fcpa-charges/> (“The trial will open a rare window into [FCPA] investigations . . .”).

⁵⁷ See Richard L. Cassin, *Secret Recordings by PetroTiger General Counsel Admitted as Evidence Against Former CEO*, FCPA BLOG (Jan. 12, 2014), <http://www.fcpablog.com/blog/2015/1/12/secret-recordings-by-petrotiger-general-counsel-admitted-as.html>.

⁵⁸ Press Release, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corp. Involving FCPA Misconduct, U.S. SEC. & EXCH. COMM’N (Apr. 22, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780>.

⁵⁹ Andrew Ceresney, *FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry*, U.S. SEC. & EXCH. COMM’N (Mar. 3, 2015), <http://www.sec.gov/news/speech/2015-spch030315ajc.html>. He further elaborated:

Self-reporting from individuals and entities has long been an important part of our enforcement program. Self-reporting and cooperation allows us to detect and investigate misconduct more quickly than we otherwise could, as

Layne Christensen and Biorad Laboratories, both of which received substantial credit for self-reporting and cooperating with the investigation:

Among other things, . . . [Layne Christensen] provided real-time reports of its investigative findings, produced English language translations of documents, made foreign witnesses available, and shared summaries of witness interviews and forensic reports. The company also undertook an extensive remediation effort. Because of the company's extensive remediation, cooperation and self-reporting steps, . . . [t]he penalty imposed was around 10 percent of the disgorgement amount, whereas penalties have typically been closer to 100 percent of the disgorgement amount.

Similarly, . . . Bio-Rad Laboratories . . . provided translations of numerous key documents, produced witnesses from foreign jurisdictions, and undertook extensive remedial actions. There, the DOJ imposed a criminal fine of only \$14 million, which was equivalent to about 40 percent of the disgorgement amount. Again, a large reduction from the typical ratio.

This risk of suffering adverse consequences from a failure to self-report is particularly acute in light of the continued success and expansion of our whistleblower program

Whistleblowers have alerted us to conduct that we would otherwise have been unaware of, allowed us to expedite our investigations, and provided us with a detailed roadmap for

companies are often in a position to short circuit our investigations by quickly providing important factual information about misconduct resulting from their own internal investigations.

In addition to the benefits we get from cooperation, however, parties are positioned to also help themselves by aggressively policing their own conduct and reporting misconduct to us. We recognize that it is important to provide benefits for cooperation to incentivize companies to cooperate. And we have been focused on making sure that people understand there will be such benefits. We continue to find ways to enhance our cooperation program to encourage issuers, regulated entities, and individuals to promptly report suspected misconduct. The Division has a wide spectrum of tools to facilitate and reward meaningful cooperation, from reduced charges and penalties, to non-prosecution or deferred prosecution agreements in instances of outstanding cooperation.

misconduct. The kind of evidence they provide us often cannot be obtained from other sources.⁶⁰

Critics of the calculus of self-reporting have been and remain wary. Lanny Breuer, former Attorney General for the DOJ's Criminal Division, changed his position on the advisability of self-reporting when he left the Department of Justice from urging voluntary reporting to a more cautious view that "... it is not clear ... companies are always best served by disclosing."⁶¹ Similarly, practitioners echoed the dilemma for companies:

Because of the degree of prosecutorial discretion present in the U.S. enforcement system, however, ranging from whether to prosecute at all, what charges to bring, and what penalty-mitigation credit to give in a negotiated resolution, it remains difficult to isolate the benefits of voluntary disclosure. This creates a lack of certainty and predictability that has made disclosure (in the sense of self-reporting to the U.S. enforcement authorities) decisions often very difficult for companies. While the costs of self-reporting are fairly predictable and substantial, the benefits are not.⁶²

B. United Kingdom Bribery Act ("UKBA")

Although Congress may have expected the world to quickly follow its lead in combatting corruption, two decades elapsed before the OECD adopted its Convention on Combatting Bribery of Foreign Public Officials⁶³ and more than another decade passed before the

⁶⁰ Ceresney, *Remarks*, *supra* note 43.

⁶¹ See Breuer & Lichtenbaum, *supra* note 10 (discussing Breuer's belief that self-reporting may not always be the best decision for a company); Lanny A. Breuer, *Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE (Sept. 17, 2014), <http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-24th-national-conference-foreign-corrupt> (describing Breuer's initial position on self-reporting).

⁶² Lucinda A. Low, Owen Bonheimer & William Gordon, *FCPA Self-Reporting and the Effects of the Dodd-Frank Whistleblower Provisions: A New Calculus*, STEPTOE & JOHNSON LLP (May 5, 2011), <http://www.steptoel.com/assets/html/documents/PLI%20FCPA%20-%20FCPA%20Self-Reporting%20-%20May%202011.pdf> (citing Lucinda A. Low, Owen Bonheimer & David S. Lorello, *The Uncertain Calculus of Voluntary Disclosures*, STEPTOE & JOHNSON LLP (Mar. 2007), <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf>).

⁶³ See Argentina-Brazil-Bulgaria-Chile-Slovak Republic-Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public

United Kingdom adopted its Bribery Act.⁶⁴ Most recently, Brazil,⁶⁵ China,⁶⁶ and India⁶⁷ have adopted similar legislation aimed at deterring improper business behavior, each with its own particular thrust. This section considers the state of the law in the U.K.

The U.K. business community — and their advisers — reacted with concern as the UKBA set a higher bar than the FCPA regarding bribery in commercial transactions. First, this new anti-corruption legislation, enacted in 2010 and effective in 2011, defined bribery to include any transfer of value made by or to any individual in the chain of business, public official or private individual.⁶⁸ Further, the UKBA extends its reach to include those involved in doing business in the U.K., whether or not the offending transaction occurred within the country's borders.⁶⁹ Finally, no exception for facilitation payments exists,⁷⁰ requiring those businesses affected by the UKBA to review existing policies intended to comply with the more lenient standard of the

Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1; see also Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 224-25 (1996).

⁶⁴ See Bribery Act 2010, c. 23 (U.K.).

⁶⁵ See Decreto No. 12,846, de 1 de Agosto de 2013, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.8.2013 (Braz.), available at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/112846.htm; Beverley Earle & Anita Cava, *The Penumbra of the United States' Foreign Corrupt Practices Act: Brazil's Clean Companies Act and Implications for the Pharmaceutical Industry*, 13 RICH. J. GLOBAL L. & BUS. 439, 440 (2014) [hereinafter *Penumbra*]; Jaclyn Jaeger, *Petrobras Probe Portends Brazil Enforcement Crackdown*, COMPLIANCE WEEK, Mar. 17, 2015, available at <https://www.complianceweek.com/news/news-article/petrobras-probe-portends-brazil-enforcement-crackdown#.ViU0yhCrSRs> (outlining the framework of Brazil's Clean Companies Act and the country's investigation of the oil company Petrobras, calling it “a stark change for Brazil”).

⁶⁶ Zhonghua Renmin Gongheguo Xing Fa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980) (amended 2011); Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the People's Republic of China] (promulgated by Order No. 10 of the President of the People's Republic of China, Sept. 2, 1993, effective Dec. 1, 1993), art. 8.

⁶⁷ The Prevention of Corruption Act, No. 49 of 1988, PEN. CODE (India).

⁶⁸ See Bribery Act 2010, c. 23, §§ 1–6 (U.K.).

⁶⁹ *Id.* § 12.

⁷⁰ See *Facilitation Payments*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery—corruption/the-bribery-act/facilitation-payments.aspx> (“A facilitation payment is a type of bribe and should be seen as such. . . . Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency.”).

FCPA on this point.⁷¹ Enforcement of the UKBA rests with the Serious Fraud Office (“SFO”), which has stand-alone authority to both investigate and prosecute; this structure is fairly unusual in the British criminal scheme.

On the other hand, a business’ strong compliance policy offers a safe harbor of sorts, as the UKBA approves of “adequate procedures.”⁷² Current efforts to further promote robust procedures include a proposal to “make it an offence for organisations to fail to prevent ‘acts of financial crime’ by associated persons, including fraud and money laundering,”⁷³ and to recognize the same defense. Some suggest that this new proposal, when taken together with Section 7 of the Act that established corporate responsibility to “prevent bribery by associated persons,”⁷⁴ would make it easier for the SFO to pursue companies themselves,⁷⁵ in addition to individuals.

In 2012, the SFO adopted revisions to its policies that made a “critical change”⁷⁶ in its approach to enforcement by removing language explicitly providing that self-reported conduct “would be dealt with civilly whenever possible.”⁷⁷ The revisions provide, quite simply: “Self-reporting is no guarantee that a prosecution will not follow.”⁷⁸ The new view places great weight on the adequacy of the procedures in place to contain the behavior of a rogue employee.⁷⁹

⁷¹ See Geoffrey Gauci & Jessica Fisher, *The UK Bribery Act and the US FCPA: The Key Differences*, ASS’N. CORP. COUNSEL (June 1, 2011), <http://www.acc.com/legalresources/quickcounsel/ukbafcpa.cfm>.

⁷² Bribery Act 2010, c. 23, § 7(2) (U.K.); see also Earle & Cava, *Penumbra*, *supra* note 65, at 444; Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 59-66 (2013) (calling for a similar approach vis à vis the FCPA).

⁷³ Louise Roberts, *The UK Bribery Act — What to Expect in 2015*, ANTICORRUPTION BLOG (Dec. 15, 2014) [hereinafter *UK Bribery Act*], <http://www.anticorruptionblog.com/uk-bribery-act/the-uk-bribery-act-what-to-expect-in-2015>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Antonio Suarez-Martinez, *Investigating and Self-Reporting Corruption: New Serious Fraud Guidance on the U.K. Bribery Act Raises Stakes*, INT’L L. NEWS, Winter 2013, available at http://www.americanbar.org/publications/international_law_news/2013/winter/investigating_and_selfreporting_corruption_new_serious_fraud_guidance_the_uk_bribery_act_raises_stakes.html.

⁷⁷ Kirkland Alert, *New Guidance on the U.K. Bribery Act and Self Reporting Issued by the Serious Fraud Office*, KIRKLAND & ELLIS (October 2012), http://www.kirkland.com/siteFiles/Publications/Alert_100912.pdf.

⁷⁸ *Corporate Self Reporting*, SERIOUS FRAUD OFFICE (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery—corruption/corporate-self-reporting.aspx>. The guidance specifically sets forth:

There is much interest in understanding the parameters of adequate procedures, the basic elements of which are generally familiar by now,⁸⁰ but the dearth of decisions provides little insight.⁸¹ Indeed, in

Whether or not the SFO will prosecute a corporate body in a given case will be governed by the Full Code Test in the Code for Crown Prosecutors, the joint prosecution Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010.

If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.'

Id.

⁷⁹ Suarez-Martinez, *supra* note 76.

⁸⁰ The following should be pillars of a business' procedures:

- (1) Procedures proportionate to the bribery risks faced and nature, scale and complexity of the company's activities;
- (2) Top-level management commitment to preventing bribery, which fosters a culture within the company in which bribery is never acceptable;
- (3) Periodic assessment and documentation of the nature and extent of its exposure to potential external risks of bribery;
- (4) Proportionate and risk based approach to due diligence procedures in respect of persons who perform or will perform services for or on behalf of the company;
- (5) Internal and external communication, including training, proportionate to the risks faced to ensure that bribery prevention policies and procedures are embedded throughout the organization;
- (6) Monitoring and review of procedures to prevent bribery and make improvements where necessary.

Cara Dowling & Anita Esslinger, *Corruption Costs: The UK Bribery Act 2010*, BRYAN CAVE LLP 1, 4-5 (February 2015), <https://www.bryancave.com/images/content/6/8/v2/68817/Bulletin-Africa-Mining-Blog-February-2015-v1.pdf> (referencing MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 1, 21-31 (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf). Transparency International UK has issued a set of documents that provide "clear, practical advice on good practice anti-bribery systems." *Adequate Procedures Guidance*, TRANSPARENCY INT'L UK, <http://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures> (last visited May 24, 2015).

⁸¹ In July, 2014, Ben Morgan, the Joint Head of Bribery and Corruption of the

late 2014, headlines announced the fact that the SFO obtained its first criminal convictions.⁸² Three executives of Sustainable AgroEnergy were prosecuted for fraud against investors; two of them were convicted of violating the Bribery Act and were sentenced to four and six years in jail.⁸³

Obviously, and unlike the situation in the United States, enforcement of the UKBA by the SFO is viewed as thin, a perception that may be buttressed by the fact that its budget was “cut from £52 million in 2008 to £32 million in 2014.”⁸⁴ In response to criticism that it started only twelve investigations in 2014 despite receiving at least 2,500 whistleblower reports,⁸⁵ the SFO defended itself by arguing that the agency was “set up to specialise in only the most complex and serious cases.”⁸⁶ The spokesman stated that the SFO also gives good leads to other responsible agencies.⁸⁷

It is interesting to note that the SFO’s enforcement authority has included deferred prosecution agreements (“DPAs”) only since February 2014,⁸⁸ leaving commentators wondering “whether . . . [doing so] encourages more companies to self-report bribery and

SFO, publicly acknowledged that “we have very few corporate convictions in our stable.” Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, Speech to UK Aerospace and Defence Industry Seminar (July 1, 2014), *available at* <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/ben-morgan-speech-to-uk-aerospace-and-defence-industry-seminar.aspx>. In the United States, the DOJ offers some insight into appropriate procedures through its Advisory Opinions. See Earle & Cava, *Not a Bribe*, *supra* note 22, at nn.89–101 and accompanying text.

⁸² Samuel Rubinfeld, *SFO Secures First Bribery Act Conviction*, WALL ST. J. (Dec. 5, 2014), <http://blogs.wsj.com/riskandcompliance/2014/12/05/sfo-secures-its-first-bribery-act-conviction>.

⁸³ Press Release, Serious Fraud Office, City Directors Sentenced to 28 Years in Total for £23m Green Biofuel Fraud (Dec. 8, 2014), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-sentenced-to-28-years-in-total-for-23m-green-biofuel-fraud.aspx>; see Thomas D. Ryerson, *UK Continues to Ramp Up Enforcement Under Bribery Act*, WHITE COLLAR BRIEFLY (Jan. 7, 2015), <http://www.whitecollarbriefly.com/2015/01/07/uk-continues-to-ramp-up-enforcement-under-bribery-act>.

⁸⁴ Roberts, *UK Bribery Act*, *supra* note 73.

⁸⁵ James Salmon, *Serious Fraud Office Under Fire for Turning a Deaf Ear to Whistleblowers as It Launches Just 12 Investigations Last Year Despite 2,500 Reports of Corruption*, THIS IS MONEY (April 6, 2015), <http://www.thisismoney.co.uk/money/markets/article-3027807/Serious-Fraud-Office-fire-turning-deaf-ear-whistleblowers-launches-just-12-investigations-year-despite-2-500-reports-corruption.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Louise Roberts, *Deferred Prosecution Agreements Arrive in the UK*, ANTICORRUPTION BLOG (Feb. 24, 2014), <http://www.anticorruptionblog.com/uk-bribery-act/deferred-prosecution-agreements-arrive-in-the-uk>.

corruption to the SFO.”⁸⁹ Indeed, shortly thereafter, the SFO’s Joint Head of Bribery and Corruption, Ben Morgan, publicly addressed the possibility of entering into a DPA with the enforcement authority by posing two questions in the mind of anyone advising a company regarding self-disclosure:

- 1) Will the SFO ever find out? and
- 2) If they do, what would they really do about it anyway?⁹⁰

These two questions bring into focus the top-of-mind concerns of anyone advising a business facing the dilemmas presented when evidence of wrongdoing is uncovered. They have universal application in the context of the question under consideration here: Why not make it easier for a business to know how and why the enforcement authority has decided not to proceed with a case? Why not be transparent?

C. *A Snapshot of Incentives to Blow the Whistle*

Other laws influence company decision-making with respect to the FCPA. One might suggest that there is a proverbial elephant in the room: the increasing number of laws that offer tantalizing incentives to report corporate wrongdoing to the government, together with the increasing awareness of these laws.⁹¹ Indeed, although the False Claims Act⁹² has offered a reward for reporting fraud upon the government since the Civil War, the collapse of Enron motivated Congress to enact several federal statutes intended to restore trust in the markets by protecting employees who reported their employer’s wrongdoing.⁹³ The first was the Sarbanes-Oxley Act of 2002.⁹⁴

⁸⁹ Roberts, *UK Bribery Act*, *supra* note 73.

⁹⁰ Morgan, *supra* note 81.

⁹¹ See White Remarks, *supra* note 33 (“Another tool that we are using with growing frequency and success is our whistleblower authority, which enables us to award those who come forward with evidence of wrongdoing. . . . We believe this program is already a success. And, as more awards are made, we expect more people to come forward, which will dramatically broaden our presence.”).

⁹² 31 U.S.C. §§ 3729–3733 (2012).

⁹³ A host of federal statutes predate those of the past 15 years. See, e.g., JON O. SHIMABUKURO & L. PAIGE WHITAKER, *WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW* (2012), available at <https://www.fas.org/sgp/crs/misc/R42727.pdf> (providing an overview of eighteen federal statutes offering protection against retaliation to private sector whistleblowers); see also *Federal Whistleblower Protections*, NAT’L WHISTLEBLOWERS CTR., http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129 (last visited May 24, 2015).

Section 806 of this Act provided that “no publically traded company, nor any officer, employee, contractor, subcontractor, or agent of such company, may take retaliatory adverse employment action against a whistleblowing employee.”⁹⁵ Other important whistleblower protections appear in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”),⁹⁶ including the Consumer Financial Protection Act of 2010 (“CFPA”),⁹⁷ a response to the financial crisis of 2008.

These federal⁹⁸ statutes have had their intended effect. For example, according to the SEC’s 2014 Report on the Dodd-Frank Whistleblower Program, the agency received 334 whistleblower tips in FY 2011, 3,001 tips in FY 2012, 3,238 tips in FY 2013, and 3,620 tips in FY 2014.⁹⁹ Further, “since the beginning of the whistleblower program, the Commission has received . . . tips from individuals in 83 countries

⁹⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

⁹⁵ Sara A. Begley & Amanda Haverstick, *When the Whistle Blows . . . Recent Developments in Whistleblower Retaliation Law and How Employers Can Guard Against Costly Claims*, FORBES (May 14, 2014), <http://www.forbes.com/sites/theemploymentbeat/2014/05/14/when-the-whistle-blows-recent-developments-in-whistleblower-retaliation-law-and-how-employers-can-guard-against-costly-claims> (“The bottom line is that employers of all sizes that maintain public company service contracts now have an urgent need to implement internal whistleblower compliance programs to protect against retaliation risks.”); see also Sarbanes-Oxley Act, 116 Stat. at 745. It is interesting to note that recent research seems to suggest that protection against retaliation is more effective than compensation as a strategy to promote internal whistleblowing. N.C. State Univ., *Protections, Not Money, Can Boost Internal Corporate Whistleblowing*, SCIENCE DAILY (Mar. 2, 2015), www.sciencedaily.com/releases/2015/03/150302091701.htm.

⁹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

⁹⁷ *Id.* § 1011 (codified at 12 U.S.C. § 5491) (establishing the Bureau of Consumer Financial Protection).

⁹⁸ States have also undertaken to incentivize whistleblowing by offering protection against retaliation. See *State Whistleblower Laws*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 19, 2010), <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (creating an overview of state laws offering protection to whistleblowers). Recently, California took the step of clarifying and strengthening its protections for whistleblowers by enacting amendments effective January 1, 2014 and “significantly altering California Labor Code Section 1102.5, California’s general whistleblower statute.” Keith A. Goodwin & Laura Reathaford, *New California Law Expands Protections for Whistleblowers*, PROSKAUER (Dec. 12, 2013), <http://calemploymentlawupdate.proskauer.com/2013/12/articles/retaliation/new-california-law-expands-protections-for-whistleblowers>.

⁹⁹ SEC, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20 (2014), available at <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>.

outside the United States.”¹⁰⁰ Finally, and perhaps most significant, is the money:

Since the inception of the [SEC’s] . . . program in August 2011, [it] has authorized awards to fourteen whistleblowers, with awards being made to nine whistleblowers during Fiscal Year 2014

On September 22, 2014, the Commission authorized an award of more than \$30 million to a whistleblower who provided original information that led to a successful SEC enforcement action. This . . . award is more than double the amount of the previous highest award made under the SEC’s whistleblower program.¹⁰¹

With respect to FCPA enforcement, the SEC recently commented on its review of its whistleblower program four years after adopting it. In laying a foundation for the data noted above, the Director of SEC Division of Enforcement specifically noted:

Th[e] risk of suffering adverse consequences from a failure to self-report is particularly acute in light of the continued success and expansion of our whistleblower program

The program creates a powerful inducement for those aware of wrongdoing to break their silence and it has been *very successful, even transformative, in its impact*. Whistleblowers have alerted us to conduct that we would otherwise have been unaware of, allowed us to expedite our investigations, and provided us with a detailed roadmap for misconduct. The kind of evidence they provide us often cannot be obtained from other sources.¹⁰²

Similarly, in addition to the SEC program described above, the Dodd-Frank whistleblower provisions apply to “monetary sanctions recovered by . . . the DOJ, self-regulatory organizations, state attorneys general, and other regulators.”¹⁰³

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.* at 10 (citing Order Determining Award Claim, SEC Rel. No. 73174, File No. 2014-10 (Sept. 22, 2014)).

¹⁰² Ceresney, *Remarks*, *supra* note 43 (emphasis added); *see also* Mike Koehler, *SEC Potpourri*, FCPA PROFESSOR (May 11, 2015), <http://www.fcpaprofessor.com/sec-potpourri> (discussing SEC Chair Mary Jo White’s comments on the SEC’s whistleblower program).

¹⁰³ FRIED FRANK, NEW INCENTIVES FOR FOREIGN CORRUPT PRACTICES ACT

Of special note to our discussion of declinations is the willingness of the judiciary to expand the protected class of whistleblowers, which we believe reflects an increased social norm of promoting transparency. In this respect, the 2014 Supreme Court decision in *Lawson v. FMR LLC*¹⁰⁴ requires specific discussion. In considering the possible layers of whistleblowers in a public company who might need protection from retaliation for whistleblowing, the Supreme Court held that the protected class extends to “not only employees of a public company, but also employees of a private contractor or subcontractor that performs services for a public company, including individuals who have a services contract with a public company officer or employee.”¹⁰⁵ Interestingly, Justice Sotomayor wrote a dissenting opinion expressing concerns about the new “stunning reach”¹⁰⁶ of Section 806, perhaps a bit surprising given the general perception that misbehavior runs amok in the financial industry.¹⁰⁷

Similarly, California’s new whistleblowing framework substantially strengthens the scope of protections offered to an employee whistleblower by specifically expanding the range of protected reporting options. The statute had always extended anti-retaliatory protections to:

[E]mployees who reported reasonably-believed violations of state or federal laws, rules, or regulations to a government or law enforcement agency. SB 496 extends this protection to employees who report suspected illegal behavior: (1) *internally* to “a person with authority over the employee” or to another employee with the authority to “investigate, discover, or correct” the reported violation; or (2) *externally* to any “public body conducting an investigation, hearing, or inquiry.” . . .

SB 496 further provides that the protection of whistleblowers applies regardless of whether disclosing such information is part of the employee’s job duties. For example, a company’s

WHISTLEBLOWERS: DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 2 n.8 (July 16, 2010) (citing Dodd-Frank Act 2012 § 922), available at <http://www.friedfrank.com/siteFiles/Publications/A97331BB3E441A079E01314A968EECD7.pdf>.

¹⁰⁴ *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014).

¹⁰⁵ Begley & Haverstick, *supra* note 95; *Lawson*, 134 S. Ct. at 1165-66.

¹⁰⁶ *Lawson*, 134 S. Ct. at 1178 (Sotomayor, J., dissenting); see also Begley & Haverstick, *supra* note 95.

¹⁰⁷ See generally Don Mayer, Anita Cava & Catharyn Baird, *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515 (2014) (discussing the lack of accountability in the financial system).

compliance officer is protected under section 1102.5 for disclosing purported illegal activity even though his job duties may require him to report such activity externally or internally.¹⁰⁸

It is obvious that businesses are now engaging with a new world of risk, one created not by the public officials of foreign countries, but by the public officials in Congress. Without a doubt, the reach of whistleblower incentives has permeated corporate culture and has become an additional “cost” of corruption.

II. THE COST OF CORRUPTION¹⁰⁹

The cost of corruption is insidious.¹¹⁰ It infects societies, discourages innovation and individuals’ participation, and subverts development.

Corruption is a global problem. In the three decades since Congress enacted the FCPA, the extent of corporate bribery has become clearer and its ramifications in a transnational economy starker. Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law. And it threatens stability and security by facilitating criminal activity within and across borders, such as the illegal trafficking of people, weapons, and drugs. International corruption also undercuts good governance and impedes U.S. efforts to promote freedom and democracy, end poverty, and combat crime and terrorism across the globe.

Corruption is also bad for business. Corruption is anti-competitive, leading to distorted prices and disadvantaging honest businesses that do not pay bribes. It increases the cost of doing business globally and inflates the cost of government contracts in developing countries. Corruption also introduces significant uncertainty into business transactions: Contracts secured through bribery may be legally unenforceable, and

¹⁰⁸ Goodwin & Reathaford, *supra* note 98.

¹⁰⁹ See generally RESOURCE GUIDE, *supra* note 21, at 2-3 (using this phrase and describing those costs).

¹¹⁰ See generally Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325 (2012) (discussing history of analysis of bribery, a form of corruption) [hereinafter *Business Case*].

paying bribes on one contract often results in corrupt officials making ever-increasing demands. Bribery has destructive effects within a business as well, undermining employee confidence in a company's management and fostering a permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior. Bribery thus raises the risks of doing business, putting a company's bottom line and reputation in jeopardy. Companies that pay bribes to win business ultimately undermine their own long-term interests and the best interests of their investors.¹¹¹

Assistant Attorney General Caldwell has explicitly addressed the costs of corruption from a public policy point of view:

[C]orrupt countries are less safe. Corruption thwarts economic development, traps entire populations in poverty, and leaves countries without a credible justice system. Corrupt officials who put their personal enrichment before the benefit of their citizenry create unstable countries. And as we have seen time and time again, unstable countries become the breeding grounds and safe havens for terrorist groups and other criminals who threaten the security of the United States.¹¹²

This was not always a common understanding. In 1978, only a year after the FCPA was enacted, Susan Rose-Ackerman, a Yale economist, shifted the discussion from the moral sphere to the economic cost of corruption in her ground breaking work, *Corruption: A Study in Political Economy*.¹¹³ Others extended this argument, which seemed to resonate more than the earlier moral arguments against corruption and bribery. Paolo Mauro, in *Corruption and Growth*, studied the deleterious impact of corruption on growth.¹¹⁴ In a 1997 publication following a conference on corruption, Kimberly Ann Elliot noted: "Corruption is by no means a new issue, but it has only recently emerged as a global issue."¹¹⁵ This philosophical shift was reinforced in the OECD Anti-Bribery Convention, which was drafted in 1997 and

¹¹¹ RESOURCE GUIDE, *supra* note 21, at 2-3.

¹¹² Leslie R. Caldwell, Assistant Attorney Gen., Address at Duke University School of Law (Oct. 23, 2014) (transcript available at <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law>).

¹¹³ SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 1 (1978).

¹¹⁴ Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705-06 (1995); see also *Bribonomics*, *ECONOMIST*, Mar. 19, 1994, at 86.

¹¹⁵ KIMBERLY ANN ELLIOTT, *CORRUPTION AND THE GLOBAL ECONOMY* vii (1997).

became effective in 1998.¹¹⁶ The literature on corruption is extensive and expands on these themes in numerous articles.¹¹⁷

Two examples capture not only the cost of corruption and bribery in human terms, but also the waste of poor decision-making in economic terms. In 1995, Transparency International reported that pervasive bribery resulted in the Ecuadorian government purchasing locomotives that were too heavy for the rails and therefore inoperable. The fiasco certainly distorted the development process.¹¹⁸ The scale of this diversion of funds to non-functional transportation underscores how bribery can deprive a society of a desperately needed resource. Rose-Ackerman notes that certain projects are ideal for hiding bribes, most notably those that are complex.¹¹⁹ Indeed, the more complex, the greater the opportunity to obfuscate and enable officials to line their pockets and the less opportunity to discover wrongdoing.¹²⁰ The second example was described by Dennis McNerney, then Chief of the DOJ Fraud Section, in a speech at an ABA meeting in Washington, D.C. in 2010.¹²¹ Flashing a photo of a charred baby incubator on the screen, he referred to the purchase of defective incubators by certain unnamed government entities.¹²² The picture offered a dramatic

¹¹⁶ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

¹¹⁷ See, e.g., Daniel C.K. Chow, *How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws*, 49 UC DAVIS L. REV. 685 (2015); Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC DAVIS L. REV. 497 (2015); C. Raj Kumar, *Corruption in India: A Violation of Human Rights: Promoting Transparency and the Right to Good Governance*, 49 UC DAVIS L. REV. 741 (2015); Philip M. Nichols, *The Good Bribe*, 49 UC DAVIS L. REV. 647 (2015); Andrew Brady Spalding, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, 49 UC DAVIS L. REV. 443 (2015); Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Public Benefit Corporation*, 49 UC DAVIS L. REV. 623 (2015).

¹¹⁸ See STEVE WEINBERG, *THE REPORTER'S HANDBOOK: AN INVESTIGATIVE GUIDE TO DOCUMENTS AND TECHNIQUES* 61 (1996); Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 15 DICK. J. INT'L L. 207, 232 (1996) (quoting Valeria M. Dirani, *Building Islands of Integrity-The Ecuador Model After One Year*, TI NEWSL., Mar. 1995, at 3-4).

¹¹⁹ ROSE-ACKERMAN, *supra* note 113, at 81-82.

¹²⁰ See *id.*

¹²¹ Dennis McNerney, Chief, Dep't of Justice, Criminal Div., Fraud Section, Keynote Address at the A.B.A.'s Third Annual Institute on the Foreign Corrupt Practices Act (Oct. 21, 2010) (notes on file with author).

¹²² *Id.*

illustration of the real costs of bribery. Needed funds would be spent on defective warmers that could cause serious harm to infants. The presumption is that McInerney was talking about China.¹²³

Perhaps no story more demonstrates the cost of corruption and its impact on individuals and societies than of Tunisia's Mohammed Bouazizi. After facing harassment for bribes and confiscation of his street vendor equipment, Mohammed simply set himself on fire in 2010 to protest the corruption that made his life unbearable and to signal that people would no longer silently endure the treatment.¹²⁴ His act set in motion events that led to the end of the twenty-three-year-long rule of Tunisia's President.¹²⁵

The connection between bribery and the creation of political instability in Tunisia is no doubt very well appreciated in China. Many commentators have observed that China has begun to take the control of corruption very seriously in the last two years. Nate Bush of O'Melveny and Meyers in Singapore and formerly in Beijing, argued that these last two years represent the biggest change in China since the Cultural Revolution.¹²⁶ Premier Xi Jinping has instituted the "Four Comprehensives" (adding one to the original three):

- Comprehensively build a moderately prosperous society,
- Comprehensively deepen reform,
- Comprehensively govern the country according to law,
- Comprehensively apply strictness within party.¹²⁷

¹²³ *Id.*; see also Earle and Cava, *Not a Bribe*, *supra* note 22, at 156.

¹²⁴ See Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST (Mar. 26, 2011), https://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB_story.html.

¹²⁵ See Angelique Chrisafis & Ian Black, *Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protestors Claim Victory*, GUARDIAN (Jan. 14, 2011), <http://www.theguardian.com/world/2011/jan/14/tunisian-president-flees-country-protests>.

¹²⁶ Nate Bush, Lawyer at O'Melveny & Myers LLP (Singapore), Address at Foreign Corrupt Practices Act and International Anti-Corruption Developments 2015 (May 5, 2015) (notes on file with author).

¹²⁷ Chris Buckley, *Xi Jinping's 'Four Comprehensives' Give Shape to a Crowded Agenda*, Sinosphere, N.Y. TIMES (Mar. 1, 2015, 6:00 PM), <http://sinosphere.blogs.nytimes.com/2015/03/01/the-evolution-of-xi-jinpings-four-comprehensives>; see also Ryan Mitchell, *Decoding Xi Jinping's 'Four Comprehensives': The Decision for Discipline (and Law?)*, WORLD POST (Mar. 2, 2015), http://www.huffingtonpost.com/ryan-mitchell/decoding-xi-jinpings-four_b_6757744.html.

The last is a reference to the previously announced “Tigers and Flies” anti-corruption campaign aimed at both powerful and small bureaucrats.¹²⁸

Like Tunisia, China understands how quickly one event can catch a population’s imagination and destabilize a sitting government. This campaign in China is part of its public pledge to crack down on corruption. China has sent messages before about a zero tolerance, as when it executed Zheng Xiaoyu, head of State Food and Drug Administration, in July 2007 after his conviction just two months earlier for accepting bribes that led to tainted food products in the marketplace.¹²⁹ While not suggesting that China’s use of the death penalty is wise, we note that it certainly signals a government’s desire to send a message to the population about its intolerance for corruption — at least in some instances.

There is not unanimity on the cost of corruption.¹³⁰ Some argue that cost of stamping out international bribery as it is being pursued globally is too high.¹³¹ Critics focus on the dollar cost of compliance and suggest that it neither makes sense nor is proportionate to the alleged crime.¹³² A 2015 headline in *The Economist* captures this view: “Daft on Graft: A hard line on commercial bribery is right. But the system is becoming ridiculous.”¹³³ The article continues:

¹²⁸ See Tania Branigan, *Xi Jinping Vows to Fight “Tigers” and “Flies” in Anticorruption Drive*, *GUARDIAN* (Jan. 22, 2013), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption> (Deng Xiaoganag, Associate Professor of Sociology at the University of Massachusetts, commented that China was concerned about the impact of corruption on the stability of communist rule, stating, “The party realises the impact of [abuses of power] on their legitimacy and maintaining their rule” but there is now a “sense of urgency”).

¹²⁹ See Joseph Kahn, *China Quick to Execute Drug Official*, *N.Y. TIMES* (July 11, 2007), <http://www.nytimes.com/2007/07/11/business/worldbusiness/11execute.html>.

¹³⁰ See Thomas B. Edsall, *The Value of Political Corruption*, *N.Y. TIMES* (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html>; Chris Matthews, *When Corruption Is Good for the Economy*, *FORTUNE* (Aug. 7, 2014), <http://fortune.com/2014/08/07/corruption-economic-benefits/>.

¹³¹ “FCPA Inc.,” a term coined by Professor Mike Koehler. Mike Koehler, *Archive for the ‘FCPA Inc.’ Category*, *FCPA PROFESSOR* (July 10, 2015), <http://www.fcpaprofessor.com/category/fcpa-inc>. For a discussion of FCPA Inc., see Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, *WALL ST. J.* (Oct. 2, 2012), <http://www.wsj.com/articles/SB10000872396390443862604578028462294611352> and Nathan Vardi, *The Bribery Racket*, *FORBES* (June, 6, 2010, 12:00 AM), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>.

¹³² See *supra* note 131.

¹³³ *Daft on Graft*, *ECONOMIST* (May 9, 2015), <http://www.economist.com/news/leaders/21650547-hard-line-commercial-bribery-right-system-becoming-ridiculous-daft-graft>.

As corrosive as bribery is, the response must be proportional. Investigations that drag on are a waste of management and public resources. The starting-point for up to half of all cases is a firm's voluntary disclosure, but if costs continue to rise then firms may be more tempted to bury their bad news. Anti-corruption campaigners would have nothing to cheer if the cure ended up being more harmful than the disease.¹³⁴

Against the backdrop of the enforcement climate and an understanding of all the costs of corruption,¹³⁵ we turn to look at the mechanism of declinations as way to ameliorate this more hidden cost of corruption: the cost of compliance. The cost of compliance can be thought of as both the amount paid by a company to institute and maintain an adequate program¹³⁶ as well as the cost of failing to prevent bribery and having to pay fines as well as legal fees.¹³⁷ The former can cost over \$100 million, as Walmart's Jay Jorgenson has noted,¹³⁸ while the latter as an aggregate for 2014 was estimated to be \$1.6 billion or "the second highest on record."¹³⁹

III. DECLINATIONS

We have examined both the enforcement environment and the moral, economic, human, and political cost of corruption as well as the cost of compliance. We turn to defining a declination and how the government has used them to date.

A. *The Difficulty Defining Declinations*

What are declinations? While this seems to be an obvious question, there is no obvious answer.¹⁴⁰ A working definition may be "decisions

¹³⁴ *Id.*

¹³⁵ See McNerney, *supra* note 121. See generally Nichols, *Business Case*, *supra* note 110 (discussing a history of analysis of bribery, a form of corruption).

¹³⁶ See *supra* note 9 and accompanying discussion.

¹³⁷ See SHEARMAN & STERLING, LLP, FCPA DIGEST 3-5 (2014), available at <http://www.shearman.com/~media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf> (presenting a history of criminal and civil fines 2011-2013).

¹³⁸ See *supra* note 9 and accompanying discussion.

¹³⁹ Ed Silverstein, *FCPA Penalties Relatively High During 2014*, INSIDECOUNSEL MAGAZINE (Jan. 12, 2015), <http://www.insidecounsel.com/2015/01/12/fcpa-penalties-relatively-high-during-2014>.

¹⁴⁰ See Christopher M. Matthews, *What Does an FCPA Declination Letter Look Like?*, WALL. ST. J. (Feb. 24, 2012, 10:01 AM), <http://blogs.wsj.com/corruption-currents/2012/02/24/what-does-an-fcpa-declination> (noting the Chamber Of Commerce asked

by the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) to conclude formal and informal investigations into potential violations of the FCPA without bringing enforcement actions.”¹⁴¹ But while this may help to frame what declinations are, declinations are truly defined by what they are not: enforcement actions.¹⁴² And for the purposes of avoiding enforcement actions, this definition gives little guidance.

As a practical matter, a declination is a formal notice by the DOJ or SEC that they do not plan to proceed against the company and will close the case — at least for the moment.¹⁴³ It is different from a non-prosecution agreement and deferred prosecution agreement.¹⁴⁴ The company does not have to admit to facts or agree to stipulations. Nor do the DOJ or SEC have to reveal what led to the decision to decline an enforcement action. The U.S. Attorneys’ Manual (“Manual”) lists the power to decline to prosecute as “an exercise of prosecutorial discretion.”¹⁴⁵

for information about this: “In particular, to the extent that a declination decision is based on the robustness of a company’s compliance program, information about that program would help provide a standard against which other companies may measure their own programs”).

¹⁴¹ James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, BLOOMBERG L. REPS.: CORPORATE COUNSEL (2011), available at http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOI9NPI0LTYnMQZ56TfzcRVPMQ iLsSwOZDm83!/document.name=/miller_chevalier_tillen_bohn_article.pdf.

¹⁴² See, e.g., Nathaniel Edmonds et al., *FCPA Declinations: How to Maximize Your Chance to Get a Pass When a Corruption Problem Occurs*, STAY CURRENT (2011), http://www.paulhastings.com/Resources/Upload/Publications/FCPA_Declinations_-_How_to_Maximize_Your_Chance_to_Get_a_Pass_When_a_Corruption_Problem_Occurs.pdf (“A declination occurs when a viable criminal investigation or prosecution exists, but DOJ determines that no further action should be taken.”).

¹⁴³ See *id.*

¹⁴⁴ The DOJ and SEC may both resolve investigations through the use of DPAs and NPAs. Under a DPA, the “DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred . . . for the purpose of allowing the company to demonstrate its good conduct.” RESOURCE GUIDE, *supra* note 21, at 74. Under an NPA, the DOJ “maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA.” *Id.* at 75. A DPA by SEC is “a written agreement between SEC and a potential cooperating individual or company in which the SEC agrees to forgo an enforcement action . . . if the individual or company agrees to” certain conditions. *Id.* at 76. Similarly, a NPA is a written agreement “that provides that SEC will not pursue an enforcement action” if the individual or company agrees to certain conditions. *Id.* at 77.

¹⁴⁵ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.110(A) (2015). The principles of Federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

However, the U.S. Attorneys' Manual also states:

- A. Whenever the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.
- B. Comment. USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in Federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.¹⁴⁶

This underscores that the government already tracks declinations, at least theoretically.

Neither the DOJ nor the SEC has presented a clear definition of what declinations are nor have they presented clear guidance on the contours of declination decisions. The term is not defined by statute, nor is it defined in the U.S. Attorneys' Manual or the SEC Enforcement Manual.¹⁴⁷ The Guide does not offer a concise definition but rather describes a declination as a decision by either the DOJ or SEC to "decline to bring an enforcement action under the FCPA."¹⁴⁸ Though the Guide goes on to discuss some of the factors that affect declination

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1. Initiating and declining prosecution;
 2. Selecting charges;
 3. Entering into plea agreements;
 4. Opposing offers to plead *nolo contendere*;
 5. Entering into non-prosecution agreements in return for cooperation; and
 6. Participating in sentencing.

¹⁴⁶ *Id.* at § 9-27.270.

¹⁴⁷ UNITED STATES ATTORNEYS' MANUAL, *supra* note 145, discusses declinations generally at § 9-27.220 (*Principles of Federal Prosecution*) and § 9-28.200 (*Principles of Federal Prosecution of Business Organizations*). The SEC Enforcement Manual discusses closing investigations where no enforcement action is recommended in section 2.6.

¹⁴⁸ RESOURCE GUIDE, *supra* note 21, at 75 (DOJ), 77 (SEC).

decisions,¹⁴⁹ these factors are broad and it is difficult to understand how and when those factors are present without context.

Professor Mike Koehler, writer of the influential blog *FCPA Professor*, defines a declination as “an instance in which the DOJ has concluded it can prove beyond a reasonable doubt all the necessary elements of a cause of action, yet decides not to pursue the action.”¹⁵⁰ “Anything less,” Koehler argues, “ought not be termed a ‘declination.’ It is really no different [than] saying a police officer ‘declined’ to issue a speeding ticket in an instance in which the driver was not speeding. This is not a declination, it is what the law commands, and such reasoning applies in the FCPA context as well.”¹⁵¹

Koehler’s definition¹⁵² is imperfect as well. In *The FCPA Blog*, Marc Alain Bohn argues that Koehler’s proposed definition “represents the ideal,” but still fails to capture how the term is used by the agencies responsible for issuing the declinations:

As a practical matter[,] the definition runs into difficulties, primarily because of the dearth of information surrounding decisions by the DOJ and SEC to conclude investigations without pursuing enforcement actions.

Outside of a handful of exceptions, the agencies have not publicly acknowledged these decisions, much less explained the reasoning behind them. As a result, it is nearly impossible for those not directly involved in a matter to conclude why the agencies have decided not to pursue an enforcement action — even those directly involved may not have a full understanding

¹⁴⁹ See *infra* Part III.B.

¹⁵⁰ Mike Koehler, *Morgan Stanley’s So-Called “Declination,”* FCPA PROFESSOR (July 26, 2012) [hereinafter *Morgan Stanley Declination*], <http://www.fcpaprofessor.com/morgan-stanleys-so-called-declination>. A similar definition was used by the firm Wilmer Hale in a client alert issued shortly after the Resource Guide was released: “the concept of a declination is supposed to be reserved for instances in which the offense is chargeable but the government declines in its own discretion to bring a case.” *DOJ and the SEC Issue Much-Anticipated FCPA Guidance*, FOREIGN CORRUPT PRACTICES ACT ALERT (Wilmer Hale, D.C.), Nov. 19, 2012, at 9, available at <http://www.wilmerhale.com/files/upload/DOJ%20and%20the%20SEC%20Issue%20Much-Anticipated%20FCPA%20Guidance.pdf>.

¹⁵¹ Mike Koehler, *The Need for a Consensus “Declination” Definition*, FCPA PROFESSOR (Jan. 15, 2013), <http://www.fcpaprofessor.com/the-need-for-a-consensus-declination-definition>.

¹⁵² Mike Koehler, *Grading the Foreign Corrupt Practices Act Guidance*, WHITE COLLAR CRIME REP. 8 (2012) [hereinafter *Grading FCPA Guidance*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189072.

Without more transparency from the agencies on the rationale behind their enforcement decisions, I think it is appropriate to apply the short-hand label “declination” more broadly to each instance where the DOJ or SEC has notified a company that it does not intend to bring an enforcement action. Including all such agency decisions is really the only way to consistently and systematically track possible declinations writ large.¹⁵³

Business may prefer this information blackout because of concerns about privacy and bad publicity. Increasingly, a business will disclose either that an investigation has been commenced or that there has been a declination in SEC filings or, occasionally, in news reports.¹⁵⁴ Experienced lawyers have observed and commented on the increase in declinations.¹⁵⁵ Clearly, it could be extremely useful to companies if information on declinations could be made available in a timely manner to the public without exposing the companies or individuals unless they themselves chose to publicly disclose. In fact, the U.S. Chamber of Commerce has asked for this information on behalf of business members.¹⁵⁶

Despite the lack of a clear definition, companies receive declination letters from the SEC or the DOJ indicating that no action will be taken against the company. An example of such a letter is available in the public domain and is illuminating. Sent by the DOJ to Allianz’s legal team in 2012, it states:

¹⁵³ Marc Alain Bohn, *Revisiting the Definition of ‘Declinations,’* FCPA BLOG (Jan. 22, 2013, 2:33 AM), <http://www.fcpablog.com/blog/2013/1/22/revisiting-the-definition-of-declinations.html>.

¹⁵⁴ See *infra* Part III.C.4 (discussing public disclosures of declinations).

¹⁵⁵ See Tillen & Bohn, *supra* note 141 (“[T]here has been a less publicized trend that has paralleled this increase [in enforcement]: decisions by the [DOJ] and the [SEC] to conclude formal and informal investigations into potential violations of the FCPA without bringing enforcement actions.”); see also Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1997 n.82 (2012) (discussing declinations and referencing Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) and Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003)).

¹⁵⁶ Letter from the U.S. Chamber of Commerce et al. to the Honorable Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., Dep’t of Justice, & Robert Khuzami, Dir. of Enforcement, U.S. Sec. & Exch. Comm’n (Feb. 21, 2012) [hereinafter Chamber of Commerce Letter] (“We also request that the Department reconsider its practice of not providing information about its decisions to close FCPA-related investigations with no enforcement action. An understanding of the real-world circumstances that result in a declination would be tremendously useful to companies seeking to comply with the FCPA.”).

The Department of Justice received an allegation that your client, Allianz SE, may have violated the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78 dd-1, et seq., in connection with securing sales of its insurance products in Indonesia.

On behalf of your client, you have provided certain information to the Department and described certain inquiries that have been made to determine the veracity of the allegations. Based upon our investigation and the information that has been made available to us to date, we presently do not intend to take any enforcement action and have closed our inquiry into this matter. If, however, additional information or evidence should be made available to us in the future, we may reopen our inquiry.¹⁵⁷

Certainly, any individual or organization under investigation would welcome the news that the investigation is being closed without any enforcement action. But unless the government offers clear guidance regarding what exactly leads to a declination, determining what steps can be taken to achieve such an outcome can be puzzling.

Although the Guide does not offer a clear definition of what a declination is, it does offer guidance regarding what goes into a declination decision. First, the Guide discusses general factors that weigh into an official decision whether to bring or decline an enforcement action. Then, the Guide provides six examples of past declinations by the DOJ and SEC. These are helpful, but as discussed below in further detail, this information still does not allow FCPA experts to accurately pin down and succinctly define the term.

Commentators argue about whether a decision can be a declination if there was not a strong case in the first instance. The SEC and the DOJ investigated International Cobalt Energy, a Houston based corporation (with Goldman Sachs as investors) for irregularities in its Angola operations. Professor Koehler comments:

In Cobalt, the SEC issued a Wells Notice - which is an initial indication by the SEC that the Commission intends to bring an enforcement action. Cobalt, unlike so many other [defendants][,] fought back by responding to the Wells Notice and based on public statements by the company's CEO called the SEC's case [without basis]. I think it is reasonable to

¹⁵⁷ Matthews, *supra* note 140. Although the letter did not give reasons, Matthews notes Reuters' speculation that jurisdiction over Allianz, "Europe's largest insurer," would be complicated, as it is no longer listed on the U.S. stock exchange. *Id.*

conclude that the SEC concluded . . . that it was likely to lose the case against a [defendant] that was going to fight.¹⁵⁸

It is not a declination if the SEC or DOJ has minimal information and decides not to even do an investigation. Indeed, there must be such an investigation before there is a declination to prosecute. If a matter is not even worthy of an investigation, it would not be worth tracking. In that case, neither the DOJ nor SEC would either inform the company or individual. Hypothetically, the DOJ might decide not to investigate a report alleging Walmart is bribing ministers in country X where Walmart stores neither exist nor are contemplated. The decision to avoid that would not be a declination.

However, a declination occurs when the agency decides not to pursue charges after an investigation commences and the party is notified. This was the scenario in the Cobalt case. Just because an individual disagrees and does not think the DOJ could win the case does not negate that it is a declination. FCPA cases are different from other types of crimes. The breadth of activity the statute covers allows the government to take a broad view of what constitutes a violation. At a recent conference, a DOJ attorney acknowledged the FCPA is a different kind of statute than other criminal statutes when he stated, “You don’t get a declination in a bank robbery case.”¹⁵⁹ Accordingly, given that the government wants to encourage self-reporting in the FCPA context, it makes sense to ask the authorities to clarify the factors leading to the decision to decline to prosecute.

B. Factors that Affect the Government’s Declination Decisions

The confusion surrounding declinations is even more peculiar given the “broken windows” approach to FCPA enforcement discussed earlier.¹⁶⁰ If the SEC has adopted a policy of “pursuing all types of violations of our federal securities laws, big and small,” and the DOJ is using FCPA enforcement as a broad foreign policy tool,¹⁶¹ how do organizations structure their behavior to avoid punishment? Because of the breadth of activity that the FCPA covers, narrowly defining a

¹⁵⁸ E-mail from Mike Koehler, Professor, S. Ill. Univ. School of Law, to author (Feb. 25, 2015) (on file with author).

¹⁵⁹ Matthew S. Queler, Assistant Chief, Fraud Section, Dep’t of Justice, Criminal Div., Remarks on *Year in Review and Enforcement Trends*, Practising Law Institute Seminar: The Foreign Corrupt Practices Act and International Anti-Corruption Developments 2015 (May 4, 2015).

¹⁶⁰ See *supra* Part I.A.1.

¹⁶¹ See *supra* Part I.A.1.

declination may be an impossible task. Further, because a declination is the best possible outcome for a company under investigation, narrowly defining the qualifications for a declination could reduce the government's leverage in negotiations. The Guide leaves it to the reader to interpret exactly what a declination is but provides guidance to allow for a reasonable inference.

1. Principles of Federal Prosecution

The first set of factors guiding the determination whether to bring or decline an enforcement action is found in the U.S. Attorneys' Manual. The *Principles of Federal Prosecution* provides:

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.¹⁶²

Of these, the first category is the most vague, as it requires both prosecutors and possible defendants with the task of determining what constitutes a substantial Federal interest.

The Manual gives seven relevant considerations the attorney for the government should weigh in "determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution:"¹⁶³

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;

¹⁶² UNITED STATES ATTORNEYS' MANUAL, *supra* note 145, § 9-27.220(A) (1997).

¹⁶³ *Id.* § 9-27.230(A).

5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.¹⁶⁴

The Comment to Section 9-27.230 discusses each of these factors in more detail and even offers an eighth factor that can be taken into consideration: the person's personal circumstances.¹⁶⁵ Business organizations are subject to all of these considerations as well as a number of other factors that specifically relate to businesses.¹⁶⁶

2. Principles of Federal Prosecution of Business Organizations

Corporate liability can be far murkier than individual liability. An organization may be infected with a culture of corruption from the top-down or could have corrupt individual employees that surreptitiously evade internal compliance mechanisms. The "artificial nature" of a corporation makes the enforcement of criminal laws more complicated than in the case of individuals, but the Manual calls for similar treatment:

Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.¹⁶⁷

The Manual requires prosecutors to consider the same factors listed in the *Principles of Federal Prosecution* when determining whether to bring or decline to bring an action against a business organization. However, because of the legal fiction of the corporate "person," the Manual lists nine additional factors that prosecutors should consider when "conducting an investigation, determining whether to bring

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 9-27.230(B).

¹⁶⁶ *See infra* Parts III.C.1-2.

¹⁶⁷ UNITED STATES ATTORNEYS' MANUAL, *supra* note 145 § 9-28.200(A) (2008).

charges, and negotiating plea or other agreements.”¹⁶⁸ The factors include the type of offense, extent of wrongdoing, company’s history, disclosure, compliance program status, remedial actions, other harms, the status of individual prosecutions and the adequacy of remedies.¹⁶⁹

As indicated, each of these factors is discussed in further detail in the Manual.¹⁷⁰ Not only is each one vaguely worded, but the Manual also does not adequately explain the weight to be given to the factors in relation to one another. Rather, the Manual states: “The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation.”¹⁷¹ Other passages single out concerns that should carry more weight than others.¹⁷² Cooperation,

¹⁶⁸ *Id.* § 9-28.300(A).

¹⁶⁹ *Id.* The Manual states:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. the existence and effectiveness of the corporation’s pre-existing compliance program;
6. the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions.

Id.

¹⁷⁰ *See id.* §§ 9-28.400, .500, .600, .700, .800, .900, .1000, .1100.

¹⁷¹ *Id.* § 9-28.400(A).

¹⁷² *See, e.g., id.* § 9-28.500(B) (“Of [the pervasiveness of wrongdoing] factors, the most important is the role and conduct of management.”).

for example, is a significant mitigating factor, but “[t]he government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice.”¹⁷³ The Manual makes clear that no single factor is dispositive and leaves it up to prosecutors to weigh the nine factors: “Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.”¹⁷⁴ This leaves considerable room for interpretation. Understanding more about how these factors are applied is critical to understanding the nature of declinations.

3. SEC Enforcement Manual

The SEC acknowledges that it can be more difficult to close an investigation where there has been no enforcement action than to close an investigation when enforcement actions are taken.¹⁷⁵ Unlike the DOJ, the SEC does not distinguish between individuals and corporations in determining “factors that should be considered in deciding whether to close an investigation.”¹⁷⁶ These factors include:

- the seriousness of the conduct and potential violations
- the staff resources available to pursue the investigation
- the sufficiency and strength of the evidence
- the extent of potential investor harm if an action is not commenced [and]
- the age of the conduct underlying the potential violations.¹⁷⁷

Each of these factors, like the factors listed in the U.S. Attorneys’ Manual, provides significant room for interpretation. The known cases where declinations were issued provide guidance regarding these factors in the same manner case law provides guidance regarding statutory law.¹⁷⁸ Much of the language used in the manuals is

¹⁷³ *Id.* § 9-28.720(A). “Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive.” *Id.*

¹⁷⁴ *Id.* § 9-28.300(B).

¹⁷⁵ U.S. SEC. & EXCH. COMM’N, ENFORCEMENT MANUAL § 2.6.1 (2012), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See infra* Parts III.C.2–IV.

purposefully ambiguous and intended to give officials rather broad discretion; consequently, examples are needed to provide clarity for businesses. The Resource Guide provides six examples, but as discussed further below, these examples do not provide the guidance necessary to accurately define a declination, let alone secure one.

C. Known and Unknown Declinations

Declinations become known through a number of means. We explore the methods listed below either through a government release of selective information or the company or individual's release of information. What is not known are the exact number of declinations that are not made public through either of the aforementioned means.

1. 83 Closed Investigations (1983)

Information on declinations may come from the government release of information, but there is no way to double-check the accuracy of the release. In 1983, well before the FCPA was amended in 1988, a House committee requested information about FCPA closed investigations in order to gain a better understanding of the DOJ's FCPA enforcement program.¹⁷⁹ The DOJ responded with a list of eighty-three closed investigations and a paragraph describing each one.¹⁸⁰ This trove of information must be understood in a context of pre-OECD Convention, pre-international concern about this issue — especially in Europe, China, South Korea, and Brazil — and pre-internet, when it was less likely to find information as easily via text and email. Many of these eighty-three cannot be considered declinations; rather, the DOJ simply did not have enough information to open an investigation in a relatively hostile climate and with no dedicated resources. That was a vastly different era. Currently, there are dedicated FCPA units in the SEC and DOJ and over thirty new FBI agents dedicated to FCPA enforcement added in 2015.¹⁸¹

¹⁷⁹ Koehler, *Grading FCPA Guidance*, *supra* note 152, at 7.

¹⁸⁰ Mike Koehler, *DOJ FCPA Cases Closed (1983)*, SCRIBD., <http://www.scribd.com/doc/114564132/DOJ-FCPA-Cases-Closed-1983> (last visited Aug. 30, 2015, 8:45 AM) [hereinafter *FCPA Cases Closed*].

¹⁸¹ David R. Jimenez, Robert L. Peabody, Paul V. Kelly & Conrad S. Kee, *FBI Announces New Focus on FCPA Violations — Foreign Corrupt Practices Act*, NAT'L L. REV. (Jan. 17, 2015), <http://www.natlawreview.com/article/fbi-announces-new-focus-fcpa-violations-foreign-corrupt-practices-act>.

It is important to note, however, that some of the eighty-three cases might be prosecuted today because the international climate is no longer so hostile. For example, in Investigation No.1, the facts state:

A major American tobacco producer entered into a contract with a South American country and a charitable organization of that country in which the tobacco producer agreed to pay several millions of dollars in donations and was to receive in return pricing concessions from the country's price controls on cigarettes. The wife of the country's President was the head of the charitable organization. This matter was declined since there was no evidence of any illegal payments to government officials.¹⁸²

Today this kind of conduct is looked at very seriously. The ongoing so-called "princeling" investigation is currently looking at numerous banks that hire sons and daughters of government officials arguable to curry favor and receive business.¹⁸³ Whether the DOJ declines, as they did here, or finds a prosecution appropriate remains to be seen.

Investigation 38, which involved a European subsidiary, evidence of a \$100,000 bribe, and savvy employees who refused to come to the United States for the investigation, offers another interesting example.¹⁸⁴ Currently, international cooperation and the increasing number of countries with similar or even stricter laws means this outcome would no longer be likely.¹⁸⁵ Others were declined because of difficulties with prosecution (72) or de minimis value (76).¹⁸⁶

¹⁸² Koehler, *FCPA Cases Closed*, *supra* note 180, at 365.

¹⁸³ See, e.g., Mike Koehler, *Regarding Princelings and Family Members*, FCPA PROFESSOR (Aug. 21, 2013), <http://www.fcpaprofessor.com/regarding-princelings-and-family-members>.

¹⁸⁴ Koehler, *FCPA Cases Closed*, *supra* note 180, at 373.

¹⁸⁵ Cf. Marshall L. Miller, Principal Deputy Assistant Attorney Gen., Criminal Div., Remarks at the Global Investigation Review Program (Sept. 17, 2014) (transcript available at <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>). This source states:

Today, in the Criminal Division, we are capitalizing on the cooperative relationships we have developed with foreign prosecutors, law enforcement and regulatory agencies to better access evidence and individuals located overseas. Even more significantly, we have dramatically increased our coordination with foreign partners when they are looking at similar or overlapping criminal conduct — so that when we engage in parallel investigations, they complement, rather than compete with, each other.

In fact, I flew into New York last night not from Washington but from London, where we are coordinating closely to add a new dimension to our

2. Congress Wants Numbers (2011)

In the more recent past, The House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security held hearings on issues pertaining to the FCPA. On June 22, 2011, it followed up by requesting “information on cases that have been brought to the attention of the DOJ, but your agency decided, for one reason or another, not to investigate or pursue prosecution within the last year along with the rationale for those decisions.”¹⁸⁷ The Committee also asked for the “numbers.”¹⁸⁸ On August 3, 2011, Assistant Attorney General Ronald Welch responded by referencing the nine factors found in the U.S. Attorneys’ Manual, although he listed only five: “the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation’s history of similar conduct; the existence and effectiveness of the corporation’s pre-existing compliance program; and the adequacy of the remedies, such as civil and regulatory enforcement actions.”¹⁸⁹ Without any more commentary, one cannot conclude anything from the failure to mention the other four factors.

The letter then lists eight instances in the last two years when they did not pursue charges. They include self-disclosure, cooperation, due diligence and remediation after acquisition, compliance, settlement, rogue employee, and involved minimal dollar amount.¹⁹⁰

countries’ historic special relationship, this time in the arena of white collar law enforcement.

And in today’s Criminal Division, we are vigorously employing proactive investigative tools that may not have been used frequently enough in white collar cases in past years: tools like wiretaps, body wires, physical surveillance, and border searches, to name just a few.

Id.

¹⁸⁶ Koehler, *FCPA Cases Closed*, *supra* note 180, at 380-81.

¹⁸⁷ Letter from Sandy Adams & F. James Sensenbrenner, Jr., Representatives, to Greg Andres, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice (June 22, 2011), *available at* <https://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress>.

¹⁸⁸ *See id.*

¹⁸⁹ Letter from Ronald Welch, Assistant Att’y Gen., U.S. Dep’t of Justice, to Sandy Adams, Rep., H.R. (Aug. 3, 2011), *available at* <https://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress>.

¹⁹⁰ *Id.* The original text states:

- A corporation voluntarily and fully disclosed potential misconduct;
- Corporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct;

The DOJ provided no further details on any of the cases. As opposed to the substantial information provided to Congress in 1983, Welch's response to Congress was a total of two pages. Without details, it is difficult to determine how a company in a situation should adequately respond. But the DOJ specifically stated that it would not release more details about issued declinations.¹⁹¹

Needless to say, without more information on the specifics of the declinations, it is difficult to learn from them.¹⁹² General guidelines are useful, but without specifics, companies cannot effectively structure their responses. A company that can point to an example of similar conduct can take similar remedial action in hopes of receiving a similar outcome. For example, a company is more likely to self-

-
- A parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries;
 - A parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries;
 - A company provided information to the Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;
 - A company agreed to a civil resolution with the Securities and Exchange Commission, while also demonstrating that a declination was appropriate for additional reasons;
 - A single employee, and no other employee, was involved in the provision of improper payments; and
 - The improper payments involved minimal funds compared to the overall business revenues.

Id.

¹⁹¹ *Id.* (noting that “[i]n order to protect the privacy rights and other interests of the uncharged and other potentially interested parties, the Department has a long-standing policy of not providing non-public information on matters it has declined to prosecute. Consequently, the Department cannot comment more specifically about FCPA matters where prosecution was declined”).

¹⁹² See Mike Koehler, *DOJ Declines to Get Specific in Declination Responses*, FCPA PROFESSOR (Oct. 12, 2011) [hereinafter *DOJ Declination Responses*], <http://www.fcpaprofessor.com/doj-declines-to-get-specific-in-declination-responses> (“Would it not serve the public interest for such factors to be removed from the shadowy world of opaque DOJ decision making and codified in an open and transparent manner in an FCPA compliance defense?”).

report if it has some ability to gauge the costs and benefits of self-reporting, particularly the strong benefit of self-reporting.

3. FCPA Resource Guide (2012)

In February of 2012, the U.S. Chamber of Commerce and other groups wrote to the DOJ suggesting what might be included in the Department's greatly anticipated guidance.¹⁹³ They appealed for a policy of transparency and disclosure when the government decides not to proceed with an enforcement action, suggesting the Department disclose declination details as it does in Department Opinion Releases.¹⁹⁴

The Guide was finally issued and addressed in small part the Chamber's request to address declinations, although in a limited way. The Guide gave six anonymized examples of declinations.¹⁹⁵ One included a case where the public company withdrew its bid, terminated employees and "improved its (compliance) program," although some commentators argue this was not even an actual case of FCPA violation.¹⁹⁶ In other examples, the company in question had paid very small bribes for a small profit, fired employees, reorganized compliance, self-reported, and implemented a full remediation. A constant in the declination cases include demonstrating that internal controls worked, installing comprehensive training, carrying out terminations and other disciplinary action.¹⁹⁷

While the examples given help to shed some light on declinations, critics argue that:

the Guidance declination examples raise more questions than answers. For instance, in three of the examples, it is not even clear based on the information provided that the FCPA was violated Moreover, in all the declination examples in the Guidance, the factors motivating the declination decision — such as voluntary disclosure and cooperation, effective remedial measures, small improper payments — can often be

¹⁹³ Chamber of Commerce Letter, *supra* note 156, at 1; *see also* Earle & Cava, *Not a Bribe*, *supra* note 22, at 151-53.

¹⁹⁴ Chamber of Commerce Letter, *supra* note 156.

¹⁹⁵ RESOURCE GUIDE, *supra* note 21, at 77-79; *see also* Earle & Cava, *Not a Bribe*, *supra* note 22, at 160.

¹⁹⁶ For a critique of RESOURCE GUIDE, *supra* note 21, by Professor Mike Koehler and the declination examples, *see* Mike Koehler, *The Guidance and Declinations*, FCPA PROFESSOR (Nov. 27, 2012), <http://www.fcprofessor.com/the-guidance-and-declinations>.

¹⁹⁷ *See* RESOURCE GUIDE, *supra* note 21, at 77-79.

found in many instances in which FCPA enforcement actions were brought.¹⁹⁸

The Guide also continues to refer to the decision not to bring an enforcement action against Morgan Stanley in 2012 as a declination.¹⁹⁹ In that case, a former managing director for Morgan Stanley, Garth Peterson, pled guilty for his role in a conspiracy to circumvent the company's internal controls and "transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese public official with whom he had a personal friendship."²⁰⁰ The facts of this case are known not only because the DOJ touted Peterson's guilty plea, but because the DOJ and SEC also touted their declinations with regards to Morgan Stanley.²⁰¹ There, a Morgan

¹⁹⁸ Koehler, *Grading FCPA Guidance*, *supra* note 152, at 7.

¹⁹⁹ See RESOURCE GUIDE, *supra* note 21, at 56, 116 n.307 ("In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation." (citing the Morgan Stanley case)).

²⁰⁰ Press Release, DOJ, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* <http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>.

²⁰¹ *Id.* ("After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct."); Press Release, SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702> ("Morgan Stanley, which is not charged in the matter, cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved."); see also Lucinda A. Low, Owen Bonheimer & Tom Best, *Avoiding FCPA Prosecution for Employee Conduct*, LAW360 (May 25, 2012), <http://www.steptoe.com/publications-8218.html> ("These settlements represent the first time that either the DOJ or SEC has publicly declined to bring enforcement actions against a company on the basis of an oft-suggested 'rogue' employee action. They also represent the first time that either agency has specifically and publicly enumerated the FCPA compliance steps that they deemed sufficient to warrant a declination.").

For discussion of what Morgan Stanley had in place to show that it had done everything possible to comply with the FCPA, see generally Press Release, *supra* note 200. According to the release:

"Mr. Peterson admitted today that he actively sought to evade Morgan Stanley's internal controls in an effort to enrich himself and a Chinese government official," said Assistant Attorney General Breuer. "As a

Stanley employee allowed a Chinese official to invest in Morgan Stanley and co-invested with the official, all contrary to company policy. The government highlighted Morgan Stanley's compliance program in the settlements with the employee Peterson, who was sentenced to nine months jail time.²⁰² However, Morgan Stanley was able to keep any "financial benefits of Peterson's conduct, which were nontrivial."²⁰³ Some commentators have called this declination "politically motivated."²⁰⁴ Professor Koehler cites Michael Volkov's comment that "my intelligence on the case indicated that . . . [the] DOJ apparently wanted to demonstrate for political reasons that it could recognize a company's compliance program to decline a case against a company."²⁰⁵ No doubt, the rogue employee was a factor and his willingness to plead guilty presented a neatly wrapped investigation.

managing director for Morgan Stanley, he had an obligation to adhere to the company's internal controls; instead, he lied and cheated his way to personal profit. Because of his corrupt conduct, he now faces the prospect of prison time."

. . . .

According to court documents, Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.

²⁰² Christopher M. Matthews, *Former Morgan Stanley Exec Gets Nine Months in FCPA Case*, WALL ST. J. (Aug. 17, 2012), <http://blogs.wsj.com/corruption-currents/2012/08/17/former-morgan-stanley-exec-gets-nine-months-in-fcpa-case>.

²⁰³ Low, Bonheimer & Best, *supra* note 201.

²⁰⁴ See, e.g., Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Mar. 27, 2015), <http://www.fcpaprofessor.com/friday-roundup-155> ("Since day one, I called Morgan Stanley's so-called declination politically motivated.")

²⁰⁵ *Id.* (internal quotations omitted).

The Guide even suggests that this was one of the “rare occasions in which, in conjunction with the public filing of charges against an individual, it is appropriate to disclose that a company is not also being prosecuted.”²⁰⁶ New Attorney General Loretta Lynch suggests that the publicity of the Morgan Stanley declination is a response to “a common complaint in the FCPA world, and that is the supposed lack of transparency regarding the government’s consideration of a company’s compliance efforts in making charging decisions.”²⁰⁷

But critics suggest that the decision not to bring an enforcement action against Morgan Stanley was not a decision at all because Morgan Stanley did not break any laws.²⁰⁸ Neither the SEC nor the DOJ could “decline” to bring an action because Morgan Stanley had not committed any violations; in fact, the company had a robust compliance program that Peterson went out of his way to circumvent. The district judge overseeing Peterson’s consent decree even referred to Morgan Stanley as a victim of Peterson.²⁰⁹ While the DOJ and SEC promote the Morgan Stanley case as a prime example of a declination, “based on DOJ’s own allegations and public statements, the likely reason Morgan Stanley was not prosecuted for Peterson’s conduct was because there was no basis to hold Morgan Stanley liable even under lenient respondeat superior standards.”²¹⁰

Whether the DOJ and SEC issued a declination in favor of Morgan Stanley or whether Morgan Stanley broke no laws may ultimately be immaterial as the result is the same: no enforcement action. Morgan Stanley faced no charges, while the case “gave DOJ the opportunity to show reasonableness without creating a precedent that would seriously hamper the FCPA enforcement program.”²¹¹ That this case

²⁰⁶ See RESOURCE GUIDE, *supra* note 21, at 75, 119 n.383.

²⁰⁷ See Adam Turteltaub, *In the Spotlight: Loretta Lynch*, COMPLIANCE & ETHICS PROF., Sept.–Oct. 2013, at 68, available at <http://www.justice.gov/sites/default/files/usao-edny/legacy/2015/04/06/cep-2013-09-turteltaub-lynch.pdf>. Lynch continued, “The lengthy description of Morgan Stanley’s compliance program in the Peterson charging document was a deliberate response to that criticism. The Peterson case was even cited for that purpose in the FCPA Resource Guide prepared by DOJ and the Securities and Exchange Commission (SEC) in November 2012.” *Id.*

²⁰⁸ See Koehler, *Morgan Stanley Declination*, *supra* note 150; Mike Koehler, *Stop Drinking the Kool-Aid*, FCPA PROFESSOR (Nov. 5, 2012), <http://www.fcprofessor.com/stop-drinking-the-kool-aid>.

²⁰⁹ See *United States v. Peterson*, 859 F. Supp. 2d 477, 479 (E.D.N.Y. 2012) (“It is likely that [Morgan Stanley] would be considered a victim and would be eligible to collect restitution if it chose to exercise its rights in a criminal case.”).

²¹⁰ Koehler, *Grading FCPA Guidance*, *supra* note 152.

²¹¹ Michael Volkov, *Morgan Stanley: Did the Justice Department Rollover?*, VOLKOV LAW (May 7, 2012), <http://blog.volkovlaw.com/2012/05/morgan-stanley-did-the-justice->

— even if it can be considered a declination — has limited precedential value due to its unique facts makes it a less-than-ideal example for the purposes of clarifying declinations.²¹²

4. Recent Declinations Discoverable Through Public Information

The DOJ's reluctance to publicize declinations is made all the more questionable because information on declinations is often publicly available. Declinations not released by the DOJ or SEC can be identified if disclosed by the companies involved, either through public filings or press releases.²¹³ The firm Miller Chevalier tracked known declinations from 2008 through 2012, finding twenty-one SEC declinations and twenty-seven DOJ declinations.²¹⁴ The *FCPA Blog* also tracks declinations through disclosed investigations by the DOJ or SEC. In 2013, eleven companies received declinations from either the DOJ, the SEC, or both.²¹⁵ In 2014, ten companies reported declinations.²¹⁶ Most recently in 2015 a company, Hyperdynamics, reported a declination.²¹⁷ The information on these, however, is minimal.

Again, this is so unlike any other crime. What bank robber or drug dealer self-reports? But the very nature of the ambiguity of the statute and unpredictability of the outcomes make businesses a prime candidate for being persuaded to self-report — if the calculus makes sense. Indeed, declinations reported by counsel have continued. Kimberly Parker, Practical Law Institute (“PLI”) Chair and partner at WilmerHale recently stated: “As we predicted last year, publicly announced declinations were a continued trend in 2014.”²¹⁸ Nine

department-rollover.

²¹² See Koehler, *Morgan Stanley Declination*, *supra* note 150.

²¹³ Tillen & Bohn, *supra* note 141, at 1.

²¹⁴ Babaeva et al., *FCPA Winter Review 2013*, MILLER CHEVALIER (Jan. 15, 2013), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=94508>.

²¹⁵ Richard L. Cassin, *2013 FCPA Enforcement Index*, FCPA BLOG (Jan. 2, 2014, 7:28 AM), <http://www.fcpablog.com/blog/2014/1/2/2013-fcpa-enforcement-index.html>.

²¹⁶ Richard L. Cassin, *The 2014 FCPA Enforcement Index*, FCPA BLOG (Jan. 5, 2015, 7:18 AM), <http://www.fcpablog.com/blog/2015/1/5/the-2014-fcpa-enforcement-index.html>.

²¹⁷ *Hyperdynamics Announces Close of FCPA Inquiry by Department of Justice*, PR NEWSWIRE (May 22, 2015), <http://www.prnewswire.com/news-releases/hyperdynamics-announces-close-of-fcpa-inquiry-by-department-of-justice-300088115.html> (mentioning the “cooperation” of the oil and gas exploration company (working in Guinea, West Africa) but noting that the SEC had not closed its investigation).

²¹⁸ WilmerHale, *Global Anti-Bribery Year-in-Review: 2014 Developments and Predictions for 2015*, FOREIGN CORRUPT PRACTICES ACT ALERT, Jan. 27, 2015, at 11, available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/FCPA%20YIR%20Alert_01%2027%2015.pdf.

declinations were identified, with four of those revealing that they self-disclosed: Image Sensing Systems, Layne Christensen, LyondellBasell, and SBM Offshore.²¹⁹ In several of the cases the parties settled with the SEC, remediated, and secured a declination from the DOJ. Another factor as identified in a Smith & Wesson case involved firing its international staff. Similarly, Baxter International specified unidentified punishment of staff and enhanced monitoring of third parties. Parker also noted that one case, SBM Offshore, involving conduct in several countries, settled with the Dutch for \$240 million, and at the same time earned a declination from the DOJ.²²⁰

Aside from these three disclosures (1983, 2011, and 2012) mentioned earlier by the government and others that appear in the news as mentioned in this section, government attorneys make statements at different conferences that are parsed for significance and divined for meaning. At a recent ABA National Institute on International Regulation and Compliance, Kara Brockmeyer, SEC FCPA Unit Chief, stated that a “disproportionate number of cases we decline” involve self-reporting.²²¹

These disclosures are certainly helpful for practitioners looking for guidance on declination decisions. However, because much of this information comes from the companies themselves, there is not much insight into the decision by the government to forgo action.

What these examples do provide, however, is a valid counterpoint to the DOJ’s argument that disclosure would violate the privacy rights of companies that did not engage in wrongdoing. Because the information intended to be protected can often be found by other means — especially as it relates to publicly-traded companies — the government’s argument against disclosure is substantially weakened. In cases where the background facts and the investigation are already known, it would be extremely helpful to gain insight into the resolution from the perspective of the government agency responsible for weighing the mitigating factors.

²¹⁹ *Id.*

²²⁰ KIMBERLY A. PARKER & RICHARD W. GRIME, PRACTICING LAW INSTITUTE (PLI): THE FOREIGN CORRUPT PRACTICES ACT AND INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS 2015, at 90 (2015). Parker identified three big trends: international cooperation, use of aggressive law enforcement techniques (wire taps and wires), and the bar for cooperation is getting higher (fire employees, etc.) *Id.* at 90-92.

²²¹ GIBSON DUNN, 2014 YEAR-END FCPA UPDATE 26 (2015) (quoting Kara N. Brockmeyer, FCPA Unit Chief, Sec. and Exch. Comm’n, Address at the National Institute on International Regulation and Compliance: FCPA, Economic Sanctions and Export Controls (Oct. 2014)), available at www.gibsondunn.com/publications/Documents/2014-Year-End-FCPA-Update.pdf.

The government made for only the second time (after the Morgan Stanley announcement) a public statement that it declined to prosecute PetroTiger.²²² Presumably the guilty plea of the founder (Joseph Sigelman), the self-disclosure and cooperation of the company, two additional pleas (one from the general counsel), and remediation persuaded the DOJ to issue a declination.²²³ If they issued a declination here, one must ask why the government could not release anonymized declinations regularly. What these separate disclosures about declinations and closures illustrate is that the government could track, anonymize, and reveal these occurrences. It is a myth that it would expose the companies; it can, and has, been done. As more information becomes available in general, the calls for transparency in this area will continue to grow louder. The way to silence these voices, and to silence critics, is for the DOJ and SEC to formally issue declination decisions and clearly indicate the factors that led up to those decisions.

IV. PROPOSAL

In this section, we articulate a way to improve compliance and transparency without a need for statutory change. The ability for the Executive Branch to facilitate this without needing to secure Congressional approval will no doubt streamline the process.

We conclude this article with the simple proposal that the Attorney General of the United States adopt a policy that commits the DOJ to providing: (1) a count of the number of FCPA declinations issued in the previous year; (2) an anonymized list of the basic facts of the cases; and (3) major reasons for the actions.

The FCPA statute provides that Guidelines to be issued by the Attorney General shall “determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section” and then the Attorney General “shall issue the guidelines and procedures.”²²⁴ The statute also provides for opinion procedures, which creates a “rebuttable presumption” of compliance with the

²²² Richard L. Cassin, *PetroTiger Joins Morgan Stanley with Rare DOJ Public Declination*, FCPA BLOG (June 16, 2015, 10:03 AM), <http://www.fcablog.com/blog/2015/6/16/petrotiger-joins-morgan-stanley-with-rare-doj-public-declina.html>.

²²³ *See id.*

²²⁴ 15 U.S.C. § 78dd-1(d) (2012).

statute.²²⁵ Furthermore, there is a commitment to providing “timely guidance concerning [the DOJ’s] present enforcement policy.”²²⁶

At a minimum, the Attorney General, without any changes to the statute or to the Manual, could simply start releasing information on an annual or bi-annual basis without committing to an ongoing practice. A more permanent step might give the business community more confidence in the process, especially given that there will be a new Attorney General in 2017 after the national election, and the whole process could well change again. Modifying the Manual would enshrine the declination release and although it could still be modified would make it more difficult to ignore. It is important to note that the Manual already requires the prosecution to collect “Records of Prosecutions Declined.”²²⁷ This would require someone anonymizing and shortening the report for public disclosure on a regular basis.

Knowing the sheer number, as well as the basic facts, could help companies make their decision to self-report. For example, if there are only five a year, the releases may not incent self-disclosure. But if there were more, perhaps forty a year, companies might be more willing to think about self-disclosure. Given that the government, despite having increased resources in this area, still relies on the private sector to do a large share of investigating, maintaining a robust self-disclosure pipeline is a lynchpin of continued enforcement success in this area.

The government wants companies and individuals to help hold individuals accountable. “Principal Deputy Assistant Attorney General Miller stated that companies that assist US authorities in identifying employees and external actors responsible for misconduct will be rewarded with cooperation credit, if not a declination.”²²⁸ Often companies are best able to point at the truly guilty ones. No doubt doing so also encourages companies to sacrifice at least one employee, trying to paint them as a “rogue” agent, thus helping the company in its own defense. Miller also stated, “evidence of individual culpability [is] the first thing [they] talk about when [they] walk in the door to make [a] presentation,” and “the last thing [they] talk about before [they] walk out.”²²⁹

²²⁵ *Id.* § 78dd-1(e)(1).

²²⁶ *See id.* § 78dd-1(e)(4).

²²⁷ UNITED STATES ATTORNEYS’ MANUAL, *supra* note 145, § 9-27.270.

²²⁸ *Global Anti-Bribery Year-in-Review: 2014 Developments and Predictions for 2015*, *supra* note 218, at 22.

²²⁹ GIBSON DUNN, *supra* note 221 (quoting Marshall L. Miller, Principal Deputy Attorney Gen., Address at the Global Investigation Review Program (Sept. 17, 2014)).

This underscores the importance of corporate assistance in naming responsible individuals. Companies may come to believe that they should be prepared to sacrifice one employee as guilty to make them look better. A cynic might see it as a variant of the strategy of throwing someone to the lions to keep the lions from eating you.

Many practitioners have made calls for more transparency on this matter of declinations.²³⁰ The notion that the privacy of companies and individuals will be comprised should not deter this change since the Resource Guide demonstrates that cases can be anonymized. We are neither the first nor will we be the last to call for such a change.

If the government reports declinations either annually on an appropriate date — for example, February 1st — or alternatively, on a rolling basis, as are the Opinion Releases, this simple improvement would involve very little direct cost but would entail some assignment of staff time for compilation and would make a difference to companies trying to operate their compliance programs in good faith. The Declination Reports would not have to be as long as the Opinion Releases but could contain more information than was present in the Guide. As mentioned in Part III, the government already has the obligation to collect declination records.²³¹ This proposal adds two more steps: first, collecting FCPA declinations in one place, and second, releasing the anonymized information.

The government already announces DPAs, NPAs, and the new remedy of restitution and remediation.²³² Given both DOJ's capacity to issue continuing guidance without any need for new statutory modification, which would move the DOJ from opacity to transparency, we suggest that the DOJ and the SEC commit to providing yearly or bi-yearly updates on declinations.

CONCLUSION

Declinations offer businesses the incentive that, with appropriate compliance and self-reporting procedures, they have the possibility of emerging from the endless labyrinth of a FCPA investigation with the win of a declination like Morgan Stanley did in 2012 or PetroTiger in

²³⁰ See Koehler, *DOJ Declination Responses*, *supra* note 192.

²³¹ UNITED STATES ATTORNEYS' MANUAL, *supra* note 145, § 9-27.270.

²³² See *SunTrust Mortgage Agrees to \$320 Million Settlement*, U.S. DEP'T OF JUSTICE (July 3, 2014), <http://www.justice.gov/opa/pr/suntrust-mortgage-agrees-320-million-settlement> (announcing Sun Trust Home Affordable Modification Program restitution and remediation agreement which was also an agreement not to prosecute (although the case did not involve an FCPA claim)).

2015. That is a huge incentive and avoids the “boil the ocean” problem and scope creep that many companies face in conducting an investigation.²³³ There is a confluence of events in 2015 — including a new Attorney General,²³⁴ increased scrutiny of the costs of compliance and how that affects the economy — which make this proposal about declinations particularly opportune.²³⁵

There has been so much progress since 1977, both in the United States and internationally, in moving forward the understanding and enforcement of bribery and anti-corruption laws. It makes sense to make this simple change that could assist companies who in good faith are trying to follow the law. Doing so recognizes that without cooperation there will not be effective enforcement of the FCPA and other nations’ laws prohibiting bribery. The goal will be to regularize FCPA compliance in the same way that taxes are routinely paid. It is a managed cost of doing business. Those that violate the law corruptly will pay the price.

²³³ See Caldwell Remarks, *supra* note 14.

²³⁴ See Koehler, *Senate Remains Interested*, *supra* note 11.

²³⁵ *The Anti-Bribery Business*, *ECONOMIST* (May 9, 2015), <http://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go> (quoting Mike Koehler’s discussion about the \$800 million spent by Walmart on its internal probe and \$1 billion in accountants and lawyers’ fees). *The Economist* goes further and suggests a four-pronged approach: 1) rein in the excess of the compliance industry/clearly state the scope; 2) harmonize the laws and coordination; 3) bring more cases to court; and 4) offer a compliance defense. *Daft on Graft*, *supra* note 133.