PUNISHING THE PENITENT: DISPROPORTIONATE FINES IN RECENT FCPA ENFORCEMENTS AND SUGGESTED IMPROVEMENTS

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I. INTRODUCTION

One of the ways that the United States addresses bribery of public officials is through the Foreign Corrupt Practices Act of 1977 ("FCPA").[1] After investigating corruption during the 1970s, Congress determined that there was a need for comprehensive legislation to address and remedy the problem.[2] The FCPA was enacted to address the moral and governance concerns, with the goal "to restore public confidence in the integrity of the American business system."[3] The FCPA has sought to achieve this through a combination of criminal and civil sanctions.[4] The Department of Justice (DoJ) has said that the "FCPA was intended to have and has had an enormous impact on the way

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd(1)–(3) (2006)).

2. *Id.* Despite these goals, initially the Foreign Corrupt Practices Act ("FCPA") was seldom utilized. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 389–96 (2010) (discussing the dramatic increase in FCPA enforcement in the past decade).

3. Fraud Section, U.S. Dep't of Justice & Office of the Chief Counsel for Int'l Commerce, U.S. Dep't of Comm., Foreign Corrupt Practices Act Antibribery Provisions Lay-Person's Guide 2 (2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf [hereinafter Lay-Person's Guide].

4. *Id.* For a discussion of the provisions in the FCPA and how it can impact business, see generally Ned Sebelius, *Foreign Corrupt Practices Act*, 45 Am. Crim. L. Rev. 579 (2008). Whether or not the FCPA has been effective at restoring confidence in American business is debated. *See* Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. Int'l L. & Com. Reg. 83, 92–97 (2007–2008).

American firms do business."[5] Structurally, the FCPA is comprised of two major parts: the antibribery provisions and the recordkeeping provisions.[6]

A. *Antibribery Provisions in the FCPA*

The antibribery provisions prohibit a company from making payments to a foreign official for the purpose of "influencing any act or decision of such foreign official in his official capacity."[7] The statute specifically makes it unlawful for any company registered with the Securities and Exchange Commission (SEC), "or for any . . . employee, or agent of such issuer" to "make use . . . of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or . . . the giving of anything of value" to a foreign official in order to gain a business advantage.[8] DoJ has stated that an issuer "is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC."[9] Notably, the antibribery provisions of the FCPA also apply to any "domestic concerns," including nonpublic companies.[10] In order to violate the bribery provisions of the FCPA, the issuer's employee or agent must have corrupt intent.[11] The DoJ has also stated that corrupt intent is manifest when the issuer induces "the recipient to misuse his official position to direct business wrongfully to the payer or to any other person."[12] While the antibribery provision of the FCPA also applies to individuals, this article focuses on the provision's impact on companies.[13]

5. Lay-Person's Guide, *supra* note 3, at 2; *see also* Kevin J. Harnisch & Michelle L. Ramos, *Practical Considerations for Addressing FCPA Issues*, *in* Advanced Securities Law Workshop 2008: Corporate Law and Practice 557–68 (Practising Law Institute 2008) (discussing the scope and effect of the FCPA on business decisions).

6. *See generally* Frederick F. Shaheen & Natalia Green, *Foreign Corrupt Practices Act Trends*, Briefing Papers, July 2005, at 1–16.

7. 15 U.S.C. § 78dd-1(a)(1)(A)(i). The Lay-Person's Guide to the FCPA points out that "18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct." Lay-Person's Guide, *supra* note 3, at 1. While the FCPA can apply to individuals as well as companies, this article focuses on the risks companies face.

8. 15 U.S.C. § 78dd(a).

9. Lay-Person's Guide, *supra* note 3, at 3. Companies that do not fall within this definition are not required to comply with the recordkeeping provisions. *See* Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. Bus. Ethics 615, 618 (2009) (contending that "[w]ithout similar disclosure and accounting requirements for non-issuers, the enhanced ability of U.S. companies to conceal bribe payments becomes the self-fulfilling prophecy that bribery in foreign commerce is difficult to detect and prove"). Therefore, when these companies discover an FCPA violation, they are extremely reluctant to self-report. *Id.* at 627.

10. 15 U.S.C. § 78dd-2(h)(1)(B) (identifying a "domestic concern" extremely broadly as "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States").

11. Lay-Person's Guide, *supra* note 3, at 3.

12. *Id.*

13. For more information about potential criminal implications of the FCPA on individuals, *see* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 Am. Crim. L. Rev. 671, 687–89 (2009).

B. *Recordkeeping Provisions*

In addition to prohibiting bribery, the FCPA establishes specific accounting and recordkeeping provisions.[14] The books and record provisions specifically require that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[15] Further, the books and records provision requires a company to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances."[16] The purpose of this statute is to prevent companies from inaccurately labeling expenditures, and hiding payments to foreign officials.[17] The standard for reviewing corporate behavior is broad because a company may violate the FCPA simply by knowingly failing "to implement a system of internal accounting controls or knowingly falsify[ing] any book."[18] Because bribes are often misrepresented in accounting records and are inconsistent with effective internal controls, the books and records provision allows the SEC to take actions against an issuer even if the DoJ is unable to bring criminal charges due to a lack of evidence.

II. ANALYSIS OF RECENT FCPA ENFORCEMENT ACTIONS

A. *Assurances About Voluntary Disclosure*

Voluntary disclosure occurs when a company chooses to approach enforcement officials about potential FCPA violations prior to and independent of any investigation. In recent years there has been a dramatic increase in enforcement actions against individuals and companies that violate the FCPA.[19] The DoJ has repeatedly assured companies that there are indeed benefits to being forthcoming and voluntarily disclosing any violations a company may detect.[20]

In 2003, the DoJ issued a memorandum from Deputy Attorney General Larry Thompson regarding the various factors considered when deciding whether to investigate and prosecute a corporation.[21] In that memorandum,

14. *See* Joseph Dyer, *Foreign Corrupt Practices Act*, Briefing Papers, Apr. 2000, at 6.
15. 15 U.S.C. § 78m(b)(2)(A).
16. *Id.* § 78m(b)(2)(B).
17. *See* Robert C. Blume & Ryan V. Caughey, *The FCPA: Overview*, *Enforcement Trends and Best Practices*, Sec. Litig. & Reg. Rep., Nov. 3, 2009, at 3, 4 (noting that the internal controls provisions were intended to "prevent improper uses of company assets").
18. 15 U.S.C. § 78m(b)(5).
19. Elliott Leary et al., *Trends in FCPA Enforcement*, Metro. Corp. Couns. (KPMG LLP), May 1, 2007, at 18, *available at* http://www.metrocorpcounsel.com/pdf/2007/May/18.pdf; *see also* Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement*, Feb. 13, 2008, at 2–3 [hereinafter Shearman FCPA Trends 2008], *available at* http://www.shearman.com/files/upload/FCPA_Trends.pdf (discussing recent increases in enforcement).
20. *See*, *e.g.*, Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.
21. *See generally id.*

voluntary disclosure is listed as one of the factors that may mitigate potential penalties for corporate noncompliance.[22] Additionally, that memorandum included a footnote acknowledging that the Organizational Sentencing Guidelines "reward voluntary disclosure and cooperation with a reduction in the corporation's offense level."[23] Similarly, other statements by DoJ officials have alleged a benefit to voluntarily disclosing FCPA violations. For example, Acting Deputy Attorney General Gary G. Grindler promised that companies would receive credit for voluntary disclosure and remedial actions.[24] While Mr. Grindler was not specific as to the extent of the credit, he did promise that cooperation would be considered "during the prosecutorial decision-making process."[25] Similarly, Assistant Attorney General of the Criminal Division Lanny Breuer recently said that voluntary disclosure would be appropriately rewarded.[26]

B. *Skepticism About the Benefits of Voluntary Disclosure*

Despite promises that there are tangible benefits to voluntary disclosure, the DoJ is consistently vague regarding what benefits will actually be conferred to a disclosing corporation.[27] In addition, recent record-breaking settlements and increased enforcement have led many to question whether there actually is a tangible benefit for voluntarily disclosing potential violations.[28]

22. *Id*. at 6.

23. *Id*. at 7 (citing U.S. Sentencing Comm'n, U.S. Sentencing Guidelines Manual § 8C2.5(g) (2009) [hereinafter Sentencing Guidelines], *available at* http://www.ussc.gov/2009guid/TABCON09.htm).

24. Gary G. Grindler, Acting Deputy Att'y Gen., U.S. Dep't of Justice, Address at the 2010 Compliance Week Conference (May 25, 2010) (transcript available at http://www.justice.gov/dag/speeches/2010/dag-speech-100525.html).

25. *Id*.

26. Lanny Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act 3–5 (Nov. 17, 2009) [hereinafter Breuer FCPA Speech] (transcript available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf). Similarly, in a recent speech to the American Bar Association National Institute on the Foreign Corrupt Practices Act, then-Assistant Attorney General Alice Fisher stated, "If you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit." Alice Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act 6 (Oct. 16, 2006) [hereinafter Fisher FCPA Speech] (transcript available at http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf). Later in the same address, Ms. Fisher noted that voluntary disclosure "may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit." *Id*.

27. In her prepared speech, Alice Fisher emphasized that "it would not make sense for law enforcement to make one-size-fits-all promises about the benefits of voluntary disclosure before getting all of the facts." Fisher FCPA Speech, *supra* note 26, at 6.

28. *See* Lucinda Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures*, Steptoe & Johnson LLP, Address Before the American Conference Institute, 17th National Conference, Foreign Corrupt Practices Act 24 (Mar. 2007) ("As FCPA penalties, and the collateral consequences of FCPA violations including third-country enforcement, continue to increase, companies

Criticism about the alleged benefits to voluntary disclosure began to mount after the Schnitzer Steel Industries, Inc. ("Schnitzer Steel") case in October 2006. In that case, Schnitzer Steel voluntarily disclosed bribes a subsidiary had made to Chinese officials for the purpose of gaining a competitive advantage.[29] Despite "exceptional cooperation" with the DoJ, Schnitzer Steel still faced around $15 million in fines from the DoJ and the SEC for their alleged $1.8 million paid in bribes.[30]

Because Schnitzer Steel had a disproportionate fine levied against it, critics reasonably questioned if there really was much of a benefit to voluntary disclosure. For example, reflecting on the Schnitzer Steel case, one author stated: "Despite the Government's assurances that self-reporting and cooperation will result in a tangible benefit, recent enforcement trends do not reflect this promise."[31] Another author mildly noted that the benefit of voluntary disclosure in Schnitzer Steel was simply "hard to discern."[32] In addition, other cases have led some to conclude that "voluntary disclosures involve significant risks that may be less likely to be presented if the company simply responds responsibility [sic] to FCPA issues internally without making a voluntary disclosure."[33]

Although a few have alleged that the Schnitzer Steel case actually reflects the benefits of voluntary disclosure, they appear to be in the minority.[34] In fact, recent enforcement decisions caused another author to conclude that "it is difficult to ascertain what impact voluntary disclosures have on the monetary penalties not just in an individual case, but generally across cases."[35] The alleged inability to "quantify or assess with precision" potential fines

are likely to begin to reassess the benefits of voluntary disclosure. Already there is anecdotal evidence that some companies that have made such disclosures may regret them."). One author referred to the benefits of voluntary disclosure as simply "a deviation from the worst-case scenario." Mark Vernazza & Helen Mueller, *The Long(er) Arm of the Foreign Corrupt Practices Act: The FCPA's Broad Reach and What Companies Can Do to Escape It*, Client Advisory (Edwards Angell Palmer & Dodge LLP), Feb. 15, 2008, at 2, *available at* http://www.eapdlaw.com/newsstand/detail.aspx?news=1168.

29. *In re* Schnitzer Steel Indus., Inc., Exchange Act Release No. 54,606, 89 SEC Docket 302, at 2–5 (Oct. 16, 2006) [hereinafter Schnitzer Steel SEC Settlement].

30. *See id*. at 8; *see also* Press Release, U.S. Dep't of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007) [hereinafter Schnitzer Steel Executive Pleading], *available at* http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.

31. Jessica Tillipman, *Foreign Corrupt Practices Act Fundamentals*, Briefing Papers, Sept. 2008, at 15.

32. Michael Freedman, *Trust Us*, Forbes, Dec. 25, 2006, http://members.forbes.com/forbes/2006/1225/132.html?token=MTggT2N0IDIwMDcgMTU6MzE6MzggKzAwMDA%253D.

33. Low et al., *supra* note 28, at 1.

34. Howard Goldstein made such an argument. *See* Howard Goldstein, *Recent Foreign Corrupt Practices Act Developments*, 237 N.Y.L.J. 5, Jan. 4, 2007, *available at* http://www.friedfrank.com/siteFiles/Publications/EE4B7A2BC514AFD2AD447A4B05409BB7.pdf.

35. Low et al., *supra* note 28, at 20.

led another author to conclude that "these risks represent yet another potential counterweight to the perceived benefits of a [deferred prosecution agreement]."[36]

C. *A Survey of FCPA Cases from 2002 Through 2009*

In response to these criticisms, this article compiles the settlement data of FCPA cases from 2002 through 2009 to determine if there is a pattern between the level of bribes paid and the amount of fines levied because of those bribes in voluntary and nonvoluntary disclosure cases.[37] The principal means of analysis is a comparison of averages between fines and penalties levied in relation to bribes paid. Some have questioned if there is a consistent relationship between fines companies have paid and the amounts that they bribed.[38] The forty cases considered below appear to show that there is some pattern.

Although other factors affect the amount of penalty besides the amount of bribes, the DoJ and the SEC usually quantify only bribes and penalties in their public settlement agreements.[39] Thus, bribes-to-fine comparisons offer consistently available data for contrasting penalties resulting from investigations and voluntary disclosures.[40] Additionally, comparing total fines with the

36. Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, Champion, Sept./Oct. 2006, http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/e4a884975d0659fb85257210005bd4d1?OpenDocument&Click=. There does not appear to be any literature that statistically compares FCPA corporate behavior and fines. Rather, authors that consider recent trends focus on broad observations and individual cases. *See*, *e.g.*, John Harper, Pricewaterhouse Coopers LLP, The Foreign Corrupt Practices Act—A 2009 Update (Sept. 11, 2009), *available at* http://atlantaiia.net/uploads/IIA_FCPA_Presentation_11Sep09.pdf (contending that recent "increased aggressiveness" also has meant "larger penalties" for violators without statistically analyzing recent cases).

37. The Organisation for Economic Co-Operation and Development (OECD) has expressed concern about the lack of statistical data regarding the effectiveness of the FCPA. *See* Org. for Econ. Cooperation & Dev. [OECD], *United States: Phase 2*, *Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* 27 (Oct. 2002), *available at* http://www.oecd.org/dataoecd/52/19/1962084.pdf (concluding that "there are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA"). This Article is intended to address some of the OECD's concerns by statistically evaluating recent FCPA cases in order to determine if there are benefits to voluntary disclosure.

38. At least one author does not believe that there is any discernable pattern relating fines to bribes. *See* Richard L. Cassin, *Handicapping the FCPA*, The FCPA Blog (Jan. 24, 2008, 9:08 PM), http://www.fcpablog.com/blog/2008/1/25/handicapping-the-fcpa.html.

39. Some of the other factors affecting the potential total penalty include the amount of revenue generated from a bribe; remedial actions taken by the company; the institution of compliance program reforms; the general amount of cooperation; and even the relationship between defense counsel and the enforcement agency.

40. Because the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) almost always publish the amount that a company allegedly bribed, comparing bribes-to-fines is a consistent means of contrasting penalties. While the amount of revenue sought or obtained from bribery will occasionally be published, that information appears in only some of

amount given in bribes may be the most effective way to predict potential penalties in future cases.[41]

1. Why Compare Bribes Paid with the Subsequent Fines?

An alternative approach, basing the amount of fine on the amount of harm caused, has been disparaged. The Organisation for Economic Co-Operation and Development (OECD) specifically discourages countries from basing penalties on the amount of harm caused.[42] In 2008 the OECD published a review of Argentina's efforts to penalize foreign bribery proportionately to the amount of harm caused.[43] The OECD criticized this approach, stating that "basing the fines principally on the harm actually caused may not sufficiently sanction companies that offer large bribes. In some cases where substantial bribery is discovered, there may not be much harm actually caused."[44]

A comparison between the amount of revenue or profit a company earns from bribery and its subsequent penalties could be another way to analyze recent enforcements. This method, however, also has its limitations. Such a comparison can be criticized because the amount of revenue or profit gained

the cases. The benefit gained from a bribe as either revenue or profit is sometimes published in DoJ sentencing memoranda when a company pleads guilty. *See*, *e.g.*, U.S. Dep't of Justice Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C., Dec. 12, 2008) (identifying the revenue from contracts that were allegedly tainted by bribery). However, profit or revenue from bribery may not be published if the case results in a nonprosecution agreement. Further, the amount of revenue resulting from bribes will only be published occasionally if the case results in a deferred prosecution agreement. *See*, *e.g.*, Deferred Prosecution Agreement Between the U.S. Dep't of Justice and AGCO Ltd., United States v. AGCO Ltd., No. 1:09-cr-00249-RJL (D.D.C. Sept. 30, 2009) (failing to indentify the amount of revenue resulting from the bribery). *But see* Faro Tech. Inc., Exchange Act Release No. 2,836, 93 SEC Docket 1124 (June 5, 2008) [hereinafter Faro SEC Settlement] (identifying the "net profit" that resulted from alleged bribery). Because most FCPA cases result in either a nonprosecution agreement or a deferred prosecution agreement, there is not nearly as much data regarding the amount of revenue or profit a company gained from bribery compared to the amount it bribed. Because such data are difficult to obtain, other comparisons, like comparing bribes with fines, are natural alternatives.

41. Comparing bribes to fines in a ratio is just one way to analyze recent enforcement actions. As mentioned, there are many other factors that can influence an enforcement outcome. The variation in fine-to-bribe ratios among similar cases demonstrates that FCPA enforcement is often more art than science. However, comparing bribes with fines does reveal a general pattern. *See* tables *infra* Appendix. This article contributes to the discussion about recent FCPA enforcement by demonstrating that a comparison of published data, like bribes and fines, results in a pattern.

42. *See* Org. for Econ. Cooperation & Dev., *Argentina: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* 52 (June 20, 2008), *available at* http://www.oecd.org/dataoecd/35/28/40975295.pdf.

43. *See generally id*.

44. *Id*. Still, some call for enforcement agencies to consider the net gain resulting from bribery as a penalty factor in the FCPA arena just as it is considered in other securities fraud scenarios. *See* Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 Bus. Law. 347, 352 (2008).

from bribery often does not necessarily correlate with the unfair advantage gained.[45] Further, it is difficult to assess accurately the amount of revenue a company actually obtained through a bribe.[46] Finally, the DoJ and the SEC often do not include in their public statements the amount of profit or revenue gained from bribery by the company that has been fined.[47] Because these approaches are discouraged or difficult to evaluate, comparing fines with bribes may be the most effective way to predict future outcomes simply because there are numerous cases to rely on and both bribes and fines are quantifiable. Although comparing fines to bribes is a statistically elementary approach to analyzing data, it helps to reveal patterns important to the discussion of reforming FCPA enforcement.[48]

45. Consider, for example, a situation where a company bribes a foreign official to obtain a license to operate in a particular country. Just because it now has a license does not necessarily mean it will automatically be awarded contracts or obtain business in that country. *But see* Frank R. Gunter, *Corruption*, *in* Encyclopedia of Social Problems 174 (Vincent N. Parrillo ed. 2008) (contending that there is a direct relationship between the size of the bribe and "the scale of the benefit sought by the bribe payer . . . and whether other officials might provide competition by offering to provide the same illegal benefit for a smaller bribe").

46. The DoJ and the SEC often do not have the resources to thoroughly investigate every potentially tainted contract from a company. Thus, the alleged amount of revenue or profit gained from tainted contracts is often a calculation that is provided by the companies themselves. *See* Telephone Interview with Mike Koehler, Asst. Prof. of Bus. Law, Butler Univ., Indianapolis (July 16, 2010).

47. *See*, *e.g.*, Press Release, U.S. Dep't of Justice, Justice Dep't Agrees to Defer Prosecution of York Int'l Corp. in Connection with Payment of Kickbacks under the U.N. Oil for Food Program (Oct. 1, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_783.html [hereinafter York Int'l Settlement]. Some have questioned the potency of an analysis of voluntary disclosure that is based on a comparison between the amounts of bribes paid with the amount of subsequent fines. Critics of such an analysis point out that such a comparison fails to quantify all of the factors that play a role in determining the fine. *See* Christopher M. Matthews, *Much Ado About Disclosure*, Main Justice (Aug. 5, 2010), http://www.mainjustice.com/justanticorruption/2010/08/05/much-ado-about-disclosure (quoting Jay Darden as contending that "the use of a single metric—any single metric—oversimplifies what is a very complex decision on the part of a company and oversimplifies the analysis DoJ is required to do under the Principles of Federal Prosecution of Business Organizations, where cooperation is only one of nine factors to be considered, and where voluntary disclosure is only one of many different aspects of cooperation"). The models in this article confirm that there are other variables that are unaccounted for. Specifically, the model itself reveals that it is only accounting for only some of the variation. Nevertheless, the model comparing bribes with fines is still statistically sound. *See* tables *infra* note 48. Unfortunately, only numbers that are published by the DoJ and the SEC can be statistically compared. The inherent problem with the above criticism is that the DoJ does not publish specific data that quantify the other aspects of cooperation. Given that no such data exists, observers are left only to compare published figures like bribes and fines.

48. For simplicity's sake, ratios between bribes and fines will be considered in this article. However, a linear regression analysis of the data offers a more thorough review of the data and is considered below. A regression analysis accomplishes this because it accounts for measurement errors, conflicting variables, and the fitness of a relationship of variables. The clear drawback to regression analysis in this case stems from the lack of data. There are only thirty-eight different cases considered in the regression analysis. Therefore, the sample size is insufficient for performing more accurate inferential statistics. While the insufficiency in data renders a thorough statistical analysis less potent, a regression analysis still is useful to demonstrate a correlation between penalties assessed and bribes paid. The bivariate regression analysis results follow below.

2. Data Categorization

For the purpose of this Article, the data have been divided into four principal groups and will be assessed accordingly. The first group includes com-

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines and Forfeitures

Dependent Variable: Total Fines and Forfeitures Paid				
Independent Variable	**Correlation Coefficient**	**Standard Error**	***t*-Value**	***P > t***
Bribes Paid	2.007341*	.3882622	5.17	0.000
Number of observations = 38		Prob. > *F* = 0.0000		
R-squared = 0.4261		Adj. *R*-squared = 0.4102		

*Statistical significance at .05 or less with two-tailed *t*-test (95% confidence interval)

The dependent variable in the table above is the total amount of fines and forfeitures paid from all three groups. Total bribes represent the independent variable or the explanatory variable because it serves to explain the change. The bivariate regression analysis reveals that for each unit increase in bribes paid there is a unit increase in fines and forfeitures of about 2.01 in dollars. This means that for each dollar of a bribe paid, the correlating fine and forfeiture is about $2.00. Further, the *t*-ratio in this case is 5.17, which is above the desired threshold of 1.96 for a ninety-five percent confidence level. Thus, the data demonstrate a strong link between fines and bribes. A perfect model would have a fitness of 1. However, a low R-squared number, such as .4102, is not unacceptable given the few cases considered here and the fact they are "not uncommon" in social sciences. *See* Jeffery M. Wooldridge, Introductory Econometrics: A Modern Approach 41 (2009). Similar bivariate regression analysis that does not include disgorgement and prejudgment interest follows.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines Paid

Dependent Variable: Total Fines Paid				
Independent Variable	**Correlation Coefficient**	**Standard Error**	***t*-Value**	***P > t***
Bribes Paid	.6333*	.2946	2.15	0.038
Number of observations = 38		Prob. > *F* = 0.0384		
R-squared = 0.1138		Adj. *R*-squared = 0.0892		

*Statistical significance at .05 or less with two-tailed *t*-test (95% confidence interval)

The difference between these two models is interesting. Although the statistics reveal a sound relationship between fines and bribes even when disgorgement and prejudgment interest are not considered, the model was stronger when those numbers were considered. The fact that the model can better predict outcomes when disgorgement and prejudgment interest are considered appears to negate criticism that these numbers should not be considered in such an analysis. *See* Richard L. Cassin, *More Math for the General Counsel*, FCPA Blog (Aug. 4, 2010, 8:02 AM), http://www.fcpablog.com/blog/2010/8/4/more-math-for-the-general-counsel.html (arguing that "disgorgement paid to the SEC is not part of the fine calculation under the sentencing guidelines" and therefore should not be considered in a ratio between fines and bribes).

panies that voluntarily disclose FCPA violations. Upon the discovery of an FCPA violation, the companies in this group take special action in order to bring themselves into compliance.[49] First they will cooperate by voluntarily disclosing the infraction and they also will fully comply with a DoJ investigation and provide all of the information relating to the investigation.[50] These companies also will typically cooperate by initiating rigorous compliance programs or refining the program currently in place, which sometimes means they bring in a third-party compliance monitor.[51] These companies also generally take disciplinary actions against offending employees.[52]

The second group is unique because it is comprised of corporations that disclose FCPA violations because of an impending merger and acquisition. These companies are unlike the voluntarily disclosing group because the underlying reason motivating them to disclose is that their potential buyer does not want to deal with the consequences of an FCPA violation after acquisition.[53] In order to avoid such a scenario, the buyer makes self-disclosure and restitution a prerequisite for the acquisition.[54] Because the motivation behind this type of disclosure is not entirely "voluntary," the data for this group are considered separately.

The third group is composed of corporations that do not voluntarily self-disclose FCPA violations and are approached by the DoJ or the SEC. Patterns appear to emerge regarding the companies in this group.[55] For example, many of the violators surveyed here were involved in the United Nations' Oil-for-Food program in Iraq.[56] The DoJ also focused on medical and health care

49. *See* Gibson, Dunn & Crutcher LLP, *2009 Year-End FCPA Update*, Dec. 16. 2010, *available at* http://www.gibsondunn.com/publications/Pages/2009Year-EndFCPAUpdate.aspx (summarizing cases from 2009 and noting corporate behavior before and after voluntary disclosure).

50. *See*, *e.g.*, Press Release, U.S. Dep't of Justice, Micrus Corp. Enters into Agreement to Resolve Potential FCPA Liability (Mar. 2, 2005), http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm [hereinafter Micrus Settlement]; Agreement Between the U.S. Dep't of Justice and Micrus Corp. (Feb. 28, 2005), www.justice.gov/criminal/fraud/fcpa/cases/docs/02-28-05micrus-agree.pdf.

51. *See* Monsanto Co., Exchange Act Release No. 50,978, 84 SEC Docket 2199 (Jan. 6, 2005).

52. Press Release, U.S. Dep't. of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-for-Food Program (May 11, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-461.html [hereinafter Novo Nordisk Settlement].

53. *See* Brian Chilton, *The Foreign Corrupt Practices Act Enforcement Juggernaut Steams on in 2007*, Compliance Today, May 2007, at 42, *available at* http://www.foley.com/files/tbl_s31Publications/FileUpload137/4136/Compliance_Chilton.pdf.

54. *See*, *e.g.*, Goldstein, *supra* note 34 (noting that potential buyers must perform "aggressive FCPA due diligence" and consider following DoJ's opinions procedure should that due diligence reveal FCPA violations).

55. *See* Gibson, Dunn & Crutcher LLP, *2008 Year-End FCPA Update*, Jan. 5, 2009, *available at* http://www.gibsondunn.com/publications/Pages/2008Year-EndFCPAUpdate.aspx.

56. *Id*. "The Oil-for-Food Program was established by the United Nations to enable Iraq to sell its oil for humanitarian purposes, in the context of an extensive international sanctions regime." Novo Nordisk Settlement, *supra* note 52.

product manufacturers.[57] Given recent statements by DoJ officials, it appears as though the DoJ may now be focusing on pharmaceutical companies.[58]

3. Ratios Between Penalties and Bribes Paid

The fine-to-bribe ratios discussed below are calculated simply by dividing the total fine a company paid by the amount of bribery reported. A similar ratio, the fine-and-forfeiture-to-bribe ratio, is calculated by combining the fine a company faced with forfeitures and prejudgment interest and then dividing that sum by the amount of bribes. Group ratios were calculated by dividing total fines by total bribes and also by dividing total fines and forfeitures by total bribes for each of the groups.[59] Companies that voluntarily disclose appear to have faced a fine-to-bribe ratio of 2.45. In other words, for every dollar paid in bribes, companies appear to have been fined on average $2.45. The fine-and-forfeiture-to-bribe ratio for the voluntary disclosure group was 4.54. In other words, for every dollar paid in bribes, companies appear to

57. Michael Himmel & Melissa Toner Lozner, *Foreign Corrupt Practices Act Enforcement Blitz Snares Health Care Companies*, Bloomberg Health L. Rep., July 2009, at 1, *available at* http://www.lowenstein.com/files/Publication/05c3d829-0498-4843-b6ea-09f804b0be04/Presentation/PublicationAttachment/8c28c7b6-7ee9-4363-8efa-0ea979c34b82/Foreign%20Corrupt%20Practices%20Act%20Enforcement%20Himmel%20Lozner%20BB%2009.pdf; *see also* Mike Koehler, *A Malady in Search of a Cure—The Increase in FCPA Enforcement Actions Against Health-Care Companies*, 38 U. Mem. L. Rev. 261, 265, 289 (2008) (noting enforcement patterns against medical device makers).

58. *See* Lanny A. Breuer, Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice, Keynote Address to The Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, at 1 (Nov. 12, 2009) (transcript available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf) [hereinafter Breuer Pharmaceutical Speech].

59. The bivariate regression analysis follows below for each of these groups considered individually with the exception of the two outliers. Like the ratios discussed, the coefficients below reveal similar relationships between fines and bribes for each group. Further, the coefficients also provide another prediction for likely scenarios for what a company may expect depending on the amount of bribe and depending on which group they fall into.

Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines and Forfeitures, by Disclosure Type

Dependent Variable: Total Fines and Forfeitures Paid

Independent Variable	Correlation Coefficient	Standard Error	*t*-Value	*P* > *t*	*N*	R^2
Voluntary Disclosure Bribes Paid	4.259917*	1.03719	4.11	0.001	15	0.5684
Mergers and Acquisition Bribes Paid	7.690244*	2.393851	3.21	0.085	4	0.8377
Nondisclosure Bribes Paid	1.649584*	.3248688	5.08	0.000	19	0.6026

*Statistical significance at .05 or less with two-tailed *t*-test (95% confidence interval)
Ratio 1: Total penalties/Bribes paid = 4.117486

have been fined and ordered to disgorge on average $4.54. The mergers and acquisitions group, however, appears to have faced much heftier average fines. The apparent average fine per dollar bribed in that group was $7.47 while the fine-and-forfeiture-to-bribe ratio was 10.70. Finally, companies that did not

The coefficients listed above suggest that voluntarily disclosing companies tend to face stiffer fines and forfeitures than those that do not voluntarily disclose. The linear regression model above shows that the difference between these two groups is nearly 2.5:1. Further, there appears to be less margin of error for the involuntarily disclosing group, as compared to the voluntary disclosure group, given the larger sample size. Similar bivariate regression analysis that does not include disgorgement and prejudgment interest follows below.

Bivariate Regression Analysis for the Amount of Total Fines Paid, by Disclosure Type

Dependent Variable: Total Fines Paid

Independent Variable	Correlation Coefficient	Standard Error	*t*-Value	*P* > *t*	*N*	R^2
Voluntary Disclosure Bribes Paid	2.19644*	.4878051	4.50	0.001	15	0.6093
Mergers and Acquisitions Bribes Paid	3.990503	4.179047	0.95	0.440	4	0.3131
Nondisclosure Bribes Paid	.3832311	.3071887	1.25	0.229	19	0.0839

*Statistical significance at .05 or less with two-tailed *t*-test (95% confidence interval)
Ratio 1: Total penalties/Bribes paid = 4.117486

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Bivariate Regression Analysis for the Amount of Bribes Paid by a Corporation on the Amount of Total Fines Paid, by Disclosure Type

Dependent Variable: Total Fines Paid

Independent Variable	Correlation Coefficient	Standard Error	*t*-Value	*P* > *t*	*N*	R^2
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*Statistical significance at .05 or less with two-tailed *t*-test (95% confidence interval)
Ratio 1: Total penalties/Bribes paid = 4.117486

self-disclose faced an average fine-to-bribe ratio of 1.70. Companies that did not self-disclose appeared to face a fine-and-forfeiture-to-bribe ratio of 3.19. The data tend to show that the difference between voluntarily disclosing and nondisclosing companies is about 1.5:1 in fines. In other words, companies seem to face a penalty one and a half times larger if they voluntarily disclose FCPA violations as compared to companies that do not.[60]

4. The Two Outliers

The two cases with record-breaking fines imposed for FCPA violations make up the fourth group.[61] In 2008, Siemens Aktiengesellschaft ("Siemens") was fined approximately $1.96 billion for systemic bribery, $810 million of which came from the United States.[62] In 2009 Kellogg Brown & Root LLC ("KBR") was fined approximately $579 million for bribes, some of which were used to influence Nigerian government officials.[63] The KBR and Siemens cases resulted in fines much larger than anything else seen in FCPA enforcement.[64] Curiously, a fine-to-bribe ratio analysis reveals that both the KBR and Siemens cases seem statistically disproportionate compared to companies that voluntarily disclosed.[65] The data suggest that KBR and Siemens faced about one-fourth of the fines that typical voluntary-disclosing companies faced and about one-fourth of what nonvoluntary disclosing companies averaged.

Perhaps the reason for the apparent statistical anomaly is the sheer size of the fines they faced.[66] The two companies' combined fines totaled nearly $2.5 billion.[67] Because of the size of the fines and the anomalous fine-to-bribe ratio in these two cases, they were considered in a category by themselves rather than with the other nondisclosing companies. Considering these two cases separately also makes sense given the fact that there is simply no cor-

60. These statistics appear to contradict recent statements by Lanny Breuer that in FCPA cases the DoJ strives "to apply a consistent and principled approach" and endeavors to "provide clarity, consistency, and certainty in outcomes." *See* Breuer FCPA Speech, *supra* note 26, at 4.

61. *See* Melissa Aguilar, *Siemens Teaches Cos. FCPA Dos & Don'ts*, Compliance Wk. (Jan. 20, 2009), http://www.complianceweek.com/article/5234/siemens-teaches-cos-fcpa-dos-and-don-ts.

62. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to FCPA Violations and Agree to Pay $450 in Combined Criminal Fines (Dec. 15, 2008) [hereinafter Siemens Settlement], *available at* http://www.usdoj.gov/usao/dc/Press_Releases/2008%20Archives/December/08-1105.pdf.

63. Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

64. *See Survey of Recent FCPA Developments*, Client Advisory (Arnold & Porter LLP), Feb. 2009, at 1, *available at* http://www.arnoldporter.com/public_document.cfm?u=surveyofrecentfcpadevelopments&id=13958&key=25I2 (commenting that the Siemens settlement was "almost 20 times higher than the largest previous penalty under the FCPA").

65. *See* tables *infra* Appendix. While KBR appears to have faced a fine-to-bribe ratio similar to other companies in the nonvoluntary group, it was treated differently because of the size of the case. The amount of fines and bribes in that case was so large that including it would have skewed the analysis.

66. Thomas Gorman, *The Siemens FCPA Case: A Record Settlement and a Warning to All*, SEC Actions (Dec. 16, 2008, 5:22 AM), http://www.secactions.com/?p=655.

67. *Id.*

responding data from an extremely large voluntary disclosure situation comparable with either KBR or Siemens.[68] Because of the disparities between the statistics and the lack of similar cases, grouping KBR and Siemens cases with other nondisclosing cases is not statistically beneficial.

However, when considered as a separate group, the Siemens and KBR cases may demonstrate a disappointing trend. Despite the record-breaking nature of the fines in these two cases, the average ratio between fines administered and bribes paid for KBR and Siemens was apparently less than 1:1.[69] Because this ratio appears to be significantly lower than what voluntarily disclosing companies seem to face, the discrepancy could have a chilling effect on voluntary disclosure for larger corporations with unusually large FCPA violations. Given the size of the fines that Siemens and KBR faced, it is less likely that a company will voluntarily disclose similar large-scale systemic corruption.

While the total penalty Siemens faced may have been drastic, the amount of bribery conducted by Siemens was simply unprecedented.[70] The amount of penalty that Siemens faced in relation to that rampant bribery appears to have been considerably less than what other firms appear to receive. This disparity led one author to ask, "What deterrence is there when an FCPA violator (let alone the most egregious violator in the history of the FCPA) can immediately get U.S. government business, including from the same government agency that prosecuted it for violating the FCPA?"[71] Further, others have noted that the Siemens settlement, rather than deterring companies from bribery, may have had the opposite effect for large, well-financed corporations in similar situations.[72] In response to these criticisms, Mark Mendelsohn, the former Deputy Fraud Section Chief during the Siemens enforcement, argued that the fine in the Siemens case was appropriate given "the cost of the investigation itself for the company, and the remediation."[73] One problem with this statement is that many other companies involved in similar FCPA investigations with the DoJ also face proportionately similar investigation and remediation costs but also appear to face much higher fines.[74]

68. *See id.*

69. *See* tables *infra* Appendix.

70. The case against Siemens was the largest FCPA case to date. *See* Siemens Settlement, *supra* note 62. In fact, the alleged amount of bribery in the Siemens case was at least 68 times greater than the highest case in the nonvoluntary disclosure group. *See* tables *infra* Appendix.

71. Mike Koehler, *Siemens . . . The Year After*, FCPA Professor (Dec. 14, 2009, 12:12 PM), http://fcpaprofessor.blogspot.com/2009/12/siemens-year-after.html.

72. *See* David Crawford & Mike Esterl, *Siemens Settlement Sets Off Criticism of German Inquiries*, Wall St. J., Oct. 8, 2007, at A12 (quoting the spokesman for the German Association of Police Detectives as saying the settlement was "a joke and insignificant").

73. Christopher M. Matthews, *Mendelsohn Defends FCPA Settlement with Siemens*, Main Justice (Feb. 10, 2010, 5:14 PM), http://www.mainjustice.com/justanticorruption/2010/02/10/mendelsohn-defends-fcpa-settlement-with-siemens/.

74. Curiously, while addressing the costs associated with nonvoluntary disclosure Lanny Breuer noted that the DoJ was "fully aware that internal investigations and remedial measures may be costly." *See* Breuer Pharmaceutical Speech, *supra* note 58, at 3. By recognizing that most companies face the same types of costs, Mr. Breuer further demonstrates that Siemens was not unique

Whether Siemens and KBR will impact other settlements remains to be seen. Perhaps more important than the fines levied against KBR and Siemens is the fact that the DoJ is willing to tackle large cases of corruption.[75] Nevertheless, most cases are quite unlike KBR and Siemens. The FCPA cases from 2002 through 2009 surveyed in this article reveal that most companies with reported FCPA violations will have committed bribes in the million to tens of millions of dollars range.[76] Given the monetary differences, a company facing a typical FCPA investigation and enforcement should probably not focus on the Siemens or KBR cases, but rather focus on potential costs and benefits stemming from similar voluntary disclosure cases.

5. Notable Cases from 2002 Through 2008

a. Voluntary Disclosures

From 2007 through 2008 there were some notable voluntary FCPA disclosure cases. Perhaps the most interesting case was a settlement between the SEC and Bristow Group Inc. ("Bristow Group").[77] Bristow Group, a manufacturer of oil and gas facilities, allegedly made improper payments to Nigerian officials in order to receive a reduction in employment taxes in that country.[78] Bristow Group also underreported its expatriate payroll expenses.[79] The total improper payments from Bristow Group to Nigerian officials totaled approximately $423,000.[80] Despite the large amount of bribes, Bristow Group did not have to pay any fines and was ordered only to cease and desist.[81] The SEC noted that Bristow Group had "cooperated with the Commission's investigation and took a number of remedial steps."[82] If the voluntary disclosure average highlighted in Table 7 (page 443) would have been applied in this case, Bristow Group could have incurred a fine and forfeiture on the order of

and thus the disproportionately low fines were an anomaly. *Id.* Nevertheless, Mr. Breuer cautioned that criminal fines and negative publicity can make the costs of nondisclosure "much higher." *Id.* However, he did not address the disproportionately low fines that the nondisclosing companies considered in this article seem to face compared with those who voluntarily disclose. *Id.*

75. Philip Urofsky & Danforth Newcomb, Shearman & Sterling LLP, *FPCA Digest: Recent Trends and Patterns in FCPA Enforcement*, Mar. 2009, at 1, *available at* http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf (noting that "[m]ore important than the size of the penalty are the multi-year trends of increasing numbers of enforcement").

76. *See* tables *infra* Appendix.

77. Press Release, U.S. Sec. & Exch. Comm'n, SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations (Sept. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-201.htm.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

$4.5 million. In that regard, Bristow Group is the case that tends to give hope for small penalties when a corporation voluntarily discloses and takes appropriate steps to remedy its actions.[83]

Although not as remarkable, the case against Paradigm B.V. ("Paradigm") is also important because it represents what appears to be the average fine for a company that voluntarily discloses.[84] Paradigm, a company that produces enterprise software for oil explorations, violated the FCPA by bribing various foreign officials in developing countries.[85] However, Paradigm voluntarily disclosed the violation and the DoJ reported that the company had conducted a "thorough self-investigation of the underlying conduct" and made "extensive remedial efforts."[86] The DoJ recognized these efforts and agreed not to prosecute the company and Paradigm received a 3.98 fine-and-forfeiture-to-bribe ratio, somewhat below the apparent voluntary disclosure average but still dramatically higher than the apparent average for a nondisclosing company.[87] Ironically, because Paradigm faced a lower fine than the apparent average for nondisclosing companies, it has been highlighted as an example of the benefits of voluntary disclosure.[88]

b. Nondisclosures

During the same time period, Flowserve, Inc. ("Flowserve") faced stiff penalties for its alleged bribery.[89] A subsidiary of Flowserve paid over $600,000 in kickbacks to Iraqi officials for the sale of large water pumps.[90] The case is interesting because of the large fines that the DoJ and the SEC imposed on Flowserve. Despite the company's efforts to improve "compliance policies and procedures," it still faced approximately $10.5 million in collective fines and disgorgement.[91] This case stands out as one of the highest apparent fine-to-bribe ratios for that period. Flowserve's fine-and-forfeiture-to-bribe ratio was 17.49, significantly higher than the average for the nondisclosing group.

83. *See* Harnisch & Ramos, *supra* note 5, at 564 (citing *Bristow Group* as a case where voluntary disclosure yielded "significant tangible benefits").

84. *See* Press Release, U.S. Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.justice.gov/opa/pr/2007/September/07_crm_751.html.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* Melissa Klein Aguilar, *FCPA Case Shows Benefit of Self-Disclosure*, Compliance Wk. (Oct. 30, 2007), http://www.complianceweek.com/article/3744/fcpa-case-shows-benefit-of-self-disclosure (stating the Paradigm settlement was "soothing news to corporate executives" yet failing to address the disproportional fine as compared to average nondisclosing companies).

89. Press Release, U.S. Dep't of Justice, Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Feb. 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_132.html (revealing that Flowserve was fined approximately $10 million).

90. *Id.*

91. *Id.*

c. Disconcerting Cases

Perhaps the most problematic case from this time period was the settlement of FCPA violations by Baker Hughes Inc. ("Baker Hughes"). Baker Hughes, an oilfield service company, agreed through its subsidiary to pay kickbacks to Kazakhstan officials in order to win a contract.[92] Despite voluntarily disclosing the misconduct, Baker Hughes faced stiff fines that raised serious concerns about the actual monetary benefits of voluntary disclosure.[93] Arguably the most disconcerting aspect of the Baker Hughes settlement was the fact that the DoJ justified the $11 million fine by contending that it was well below the suggested fine in the Organizational Sentencing Guidelines.[94] While that may have been factually correct, the trouble with that contention is that it failed to acknowledge that the total penalty faced by Baker Hughes was a record high and dramatically disproportionate when compared with the apparent fines faced by nondisclosing companies.[95] The fine-and-forfeiture-to-bribe ratio the company faced appeared to be twice as high as the average for voluntarily disclosing companies and nearly three times higher than involuntarily disclosing companies.[96] This apparent inconsistency in enforcement is problematic because it sends a mixed signal to companies and perpetuates dissatisfaction regarding the fairness of FCPA enforcement.

On the other end of the spectrum, the FCPA case against an oil company, the Chevron Corporation ("Chevron"), was equally perplexing. Unlike Baker Hughes, Chevron did not voluntarily disclose its FCPA violation. Chevron was involved in kickbacks to Iraqi officials for contracts under the U.N.'s Oil-for-Food program.[97] Chevron allegedly used third parties to make $20 million

92. Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007) [hereinafter Baker Hughes Settlement], *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html.

93. Willkie Farr & Gallagher LLP, Client Memorandum, Baker Hughes to Pay Record Amount in FCPA Case (May 7, 2007), *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C2420%5CBaker_Hughes_to_Pay_Record_Amount_In_FCPA_Case.pdf (noting the discrepancy between promised benefits for voluntary disclosure and the record fine).

94. Baker Hughes Settlement, *supra* note 92.

95. *See* Steptoe & Johnson LLP, International Law Advisory, Baker Hughes Agrees to Pay Record $44.1 Million to Resolve DoJ and SEC FCPA Enforcement Actions (May 3, 2007), *available at* http://www.steptoe.com/publications-4449.html#9.

96. Despite voluntarily disclosing the FCPA violation and taking remedial actions, Baker Hughes probably received a significantly higher fine due to the fact that it failed to comply with previous deferred prosecution agreement standards. *See* Veronica Foley & Catina Haynes, *The FCPA and Its Impact in Latin America*, 17 Currents: Int'l Trade L.J. 27, 36 (2009). Nevertheless, the apparent inconsistency lies in the fact that Baker Hughes voluntarily disclosed the subsequent problem and still received a fine-to-bribe ratio nearly twice the average of what an involuntarily disclosing company appears to receive. *See* Baker Hughes Settlement, *supra* note 92.

97. Press Release, U.S. Sec. & Exch. Comm'n, Chevron to Pay $30 Million to Settle Charges for Improper Payments to Iraq Under U.N. Oil for Food Program (Nov. 14, 2007) [hereinafter Chevron Settlement], *available at* http://www.sec.gov/news/press/2007/2007-230.htm (citing a third party who alleged that Chevron knew about the illegal surcharges). The regression analysis of the data in this Article also appears to show that the Chevron case was statistically anomalous compared to other involuntarily disclosing companies in the same group. *See, e.g.*, Cassin, *supra* note 48.

in illicit payments to Iraqi officials.[98] Despite the extensive bribes, Chevron faced only a $3 million fine and $25 million in disgorgement.[99] Chevron's fine-and-forfeiture-to-bribe ratio was 1.4, significantly lower than the average for the nonvoluntary disclosure group. Without considering disgorgement and interest, Chevron only faced a .15 fine-to-bribe ratio, significantly below the voluntary disclosure group average. Despite failing "to devise and maintain a system of internal accounting controls to detect and prevent such illicit payments" and likely knowing about the corruption, Chevron faced a fine-and-forfeiture-to-bribe ratio that was almost half what the voluntary disclosure group averaged.[100] The problem with the Chevron case is that it bolsters the argument that FCPA enforcements are somewhat unpredictable. The disparity in proportionality Chevron experienced in fines when compared with both the voluntary and nonvoluntary disclosure groups surveyed in this Article raises questions about the underlying fairness of FCPA enforcements.

6. Notable 2009 Cases

a. Voluntarily Disclosing and Avoiding Large Fines

Among the FCPA cases of 2009, two cases stand out. Perhaps as a way to set the tone for the year and the possible future of FCPA enforcement actions, two contrasting FCPA decisions were issued in the spring of 2009. First, in April, Latin Node Inc. ("Latin Node"), a private company, pled guilty to criminal violations under the FCPA for bribery.[101] The DoJ reported that Latin Node made nearly $2.25 million in improper payments to gain competitive advantages in the telecommunications business in Honduras and Yemen.[102]

The Latin Node case is somewhat encouraging to companies considering voluntary disclosure because the DoJ assessed only a $2 million penalty.[103] Thus, the fine-to-bribe ratio was 0.89, dramatically lower than the average voluntary disclosure ratio. In its public statement, the DoJ expressly stated that the low fine was because Latin Node "voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latin Node management with involvement in or knowledge of the violations."[104]

It is difficult to tell at this point if Latin Node's fine was unusually low because DoJ was trying to send a message about voluntary disclosures or if this

98. Chevron Settlement, *supra* note 97.
99. *Id*.
100. *See id*.
101. Press Release, U.S. Dep't. of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://miami.fbi.gov/dojpressrel/pressrel09/mm040709.htm.
102. *Id*.
103. *Id*.
104. *Id*.

is what is to be expected in the future. However, it is clear that DoJ went out of its way to level an apparently low fine-to-bribe ratio and then openly attributed that decision to Latin Node's behavior after the violation.[105] At least one author has hailed this decision as a sign that voluntary disclosure does have tangible benefits.[106]

b. Nondisclosure and Strong Fines

In contrast to Latin Node, in May 2009, Novo-Nordisk A/S ("Novo Nordisk") agreed to pay the DoJ $9 million and the SEC nearly $9 million in total fines and disgorgement stemming from $1.4 million in bribes paid.[107] The bribes were paid to the Iraqi government under the U.N. Oil-for-Food program.[108] The fine-and-forfeiture-to-bribe ratio was 12.54. That ratio was nearly four times the average nondisclosing ratio and nearly three times what the average voluntary discloser may expect.

In further contrast with the Latin Node case, DoJ's public announcement simply stated: "In recognition of [Novo Nordisk's] thorough review of the illicit payments and its implementation of enhanced compliance policies and procedures, the Department has agreed to defer prosecution of criminal charges against [Novo Nordisk] for a period of three years."[109] While Latin Node was not required to install compliance monitors and was not given a time limit to pay the fine, Novo Nordisk was assigned both.[110] The differences between the Novo Nordisk and Latin Node cases are encouraging because they appear to show a strong distinction in outcomes between voluntary and nonvoluntary disclosures.

c. Remaining Inconsistencies

Despite these two cases, inconsistencies from 2009 remain. ITT Corp. ("ITT"), for example, was a voluntary disclosure case from 2009 in which the company faced an 8.39 fine-and-forfeiture-to-bribe ratio. In that case, ITT paid nearly $1.5 million in disgorgement and $250,000 in fines for an alleged $200,000 in bribes.[111] The penalty against ITT may have been higher because it "failed to devise and maintain a system of internal accounting controls."[112] Nevertheless, ITT was praised by the SEC for cooperation in the investigation and for instituting subsequent "remedial measures."[113] Still, ITT appears to have faced a fine-and-forfeiture-to-bribe ratio that was nearly twice as high

105. *Id.*
106. Richard L. Cassin, *In Step with DoJ*, FCPA Blog (Apr. 21, 2009, 8:02 PM), http://www.fcpablog.com/blog/2009/4/21/in-step-with-the-doj.html.
107. Novo Nordisk Settlement, *supra* note 52.
108. *Id.*
109. *Id.*
110. *Id.*
111. SEC v. ITT Corp., Litigation Release No. 20896, 2009 WL 330269 (Feb. 11, 2009).
112. *Id.*
113. *Id.*

as the group average for voluntarily disclosing companies. Not considering disgorgements and prejudgment interest, ITT's fine-to-bribe ratio was 1.25, barely below the average for the nonvoluntary cases but more proportionate.

Another surprising voluntary disclosure case from 2009 was the enforcement action against oil drilling equipment company Helmerich & Payne Inc. ("Helmerich"). In that case, Helmerich made improper payments to officials in Argentina and Venezuela.[114] The illicit payments totaled nearly $200,000 and the company received a combined penalty of nearly $1 million.[115] The sums at issue in this case were similar to those in the ITT case. Just as in the ITT case, DoJ acknowledged Helmerich's voluntary disclosure and the company's cooperation in the investigation.[116] Nevertheless, the fine-to-bribe ratio was nearly double what the apparent average is for voluntarily disclosing companies. Curiously, the ITT and Helmerich cases are the third- and fourth-highest fine-and-forfeiture-to-bribe ratios for voluntary disclosures surveyed in this article. Perhaps the most perplexing fact is the apparent disproportion between the ratios in these two cases and what Latin Node faced. ITT and Helmerich faced fine-and-forfeiture-to-bribe ratios nearly seven times higher than Latin Node. The apparent statistical incongruities between these voluntary disclosure cases tend to undercut the notion that FCPA enforcement in 2009 was more proportionate or fair than in previous years.

In addition to 2009 inconsistencies in the voluntary disclosure group, there were also some unsettling cases in the nondisclosing group. For example, in 2009 Control Components Inc. ("CCI") allegedly paid $6.85 million in bribes to Middle Eastern and Asian officials.[117] CCI, a manufacturer of power generation valves, was fined $18.2 million for said bribery.[118] The DoJ also required CCI to implement a compliance program and to pay for compliance monitors for that program.[119] In that regard, the CCI case was quite similar to the Novo Nordisk matter discussed above. Nevertheless, unlike Novo Nordisk, CCI was assessed only a 2.66 fine-to-bribe ratio, whereas Novo Nordisk, a similar involuntarily disclosing company, faced a ratio that was nearly three times larger. Despite not self-disclosing its bribery, CCI faced a fine-to-bribe ratio that was significantly less than the apparent average for the involuntarily disclosing group. The CCI case manifests some of the differences in enforcement that companies have experienced even when they have seemingly simi-

114. Press Release, Dep't. of Justice, Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009) [hereinafter Helmerich DOJ Settlement], *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-741.html.

115. *In re* Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009).

116. Helmerich DOJ Settlement, *supra* note 114.

117. Press Release, U.S. Dep't of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Fine (July 31, 2009), *available at* http://www.justice.gov/usao/cac/pressroom/pr2009/091.html.

118. *Id.*

119. *Id.*

lar behavior. These differences tend to cast an inconsistent shadow on 2009 enforcement trends.

Another nonvoluntary disclosure case that raises possible inconsistency concerns is AGCO Corp. ("AGCO"). AGCO, a manufacturer of agricultural equipment, was fined over $18 million for bribes to Iraqi officials under the U.N.'s Oil-for-Food program.[120] Despite paying nearly $5.9 million in kickbacks, AGCO faced only a 3.37 fine-and-forfeiture-to-bribe ratio.[121] Ignoring disgorgement and prejudgment interest, AGCO only faced a .68 fine-to-bribe ratio. The fines in this case were apparently lower because of remedial acts taken by AGCO.[122] Nevertheless, like CCI, AGCO also "failed to maintain an adequate system of internal controls."[123] Despite that failure, AGCO apparently faced a fine-to-bribe ratio that was significantly lower than the average for voluntarily disclosing companies even though they did not self-disclose.

While it might be argued that the Government was trying to send a positive signal in 2009 regarding voluntary disclosures with the Latin Node case, it is impossible to cheer the Latin Node decision while ignoring the other apparent inconsistent cases from 2009. For example, CCI and AGCO, the two nonvoluntary 2009 cases discussed, faced a collective fine-to-bribe ratio that was only slightly larger than what Latin Node faced despite collectively bribing nearly $13 million compared to Latin Node's voluntary disclosure of $2 million in bribes.

7. Ramifications of the Statistical Data for Companies

The information discussed in this Article is relevant to any business that faces potential FCPA investigation and enforcement because it provides a prediction for what penalties a company may expect based on previous cases. This information is particularly relevant for any business that has reason to suspect that its industry is the latest focus for FCPA enforcement. In a recent address at a pharmaceutical convention, Assistant Attorney General Lanny Breuer made clear that DoJ was now focused on that industry. He stated: "Our focus and resolve in the FCPA area will not abate, and we will be intensely focused on rooting out foreign bribery in your industry. That will mean investigation and, if warranted, prosecution of corporations to be sure, but also investigation and prosecution of senior executives. Effective deterrence requires no less."[124]

120. U.S. Sec. & Exch. Comm'n, AGCO Corporation Agrees to Pay $18.3 Million to Settle SEC Charges of FCPA Violations (Sept. 30, 2009), *available at* http://www.sec.gov/news/press/2009/2009-212.htm.

121. *Id.*

122. *Id.*

123. *Id.*

124. Breuer Pharmaceutical Speech, *supra* note 58, at 2.

Mr. Breuer's remarks carry all the more potency in light of recent FCPA indictments against law enforcement and military equipment manufacturers at the Las Vegas 2010 Shot-Show.[125] The complex undercover investigations in those cases may have been a trial run for investigating other industries, such as pharmaceutical companies, that deal extensively with foreign governments.[126] Whether a company is the subject of a DoJ investigation, is involved in an industry that is under DoJ scrutiny, or is concerned about potential FCPA risks, understanding what the general outcome has been for other companies is important. The data evaluated here are valuable for companies considering voluntary disclosure because they help to refine business decisions and give support to the notion that there is no benefit to voluntary disclosure in the published cases.[127]

Concerns about the potential penalties associated with a voluntary FCPA disclosure may be causing some companies to balk at the option.[128] Part of the problem here may stem from the apparent disproportion in voluntary disclosure enforcements.[129] Given perceived inconsistencies in the amount of penalties voluntarily disclosing companies currently face, companies may naturally wonder how much larger these other potential costs and problems will be if they voluntarily disclose. These concerns naturally lead some to seriously question whether disclosure is the best action to take.[130]

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125. Dan Margolies & Jeremy Pelofsky, *U.S. Charges 22 with Bribery Involving Arms Sales*, Reuters (Jan. 19, 2010, 5:03 PM), http://www.reuters.com/article/idUSN1920007620100119?type=marketsNews. The public arrests of twenty-one of twenty-two suspects at the convention was probably intended to serve as a warning to other companies but possibly also marks a shift in FCPA enforcement towards complex, international undercover investigations. *See* McGuire Woods LLP, Legal Updates: CATCH-22: Lessons from DOJ's Massive Undercover FCPA Sting (Jan. 22, 2010), *available at* http://www.mcguirewoods.com/news-resources/item.asp?item=4481.

126. Dale Van Demark & Joel Rush, Epstein Becker Green P.C., Increased FCPA Enforcement Highlights Need for Compliance by Healthcare Companies (Jan. 22, 2010), *available at* http://www.ebglaw.com/showclientalert.aspx?Show=12365.

127. Mike Koehler is another author to argue that there are some benefits to voluntary disclosure. He points out that these benefits need to be considered when a company encounters an FCPA violation and is deciding how best to handle it. *See* Mike Koehler, *Voluntary Disclosures and the Role of FCPA Counsel*, FCPA Professor (Dec. 1, 2009, 2:45 PM), http://fcpaprofessor.blogspot.com/2009/12/voluntary-disclosures-and-role-of-fcpa.html.

128. *See* Lucinda A. Low, *The New Dynamics of FCPA Internal Investigations: Often Not a Private Affair*, 1 Foreign Corrupt Practices Act Rep. § 12:22 (Oct. 2010) (noting that when "faced with the lack of a clear benefit and this expanding list of risks, companies historically have tended to be reluctant to make voluntary disclosure").

129. *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833, 836 (1994) (arguing that high corporate compliance costs and increased corporate liability do "not necessarily reduce corporate crime and, indeed, may result in increased crime").

130. *See* Christopher M. Matthews, *Terwilliger to Propose New Rules for FCPA Disclosures*, Main Justice (June 22, 2010, 2:44 PM), http://www.mainjustice.com/justanticorruption/2010/06/22/terwilliger-to-propose-amnesty-for-fcpa-disclosures/ (citing prepared remarks by Former Deputy Attorney General George Terwilliger noting that "the benefits of disclosure are uncertain, and the companies that have disclosed wrongdoing have received disparate treatment—factors which discourage disclosure").

III. REFINING THE FCPA AND ITS EFFECTIVENESS THROUGH THE INCORPORATION OF PROPORTIONATE SANCTIONS REQUIREMENTS OF THE OECD ANTI-BRIBERY CONVENTION

There is no question that in recent years FCPA enforcement has dramatically increased.[131] Recent statements by DoJ officials reveal that these current trends will likely continue.[132] In addition to an increase in the number of enforcement actions, the scale of settlements also has been impressive and probably will increase in scope.[133] There is little doubt that recent FCPA enforcement has had a significant impact on how businesses conduct themselves.[134] Corporate compliance is now a pressing concern and has even created a growing demand for compliance assistance services.[135] However, there is much debate about whether the FCPA is effective as an antibribery measure.[136] While most consider the statute effective at curbing some bribery, disagreements arise as to whether or not it is fair, whether it stifles growth, or whether it is the most effective means of combating corruption.[137] Despite dif-

131. Dechert LLP, *U.S. Government Officials Pledge to Continue Robust FCPA Enforcement*, Dec. 2007, at 1–2, *available at* http://www.dechert.com/library/White_Collar_12-07_U.S._Government_Officials.pdf.

132. Bridget M. Rohde, Mintz Levin PC, *DOJ Criminal Chief's Recent Speech Foreshadows Increased FCPA Prosecutions and Reminds Companies to Implement and Follow Best Practices*, Jan. 7, 2010, http://www.mintz.com/publications/2050/DOJ_Criminal_Chiefs_Recent_Speech_Foreshadows_Increased_FCPA_Prosecutions_and_Reminds_Companies_to_Implement_and_Follow_Best_Practices.

133. Christopher Matthews, *A Dramatic Decade for FCPA Enforcement*, Main Justice (Jan. 3, 2010, 3:17 PM), http://www.mainjustice.com/justanticorruption/2010/01/03/a-dramatic-decade-for-fcpa-enforcement/.

134. Lee C. Buchheit & Ralph Reisner, *Why Has the FCPA Prospered?*, 18 Nw. J. Int'l L. & Bus. 263, 266 (1998) (calling the FCPA "remarkably effective" at shifting corporate behavior towards self-regulation); *see also* Shearman FCPA Trends 2008, *supra* note 19, at 8 (identifying the recent dramatic shift towards voluntary disclosure due to concerns about prosecution).

135. *See generally* Priya Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1453–57 (2008) (discussing thorough training and monitoring approaches to prevent FCPA violations in light of recent enforcement actions).

136. *See* Steven Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 Wash. & Lee L. Rev. 229, 238 (1997) (identifying two possible reasons why the FCPA has allegedly been unable to reduce corruption). In fact, one author even argues that the FCPA has made it easy for companies to commit bribery abroad. *See* Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 Fla. J. Int'l L. 169, 186 (2006).

137. Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, but for How Long?*, 2 Tul. J. Int'l & Comp. L. 289, 303–06 (1994) (discussing concerns that the FCPA disadvantages nonbribing businesses); *see also* Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?*, Wall St. J. L. Blog (Mar. 16, 2010, 4:10 PM), http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery (discussing various authors' opinions regarding the stifling effects of the FCPA on impoverished Haiti); Andy Spalding, *Letter from Central Asia* (Apr. 29, 2010, 7:28 AM), http://www.fcpablog.com/blog/2010/4/29/letter-from-central-asia.html (questioning the practical effects of the FCPA enforcement in Kazakhstan resulting in U.S. businesses being reluctant to operate there; Chinese firms, with disregard to antibribery conventions, are filling their place); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 Fla. L. Rev. 351, 403 (2010) (calling for change in disproportionate FCPA sanctions and noting their impact on emerging markets).

ferences in opinions, the question remains of how the FCPA can be improved to remove the apparent disproportion and inconsistent fines discussed above.

The OECD Anti-Bribery Convention ("OECD Convention") establishes minimum standards that countries must meet before they can be members.[138] In order to join the OECD Convention a country agrees to implement laws designed to reduce public corruption.[139] Broadly, the convention requires each member to pass laws that seek to reduce corruption by appropriately punishing bribery.[140] For example, the OECD Convention requires parties to implement "such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."[141]

OECD guidance on corruption continues through the OECD Working Group on bribery. In a recent report, the group urged members to establish laws "imposing effective, proportionate and dissuasive sanctions (including confiscation of bribes and any proceeds) upon foreign bribery convictions."[142] By encouraging members to continue to refine their laws to be proportionate and dissuasive, the report manifests the OECD's flexibility and innovation when it comes to deterring corruption.

Enforcement of the FCPA could benefit from focusing on imposing more effective, proportionate, and dissuasive sanctions, rather than fines and disgorgement penalties, which appear to be more punitive in nature. One of the problems with current voluntary disclosure enforcements is that the fine-to-bribe ratio in those cases appears to be one and a half times larger compared to nonvoluntary disclosure cases.[143] In addition, there is a great deal of variation in the amount of penalties that companies face when they voluntarily disclose FCPA violations.[144]

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138. Org. for Econ. Cooperation & Dev., Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 17, 1997 [hereinafter OECD Convention], *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

139. *Id*. at 6; *see also* Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 Law & Pol'y Int'l Bus. 53, 66–76 (1999) (discussing the history of the OECD Anti-Bribery Convention and its requirements).

140. Org. for Econ. Cooperation & Dev., *United States: Phase 2 Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions* 12 (June 1, 2005), *available at* http://www.oecd.org/dataoecd/7/35/35109576.pdf; *see also* Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 Am. Bus. L.J. 485, 501–06 (discussing in detail the OECD's requirements for criminal penalties for the bribery of foreign officials).

141. OECD Convention, *supra* note 138, at 6.

142. Working Group on Bribery, Org. for Econ. Cooperation & Dev., *Annual Report 2008*, at 9 (2008), *available at* http://www.oecd.org/dataoecd/21/24/44033641.pdf.

143. *See* tables *infra* Appendix.

144. *See infra* Appendix (Table 1, Voluntary Disclosures) (listing cases with fine-to-bribe penalty ratios ranging from 0 to 10.73); David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 Mich. J. Int'l L. 471, 474 (2009) (noting that in the case of disgorgements, "there are clearly extreme complexities and uncertainties in calculating" the penalties, especially given the fact that specific factors are not published); s*ee also* Low et al., *supra*

The discrepancies between penalties and bribes among the voluntarily disclosing cases appear to have little relation to the parties' post-FCPA violation behavior.[145] Companies that voluntarily disclose FCPA violations usually engage in the same types of behavior. For example, these companies will usually notify DoJ and the SEC of FCPA violations, purge the problematic employees, cooperate fully in the federal investigation, and then implement stringent compliance policies and internal monitors.[146] Despite these relatively uniform actions, the ratio between the amount of fines and forfeitures that a violating company may face and the bribes it committed ranges anywhere from 0 to 10.73. The glaring problem with these statistics is that a voluntarily disclosing company is left to guess whether it will face a penalty that is on par with its bribe or significantly higher.

The current means of FCPA enforcement is ineffective in at least two fundamental ways. First, random penalties for responsible actors may remove the incentives for voluntary disclosure.[147] Second, a system that penalizes similar bad actors with mismatched severity is fundamentally unfair.[148]

By encouraging proportionate punishment of antibribery provisions, the OECD offers a balanced approach to improving the FCPA. If the FCPA were to incorporate the OECD's efforts to be more effective through proportionate penalties, it would dissuade bribery in a fairer manner. While the OECD's commitment to proportionate penalties can be criticized as a merely nebulous statement without concrete standards, the fact remains that achieving proportionate and fair penalties is one of the goals of the U.S. justice system and should be sought after.

FCPA enforcement could potentially become more fair and proportionate to those who voluntarily disclose by simply limiting the range of penalty to a more consistent number. Such an effort would prevent enforcement agencies from repeating the apparent, disproportionately heavy penalty in the Schnitzer Steel case.[149] In that case, despite voluntary disclosure, the Government levied a $15 million fine for less than $1.8 million in reported bribes.[150] The company faced an 8.46 penalty-to-bribe ratio, which is apparently much higher than the average ratio for companies that did not voluntarily disclose FCPA violations in the recent years.[151] This type of apparent inconsistency is ripe

note 28, at 19–20 (contending that because disclosure usually triggers extensive cooperation, it is difficult to estimate how much credit is based on these actions).

145. *See* discussion regarding ITT and Baker Hughes, *supra* Parts II.C.6.iii, II.C.7.iii.

146. *See*, *e.g.*, Micrus Settlement, *supra* note 50.

147. Freedman, *supra* note 32.

148. Consider, for example, the recent overturn of disproportionate penalties for possession of different forms of cocaine. Kimbrough v. United States, 552 U.S. 85, 110–11 (2007) (upholding a lower court's decision to treat possession of different forms of the same illicit drug similarly, despite a 100-to-1 ratio in the Sentencing Guidelines).

149. Schnitzer Steel SEC Settlement, *supra* note 29; s*ee also* Schnitzer Steel Executive Pleading, *supra* note 30. The DoJ would likely counter that Schnitzer received unusually high penalties because of the high-ranking corporate offenders.

150. *See* Schnitzer Steel SEC Settlement, *supra* note 29, at 8.

151. *See* Voluntary and Nonvoluntary Disclosure tables, *infra* Appendix.

for reform. Thus, by keeping penalties for voluntarily disclosing companies within a more constant and predictable range and well below what nondisclosing companies face, DoJ could send a clear message that voluntary disclosure is not only a good ethical decision, but a sound business decision as well. This also would help resolve some critics' concerns that there is no benefit to voluntary disclosure of FCPA violations.[152]

IV. IMPROVING FCPA ENFORCEMENT IN VOLUNTARY DISCLOSURE SCENARIOS

The Organizational Sentencing Guidelines ("OSG") recognize that for a law to be effective it must encourage ethical behavior in addition to punishing criminal actions.[153] Specifically, the OSG addresses promoting ethics through "appropriate incentives."[154] Given the OSG's goals, there should be no reason why calculating the benefits to voluntary disclosure should be "difficult to quantify."[155] However, current seemingly disproportionate and inconsistent penalties levied in some of the cases surveyed in this Article reveal that the Government has fallen short in this mandate. Further, enforcement agencies may actually be failing to encourage ethical behavior by maintaining disproportionate fine-to-bribe ratios between voluntary and nonvoluntary disclosures.[156]

Unfortunately, the current FCPA enforcement regime also may incentivize companies to ignore FCPA problems. Because of the apparent backwards fine-to-bribe ratios between voluntary and nonvoluntary disclosures surveyed in this Article, a refinement of the law is necessary.[157] Some have even gone further and suggested that a focus on punishing companies rather than the individuals that commit bribery reflects a general lack of proportionality in

152. One critic referred to the benefits of voluntary disclosure as simply "a deviation from the worst-case scenario." Vernazza & Mueller, *supra* note 28, at 2.

153. Sentencing Guidelines, *supra* note 23, § 8B2.1(b)(6).

154. *Id*.

155. Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and Effects of International Standards*, *in* The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks 711, 779 attachment 3 (2008).

156. *See* Sue Reisinger, *On Bended Knee: Companies Are Disclosing Overseas Bribes in Record Numbers: Is That Always Necessary?*, Corp. Couns., July 2007, at 72, 73, 75–76 (discussing other options to disclosure when a violation is not large in the context of recent large settlements). Further, penalties that are disproportionate or too high tend to deter corporations from and may cause them to actually avoid self-policing. *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1774 (2005) ("If by self-monitoring and self-policing a firm increases the probability of its own conviction under the vicarious liability standard, then firms subject to that standard will have a disincentive to undertake such measures, or at least to undertake them in good faith past a certain point."). There is also concern that disproportionate fines will disadvantage American companies in the global marketplace. *See The Global Crackdown on Corporate Bribery: Ungreasing the Wheels*, Economist, Nov. 21, 2009, at 68, 69.

157. If FCPA enforcement agencies are intent on encouraging voluntary disclosure, they should adjust the punishment system to encourage this behavior. *Cf*. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182, 218 (2009) (noting that a "punishment system that cannot customize its deterrent effect at a more individualized level is an awfully blunt instrument").

punishment.[158] Because deterrence can be problematic in the corporate realm, extra care needs to be given to ensure that punishments are precise and proportionate.[159] The foremost problem with the current enforcement regime is that it appears to disproportionately penalize companies that voluntarily disclose.[160]

Possible solutions are considered below to some of these most pressing areas of concern regarding the FCPA and how it is enforced in the case of voluntary disclosures.

A. *Creating a Cost Distinction for Good Corporate Actors Through Credit*

The need for proportionate penalties in the voluntary disclosure arena has long been recognized.[161] The key problem with recent enforcement trends is that the benefits for voluntary disclosure appear to have been inconsistent and disproportionate.[162] Specifically, the problem with disproportionate fines lies in the similarities between the amounts of fines that voluntarily and involuntarily disclosing companies have faced.[163] The time has come for the Government to encourage and appropriately reward voluntary disclosure by granting substantially more credit towards punishment to companies that vol-

158. *See* Kent J. Schmidt & Bryan McGarry, *Is BAE Systems Too Big to Fail?*, Law360, Dec. 16, 2009, *available at* http://www.dorsey.com/files/upload/mcgarry_antifraud_law360_dec09.pdf. However, this trend may be abating. *See* Miller Chevalier, FCPA Winter Review 2010 (2010), *available at* http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=23807 (noting that seventeen of the thirty-five resolved enforcement actions were related to individuals during 2009).

159. *See* John C. Coffee Jr., *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Criminal Sanction*, 1 N. Ill. U. L. Rev. 3, 9–10 (1980) (noting that sanctions against a corporation are often complicated by the fact that corporate officers' motivations can be disconnected from that of the shareholder).

160. *See* tables *infra* Appendix.

161. *See* President's Blue Ribbon Comm'n on Def. Mgmt., A Quest for Excellence: Final Report to the President 110 (1986), *available at* http://www.ndu.edu/library/pbrc/36ex2.pdf (stating that a voluntary disclosure program can be effective only if there are "inducements that assure skeptical contractors they will not suffer greater sanctions by coming forward").

162. *Cf.* Voluntary and Nonvoluntary Disclosure tables, *infra* Appendix. The current enforcement inconsistencies have led to some strong criticism. One author urges that "[c]onsistency and predictability are not matters of grace granted to corporate citizens at the government's pleasure; the government *owes* consistency and predictability to public corporations that are attempting to accomplish complex tasks in difficult foreign venues, and to management and directors who want to . . . [comply] in these circumstances." James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 Bus. Law. 1233, 1239 (2007) (emphasis in original). The apparent disproportion between voluntary and nonvoluntary disclosures seen here is not the norm, nor the ideal, in self-policing scenarios. *See* Robert Innes, *Self-Reporting in Optimal Law Enforcement When Violators Have Heterogeneous Probabilities of Apprehension*, 29 J. Legal Stud. 287, 299 (2000) (stating that "the optimal fine to nonreporters will typically be higher in a self-reporting regime, permitting the achievement of requisite deterrence with less government enforcement effort").

163. *See* Roger Bowles et al., *Forfeiture of Illegal Gain: An Economic Perspective*, 25 Oxford J. Legal Stud. 275, 277 (2005) (opining that potential disgorgement penalties alone are not sufficient to deter violators). The next logical step then is to question why disgorgement penalties are imposed in voluntary disclosure scenarios if they fail to deter the underlying conduct in nondisclosure scenarios.

untarily disclose FCPA violations.[164] By granting credit, the Government will not necessarily waive violations for corporations that do not have robust antibribery programs in place.[165] Granting substantial credit to companies that self-disclose could be modeled on amnesty or leniency programs in the tax and antitrust arenas. Essentially, amnesty programs are a means of bringing actors into compliance with the law in exchange for a promise not to prosecute.[166] In the tax arena, amnesty programs have been hailed as effective not only at spurring compliance but also at collecting otherwise unpaid taxes.[167] In the antitrust arena, amnesty programs also have been an effective means of avoiding over-deterrence from disproportionately high penalties.[168]

Just as in the tax arena, a simple program could be established regarding FCPA enforcement that offers a promise not to prosecute and that grants substantial credit to companies that voluntarily disclose and take remedial actions. Specifically, such a program could have a fixed fine-to-bribe ratio of 1:1 for self-disclosing companies, a fine along the lines of what Latin Node faced. While some antitrust amnesty programs only reward the first to cooperate, an FCPA credit program should be offered to all voluntarily disclosing companies that meet the remedial requirements. Establishing a fixed-credit program that grants criminal amnesty with a proportionate fine also would help to avoid

164. *See* Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 Va. L. Rev. 1295, 1353 (2008) (arguing that an actor will only self-disclose when "the expected penalty of continued lying (probability P of detection multiplied by the sanction, S) exceeds the costs of amnesty").

165. Consider a recent Ernst & Young survey that indicates there will likely be no shortage of companies willing to ignore clear guidelines. Ernst & Young, European Fraud Survey 2009: Is Integrity a Casualty of the Downturn? 2 (2009), *available at* http://www2.eycom.ch/publications/items/fraud_eu_2009/200904_EY_European_Fraud_Survey.pdf (discussing survey results that showed that management in European businesses were more likely than employees to condone bribery in these difficult economic times); *see also* Deloitte LLP, *Deloitte Online Poll: Most Respondents Expect FCPA Violations to Increase in Coming Years* (Sept. 14, 2009), http://www.deloitte.com/view/en_US/us/Services/Financial-Advisory-Services/Foreign-Corrupt-Practices-Act-Financial-Advisory/2ac94a5e7c8a3210VgnVCM200000bb42f00aRCRD.htm (survey results noting nearly thirty-five percent of participants "still have no comprehensive FCPA compliance program in place").

166. Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 Geo. Mason L. Rev. 667, 693–95 (2007) (discussing the use of amnesty programs in various scenarios).

167. *Id*. at 696 (highlighting successful international tax amnesty programs). However, some have questioned the effectiveness of amnesty programs as deterrence. For example, one author points out that compliance with an amnesty program may mean more government scrutiny in the future and thereby cause companies to be reluctant to volunteer. *See* Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 Va. Tax Rev. 535, 574 (1991). While a legitimate concern, this would probably not have a dramatic impact on an FCPA credit program because companies that choose to voluntarily disclose under such a program would likely be required to take remedial action and impose compliance programs that tend to negate concerns about future investigations.

168. *See* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 Geo. Wash. L. Rev. 715, 744 (2001) (highlighting the concern "that higher-than-optimal penalties will induce corporations to incur excessive costs in an attempt to avoid these high fines").

over-deterrence and other self-monitoring costs.[169] Such a program would amount to more than a slap on the wrist and would also be a fair and consistent means of penalizing past misconduct while encouraging compliance.

B. *Providing Additional Guidance on FCPA Compliance Programs*

In the four decades since the FCPA was enacted, the DoJ has not issued any regulations defining key terms and has refused to do so.[170] For example, the FCPA does not specify the procedures companies should use in maintaining their books and records.[171] Likewise, no specific or detailed standards exist for what constitutes adequate internal controls.[172] To date the only official general resource available regarding the FCPA is the *Lay-Person's Guide to the FCPA*.[173] While internal guidelines are sometimes provided, they are infrequent and often vague.[174]

The DoJ also utilizes an opinion request procedure whereby companies can submit specific questions for review.[175] In recent years the DoJ has issued a number of opinions on various subjects; however, the opinions issued are not binding and only create a "rebuttable presumption" that such conduct is legal under the FCPA.[176] Another problem with these opinions is that they are

169. *See* Robert Innes, *Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement*, 17 J.L. Econ. & Org. 239, 241 (2001) (contending that "[b]y setting a self-reporting sanction exactly equal to the average penalty that a violator otherwise faces, including the violator's cost of optimal avoidance, the government can induce self-reporting without reducing deterrence—that is, without reducing the incentives that individuals have to refrain from criminal conduct. The added bonus is that self-reporting violators have no incentive to engage in any avoidance activity; avoidance costs are thereby saved."). By making fines more proportionate, enforcement agencies also may increase the likelihood that companies that are not required to report violations will choose to self-disclose. *See* Weismann, *supra* note 9, at 627 (contending that current self-governance alone is insufficient to spur change in nonissuing companies).

170. *See* Lucinda A. Low, *Ethics, Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws*, 51 Rocky Mtn. Min. L. Inst. 3 (2005); John A. Howell et al., *Increased Enforcement of the Foreign Corrupt Practices Act: Understanding the FCPA and Assisting Clients with Compliance Measures*, Aspatore Special Rep., Dec. 2009, at 6. At least one author believes that the FCPA is intentionally left vague. *See* Doty, *supra* note 162, at 1238.

171. R. Christopher Cook, Jones Day LLP, The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations (2006), http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S3210.

172. *Id.*

173. Lay-Person's Guide, *supra* note 3.

174. For example, the OECD recently published a twelve-point guide to help companies in their compliance efforts. Org. for Econ. Cooperation & Dev., *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (Feb. 18, 2010), *available at* http://www.oecd.org/dataoecd/5/51/44884389.pdf. In response to these specific recommendations, a DoJ authority announced at a public conference that he approved of them in principle, but the DoJ has not made any public endorsement since that time. *See* Melissa Klein Aguilar, *OECD Anti-Bribery Guide as Path to FCPA Compliance*, Compliance Wk. (Mar. 30, 2010), http://www.complianceweek.com/article/5866/oecd-anti-bribery-guide-as-path-to-fcpa-compliance. Complaints about vague interpretations of anticorruption laws are not unique to the FCPA. Interpretations of the newly enacted British Bribery Act by government officials in the UK also have been criticized as uncertain and inconsistent. *See* Alexandra A. Wrage, *TRACE UK Anti-Bribery Symposium*, Wrageblog.org (May 28, 2010, 6:35 PM), http://wrageblog.org/2010/05/28/trace-uk-anti-bribery-symposium/.

175. 15 U.S.C § 78dd-1(e)(1) (2006).

176. *Id.*

often extremely fact-specific.[177] If the DoJ determines that the information submitted is not sufficient, they can "request" additional information from a company.[178] Given these shortcomings in the opinion request process, there is little mystery why it is not very popular.[179]

The ambiguities in the standards may result in the unintended consequence of contributing to ambiguity in results.[180] For example, some criticize current FCPA enforcement trends as inept at actually curbing corruption but potent at discouraging foreign investment.[181] Because the OSG fails to clarify, companies were forced to return to a reliance on seemingly patchwork statements from sources within the DoJ.[182] Unfortunately, these statements also offered little additional concrete guidance.[183]

By being specific with standards, companies will likely be incentivized to take those additional steps toward eliminating corruption.[184] Interestingly, during the late 1980s, the DoJ believed that uniform guidelines would only "unduly restrict businesses."[185] Today, however, the DoJ would likely contend

177. *See* U.S. Dep't of Justice, Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 10-01 (Apr. 19, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1001.pdf (including eight points of detailed facts before discussing the DoJ's opinion).

178. 28 C.F.R. § 80.7 (2010).

179. *See* Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 Bus. Law. 691, 702–03 (2009); *see also* Mark Miller, *FCPA Opinion Procedure: DOJ's Speed Improves*, The Nat'l L.J., Aug. 4, 2008, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423431500&slreturn=1&hbxlogin=1 (stating that, without sufficient staff, the opinion procedure "will never become more than marginal").

180. *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 La. L. Rev. 861, 879 (2001) (asserting that the creation of a uniform standard would increase international corporate efficiency and decrease anxiety); *see also* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 Colum. Bus. L. Rev. 71, 85–88 (2002) (reasoning that employees are currently incentivized to ignore ethical violations that appear ambiguous).

181. *See generally* Christopher J. Skousen & Charlotte J. Wright, *How Successful Is the FCPA at Combating Fraud: The Case of U.S. and Non-U.S. Oil and Gas Companies*, Petroleum Accounting & Fin. Mgmt. J., Spring 2009 (opining that in the oil and gas arena, the FCPA has not been effective in reducing corruption despite massive compliance expenditures by corporations); *see also* Scott Johnson, *Cracking Down in Africa*, Newsweek, Oct. 19, 2009, at 11 (contending that "rather than end corruption, greater U.S. enforcement—however noble its intentions—may just ensure that Africa takes its business elsewhere").

182. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 965–66 (2009) (alleging that Organizational Sentencing Guidelines reforms fell short and were "overshadowed by DOJ's internal charging guidelines").

183. *See* U.S. Attorney's Manual § 9-28.1200 (2008); *see also* Mike Koehler, *The Holder Memo and FCPA Enforcement*, FCPA Professor (June 2, 2010, 7:01 AM), http://fcpaprofessor.blogspot.com/2010/06/holder-memo-and-fcpa-enforcement.html (noting drastic inconsistencies between guidance from Attorney General Eric Holder and recent DOJ FCPA enforcements).

184. *See* Ronald E. Berenbeim & Jeffrey M. Kaplan, *Ethics and Compliance Enforcement Decisions—the Information Gap*, Wallstreetlawyer.com, Oct. 2009 (discussing a corporate survey where an overwhelming majority of respondents desired more information about ethics program credit in order to improve their own compliance).

185. *See* Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 Vand. J. Transnat'l L. 431, 493 (1987).

that if it were to identify all of the compliance mechanisms necessary to keep a company safe from prosecutions, companies might enact only those minimum requirements and do nothing more.[186] While concern about companies doing as little as possible to comply may be reasonable in other situations, that concern is unfounded with regards to improving FCPA enforcement of voluntary disclosures.[187] Most companies are genuinely interested in improving their compliance programs.[188] In fact, a company that is willing to voluntarily disclose an FCPA violation likely is adhering already to the minimum requirements found in the OSG, prosecutor statements, and other international resources.[189]

More comprehensive guidelines also could have the additional consequence of making settlements all the more likely given the fact that more transparency would create a large behavioral divide between companies that comply with said guidance and those that do not.[190] Thus, the U.S. Sentencing Commission has the ability to reshape dramatically the antibribery landscape simply by being more forthright in its expectations and specific in its stated standards. Another benefit to giving companies thorough guidance is that the

186. Research on the subject seems to suggest the opposite. *See* Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J.L. Econ. & Org. 45, 62 (2008) (concluding that companies "are more likely to self-report violations when they are subject to frequent inspections and targeted by focused compliance initiatives").

187. A company that has a compliance program only on paper or does not even meet other minimum compliance standards currently advocated by the DoJ is unlikely to open itself up to an investigation only to reveal its lapses.

188. *See*, *e.g.*, Ernst & Young, 11th Global Fraud Survey: Driving Ethical Growth—New Markets, New Challenges (2010) [hereinafter 11th Fraud Survey], *available at* http://www.ey.com/Publication/vwLUAssets/EY_11th_GLOBAL_FRAUD_Survey/$FILE/EY_11th_GLOBAL_FRAUD_Survey.pdf (concluding from survey results that only twenty-eight percent of in-house legal counsel "feel that their organization is very well-prepared to undertake a major fraud or bribery investigation"); Alexandra A. Wrage, *An FCPA Pūpū Platter*, Wrageblog (Dec. 17, 2009, 5:37 PM), http://wrageblog.org/2009/12/17/an-fcpa-pupu-platter/ (identifying upcoming FCPA trials as good news for "companies and individuals craving more guidance and clarification in the interpretation of the FCPA"); *see also* David Benyon, *UK Bribery Act Broader Than FCPA, but More Guidelines Needed*, Risk.net, May 24, 2010, http://www.risk.net/operational-risk-and-regulation/news/1650016/uk-bribery-act-broader-fcpa-guidelines (citing "strong industry desire for more guidelines" regarding British anticorruption measures).

189. Consider, for example, the case of DynCorp International Inc., a company that was quick to voluntarily disclose payments it alleges were only to expedite the receipt of visas for employees, actions that may not even have amounted to an FCPA violation. *See* August Cole, *DynCorp Says It May Have Broken U.S. Law*, Wall St. J., Nov. 19, 2009, *available at* http://online.wsj.com/article/SB10001424052748704533904574543974050882150.html; *see also* Richard L. Cassin, *Dyncorp Reports Payments, Removes Compliance Officer*, The FCPA Blog (Nov. 29, 2009, 7:08 PM), http://www.fcpablog.com/blog/2009/11/30/dyncorp-reports-payments-removes-compliance-officer.html (questioning the need for a voluntary disclosure in this scenario given the FCPA allows for expedited payments for routine government actions).

190. For example, there does not appear to be a shortage of companies that have not implemented basic DoJ compliance advice. *See* 11th Fraud Survey, *supra* note 188, at 2 (citing expansive international survey results that "[m]ore than half of all respondents outside of North America do not have a documented response plan involving parts of the business with investigative skills" to handle FCPA concerns).

enforcement focus will remain on the perpetrators of bribery more than the company.[191]

C. *Improving the Organizational Sentencing Guidelines for FCPA Violations*

The OSG has had a tremendous impact on business decisions, in part because it allows for a fine reduction where a company cooperates with investigations, utilizes a compliance program, and accepts responsibility.[192] By one estimate the difference in corporate behavior can result in "an 80:1 swing in what a company may have to pay in federal fines, depending on whether it had good ethics and compliance programs."[193] However, despite the ability to bring clarity to many of the lingering corporate concerns regarding the adequacy of compliance programs, the OSG remain vague in their suggestions.[194]

In response to these and other concerns, the U.S. Sentencing Commission appears to be making some progress towards clarifying what actions will qualify a company for penalty credit.[195] For example, the U.S. Sentencing Commission clarified what type of reporting structure is required to reduce potential penalties.[196] Another proposed change would require hiring outside compliance reviewers as part of the remedial process.[197] Nevertheless, many of the most pressing issues remain unaddressed.

Some of the most promising advances toward tangible compliance program credit are still in the comment phase. For example, the U.S. Sentencing Commission sought comment as to whether to include a reduction in penalty if a company's compliance officer was sufficiently independent to report directly to the board of directors; the compliance program was able to detect a violation before an outside source; or a violation was promptly reported to an outside source.[198] The ethics community strongly supports the U.S. Sentencing Commission's consideration of these issues.[199]

191. *See* Thomas J. Miceli & Kathleen Segerson, *Punishing the Innocent Along with the Guilty: The Economics of Individual versus Group Punishment*, 36 J. Legal Stud. 81, 81 (2007) (proposing that while group punishment may be attractive, it is less effective than individual punishment).

192. *See* Sentencing Guidelines, *supra* note 23, § 8B2.1. Alternatively, an increase in fines can result where a company actively pursued the illegal misconduct in question. *Id.* § 8C1.1.

193. Paul Fiorelli et al., *Why Comply? Organizational Guidelines Offer a Safe Harbor in the Storm*, *in* Advanced Corporate Compliance and Ethics Workshop 2009, at 111 (Practicing L. Inst. 2009).

194. *See* Sentencing Guidelines, *supra* note 23, § 8B2.1(a)(2) (corporations were charged with creating compliance programs that were "reasonably designed, implemented, and enforced so that the program [was] generally effective in preventing and detecting criminal conduct").

195. U.S. Sentencing Comm'n, Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525, 3525 (Jan 21, 2010) [hereinafter Proposed Sentencing Guidelines].

196. *See* Sentencing Guidelines, *supra* note 23, §§ 8C2.5(f)(2)–(3)(A), 8C2.5(g)(1).

197. *See* Stephen Fishbein & Danforth Newcomb, *Advisers Reduce FCPA Risk*, Corp. Counsel, May 26, 2010, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202458742540.

198. Proposed Sentencing Guidelines, *supra* note 195, at 3535.

199. *See* Letter from Jeffery M. Kaplan & Rebecca Walker to U.S. Sentencing Comm'n, at 3 (Mar. 9, 2010), *available at* http://www.ussc.gov/pubcom_201003/KaplanWalker-Chapter8.pdf (praising the U.S. Sentencing Commission's issue for comment regarding organizations receiving a "three level mitigation for an effective compliance" when high-level personnel are involved

The OSG remains a potent medium for improving the voluntary disclosure process under the FCPA.[200] The OSG could be improved in two important ways. First, the guidelines could be improved by clarifying the standards for what specific ethical conduct qualifies a company for a reduction in penalties.[201] Second, the guidelines could further incentivize good behavior by reducing the severity of penalties faced by companies with robust compliance programs that voluntarily disclose FCPA violations.[202]

In addition to publishing more specific behavioral standards, the U.S. Sentencing Commission also could achieve better clarity by refining how it promotes ethics. One suggestion is that the ethical standards include a section that links managerial compensation with how much management focuses on internal ethical standards.[203]

The guidelines themselves also could be improved by simply reducing the amount of total penalties a voluntarily disclosing actor could face by at least half.[204] This simple refinement would send an unequivocal message to the corporate community that voluntary disclosures will be more appropriately rewarded. Such a reduction would also bring the apparent 2.45 fine-to-bribe ratio for voluntary disclosure down to a level below what nondisclosing companies seem to face. This bold standard could be qualified, of course, by a requirement that a company in question meet specific compliance standards. Having such a caveat for specific ethical behavior, however, would not reduce the potency of the new incentive. On the contrary, companies would be

in the misconduct); *see also* Letter from Ethics and Compliance Officer Ass'n to U.S. Sentencing Comm'n at 2 (Mar. 22, 2010), *available at* http://www.ussc.gov/pubcom_201003/ECOA_Mazur_comments.pdf (noting results from a member survey that found "overwhelming support [for] this idea" if the U.S. Sentencing Commission would "clarify what 'direct reporting authority' means").

200. *See* Keith T. Darcy & Jeffrey M. Kaplan, *The U.S. Sentencing Guidelines' Unfinished Business*, Main Justice (May 13, 2010, 1:36 PM), http://www.mainjustice.com/2010/05/13/commentary-the-u-s-sentencing-guidelines%E2%80%99-unfinished-business/ (noting the negative effect that the "absence of public cases of ethics and compliance program credit" has had on the efforts companies put into their compliance programs).

201. One author has called for similar changes, albeit through a regulation with the Securities and Exchange Commission. *See* Doty, *supra* note 162, at 1234. Nevertheless, real change is more likely to come from the U.S. Sentencing Commission given the Commission's recent efforts to clarify compliance requirements.

202. While not as critical, another improvement the U.S. Sentencing Commission should seriously consider is using fine revenue to establish a victim's assistance fund, as has been done in the UK. *See* Press Release, U.K. Serious Fraud Office, BAE Systems plc (Feb. 5, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx (relating a British settlement order establishing a fund "for the benefit of the people of Tanzania").

203. *See* Fiorelli et al., *supra* note 193, at 133.

204. While calls to eliminate over-deterrence through a reduction in corporate fines are not new, a specific reduction, like the one proposed, would send a clear message that fines will no longer appear disproportionate to the conduct. *See, e.g.*, Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 Cardozo L. Rev. 497, 521 (2005) (mentioning a reduction in fines as one possible avenue to reforming the Organizational Sentencing Guidelines).

more forthcoming if they were assured that their program was in line with the stated specific ethical requirements for FCPA compliance.

Many companies are eager to comply with the FCPA not only to avoid potential penalties but because they see bribery as bad for business and their customers and harmful to all people.[205] Thus, additional specificity in the guidelines coupled with credit towards any penalties would rally businesses toward a unified compliance goal. After all, if the purpose of the FCPA is to curb corruption, then the Government should take appropriate steps to make compliance not only desirable but also predictable for companies that want to come clean.[206]

V. THE FUTURE OF FCPA ENFORCEMENT AND CONCLUSION

It is difficult to predict what changes will come to FCPA enforcement in the coming years. Given the enormous settlements in recent years and increased investigations, FCPA enforcement will likely continue to be refined slowly rather than with sweeping reform.[207] If recent reforms are any prediction, future reform will probably come as other countries and organizations implement more focused approaches at combating corruption and the United States follows by adopting those approaches.[208] It is also difficult to predict the

205. For example, a major accounting firm concluded a recent expansive international ethics survey by stating: "Promoting ethical behavior in your organization—making a difference—is not just about staying on the right side of the law. It's good business." *See* Ernst & Young, 10th Global Fraud Survey: Corruption or Compliance—Weighing the Costs 21 (2008), *available at* http://www.ey.com/publication/vwluassets/weighing_the_costs_of_corruption_or_compliance:_10th_global_fraud_survey/$file/ey_10th_global_fraud_survey.pdf.

206. Some have questioned whether the recent increase in FCPA enforcements is due, in part, to the Government's income potential. *See* Mike Koehler, *Is the FCPA a Government Cash Cow?*, FCPA Professor (May 21, 2010, 12:01 AM), http://fcpaprofessor.blogspot.com/2010/05/is-fcpa-government-cash-cow.html (discussing recent DOJ and SEC personnel as stating the FCPA was "lucrative" and "profitable"). Furthermore, some have questioned the motives of current FCPA enforcement in light of personal incentives for the DoJ attorneys who prosecute these cases. *See* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, Forbes, May 24, 2010, http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket_print.html (pointing out that DoJ attorneys are "creating a lucrative industry—FCPA defense work—in which they will someday be prime candidates for the cushy assignments"). *Accord*, Ashby Jones, *Is the FCPA Just a Full-Employment Act for the Private Bar?*, Wall St. J. L. Blog (May 7, 2010, 6:08 PM), http://blogs.wsj.com/law/2010/05/07/the-fcpa-little-more-than-a-full-employment-act-for-the-private-bar/.

207. However, dramatic reform may result from new legislation regarding whistleblowers. *See* Bethany L. Hengsbach, *Proposed Whistleblower Provision Could Dramatically Increase FCPA Risk*, Gov't Contracts Blog (May 19, 2010), http://www.governmentcontractslawblog.com/2010/05/articles/fcpa/proposed-whistleblower-provision-could-dramatically-increase-fcpa-risk/?utm_medium=email&utm_source=Emailmarketingsoftware&utm_content=44498351&utm_campaign=GovernmentContractsLawBlog&utm_term=ProposedWhistleblowerProvisionCouldDramaticallyIncreaseFCPARisk; *see also* Mike Koehler, *The Financial Reform Bill's Whistleblower Provisions and the FCPA*, FCPA Professor (July 20, 2010, 5:13 AM), http://fcpaprofessor.blogspot.com/search/label/Whistleblowers (discussing the scope and potential impact of new whistleblower provisions on the FCPA).

208. *See* Thomas Fox, *End of Grease Payments Coming*, Corp. Compliance Insights, May 4, 2010, http://www.corporatecomplianceinsights.com/2010/end-of-grease-payments/ (noting that change to the FCPA, in terms of grease payments, often comes on a case-by-case basis).

number of investigations in which enforcement agencies will be involved in the future. Currently, the number of cases that are under investigation at the DoJ represents a dramatic increase over previous years.[209] Nevertheless, there may not have been a corresponding increase in staff to handle those cases.[210] Thus, the volume of investigations currently underway may be more than enforcement agencies can promptly handle.

During the first half of 2010 there were very few FCPA settlements. Some speculate that this either represents a shift in enforcement policy or reveals that the DoJ has overextended itself.[211] However, during the same time period the DoJ conducted the largest FCPA sting operation to date against law enforcement and military equipment manufacturers and vendors at the Shot-Show convention.[212] The Shot-Show arrests may be a signal from the DoJ that FCPA compliance and investigations are no longer limited to large companies.[213] Whether FCPA enforcement will continue to focus on individuals in such a fashion remains to be seen.[214]

A. *Likely Future Changes to FCPA Enforcement*

While the rate of FCPA enforcement against individuals remains to be seen, other changes to the FCPA appear likely. For example, the only current exception to the FCPA is what is known as facilitation payments.[215] A facilitation payment is one where a fee is paid to expedite services that would have been completed even without the payment.[216] Because many other jurisdictions do not allow facilitation payments, many multinational corporations avoid the practice altogether so as not to create any confusion among employees regarding where such payments are acceptable.[217] The recent

209. *See*, *e.g.*, Leary et al., *supra* note 19.

210. Richard L. Cassin, *Feds Call Time Out*, The FCPA Blog (May 20, 2010, 8:08 AM), http://www.fcpablog.com/blog/2010/5/20/feds-call-time-out.html (proposing that the number of FCPA settlements may be at a lull due to the DoJ's inability to handle the influx of cases from recent years). *But see* Ed Rial, *Beyond Reproach: Why Compliance with Anti-Corruption Laws Is Increasingly Critical for Multinational Businesses*, Deloitte Rev., no. 4, 2009, at 19, 21 (contending that "U.S. authorities have significantly increased staff dedicated to FCPA enforcement").

211. *See* Cassin, *supra* note 210.

212. Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, Jan. 19, 2010, *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

213. *See* Bethany L. Hengsbach, *Emerging FCPA Enforcement Strategy*, Law360, Feb. 16, 2010, at 1.

214. *See* Shearman & Sterling LLP, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977*, at 14 (2010), *available at* http://www.shearman.com/files/upload/FCPA-Digest-Spring-2010.pdf (discussing the recent increase in actions against individuals).

215. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

216. *See* Lay-Person's Guide, *supra* note 3, at 4.

217. *See* David M. Howard & Elisa T. Wiygul, Dechert LLP, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?*, Apr. 2009, at 4, *available at* http://www.dechert.com/practiceareas/practiceareas.jsp?pg=lawyer_publications_detail&pa_id=36&id=11878 (noting the "practical difficulties of implementing policies that allow for facilitating payments but not other forms of bribery" all but make such policies nonexistent).

British antibribery act appears to have captured popular international sentiment regarding shunning facilitation payments. Companies can reasonably expect facilitation payments to be completely done away with in the future.

Given the increase in international efforts to curb corruption, there is also a strong possibility that these efforts will become more uniform. The success of the FCPA and SOX in shaping corporate behavior, for example, has led some to suggest that those standards should be implemented more broadly as uniform international standards.[218] The OECD Convention also serves as another example of the push towards anticorruption uniformity. As more countries become members, their laws also will become much more similar. One benefit to uniformity is that as more countries adopt similar robust antibribery regulations, transaction costs will be carried by more corporations and the playing field will become more level.[219]

B. *Whether FCPA Enforcement Will Decline in Light of Other Anticorruption Laws*

With the spread of anticorruption measures around the globe, it might be asked whether FCPA enforcement will decrease. The DoJ has made it clear that it perceives the FCPA and similar anticorruption endeavors as a means of leveling the playing field for American businesses overseas.[220] In addition, the DoJ sees the FCPA as a foreign policy tool. The argument is that by setting an ethical standard for businesses with American ties, the United States can preserve the "fair functioning of international markets."[221] Concerns about foreign policy and international perception do not appear unwarranted. For example, the United Kingdom's current antibribery law resulted as an "indirect consequence of the BAE case and the damage done to the UK's international reputation by the Government's handling of it."[222] With these concerns in mind, the DoJ will likely continue its increased enforcement of the FCPA.

C. *Conclusion*

Nearly thirty years ago genuine values-based concerns about how corporations conducted business led Congress to enact the FCPA.[223] Just as in

218. *See* Timothy W. Schmidt, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 Minn. L. Rev. 1120 (2009).

219. Org. for Econ. Dev. & Co-operation, *Anti-Corruption: OECD Welcomes Slovak Move to Make Firms Liable for Foreign Bribery* (June 26, 2010), http://www.oecd.org/document/33/0,3343,en_2649_34855_45521313_1_1_1_37447,00.html (citing OECD Secretary-General Angel Gurría's comments that more international anticorruption measures "create a level playing field for firms competing internationally").

220. George Anthony "Tony" Smith, Weinberg Wheeler Hudgins Gunn & Dial LLC, *The Foreign Corrupt Practices Act: Leveling the Foreign Playing Field*, July 6, 2009, *available at* http://www.wwhgd.com/assets/attachments/Foreign_Corrupt_Practices.pdf (citing DoJ efforts to level the playing field).

221. *Id*.

222. Afua Hirsch, *New Bribery Law Puts Overseas Payments Under Scrutiny*, Guardian, Apr. 11, 2010, http://www.guardian.co.uk/uk/2010/apr/11/law-bribery-bae-overseas.

223. *See*, *e.g.*, Kenneth W. Abbott, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. Legal Stud. 141, 161 (2002).

that era, the heart of the fight against public corruption today lies in concerns about equality. Despite promises that voluntary disclosure will result in "meaningful credit" and that cooperation will result in "a meaningful benefit" to companies, the published cases studied in this article tend to show that this is simply not the case.[224] Unfortunately, recent enforcement of the FCPA has often resulted in apparent unfair and inconsistent results for companies trying to come clean. In order to achieve the equal playing field that the FCPA was established to achieve, seemingly disproportionate fines and a lack of consistent and clear guidance must give way to an enforcement regime that is predictable and completely transparent in its expectations.

224. Breuer Pharmaceutical Speech, *supra* note 58, at 3.

APPENDIX
TABLES OF CASES

Table 1: Voluntary Disclosures

Corporations	Bribes Paid or to Be Paid*	Disgorgement and Interest	Total Penalty (DoJ and SEC Fines)	Fine-to-Bribe Ratio Without Disgorgement	Total Fines and Forfeitures Combined	Fine-and-Forfeitures-to-Bribe Ratio
Micrus Corp.[a]	$355,000	$0	$450,000	1.27	$450,000	1.27
Monsanto Co.[b]	$700,000	$0	$1,500,000	2.14	$1,500,000	2.14
Statoil ASA[c]	$5,200,000	$10,500,000	$10,500,000	2.02	$21,000,000	4.04
Schnitzer Steel Indus. Inc.[d]	$1,800,000	$7,725,201	$7,500,000	4.17	$15,225,201	8.46
Baker Hughes Inc.[e]	$4,100,000	$23,000,000	$21,000,000	5.12	$44,000,000	10.73
Bristow Group Inc.[f]	$423,000	$0	$0	0	$0	0
Paradigm B.V.[g]	$250,948	$0	$1,000,000	3.98	$1,000,000	3.98
York Int'l Corp.[h]	$7,500,000	$10,320,880	$12,000,000	1.60	$22,320,880	2.98
AGA Med. Corp.[i]	$480,000	$0	$2,000,000	4.17	$2,000,000	4.17
Faro Tech. Inc.[j]	$444,492	$1,850,000	$1,100,000	2.47	$2,950,000	6.64
Con-way Inc.[k]	$417,000	$0	$300,000	0.72	$300,000	0.72
Aibel Group Ltd.[l]	$2,100,000	$0	$4,200,000	2	$4,200,000	2.00
ITT Corp.[m]	$200,000	$1,428,650.11	$250,000	1.25	$1,678,650.11	8.39
Latin Node Inc.[n]	$2,250,543	$0	$2,000,000	0.89	$2,000,000	0.89
Helmerich & Payne Inc.[o]	$185,673	$375,681.22	$1,000,000	5.39	$1,375,681.22	7.41

Table 2: Voluntary Disclosure Group Totals

Total Bribes	Total Fines	Total Fines and Forfeitures	Total Fine-to-Bribe Ratio Without Disgorgement and Interest	Total Fine-and-Forfeitures-to-Bribe Ratio
$26,406,656.00	$64,800,000.00	$120,000,412.33	2.45	4.54

*As reported by DoJ or the SEC.

a. Press Release, U.S. Dep't of Justice, Micrus Corp. Enters into Agreement to Resolve Potential FCPA Liability (Mar. 2, 2005), http://www.justice.gov/opa/pr/2005/March/05_crm_090.htm; Agreement Between the U.S. Dep't of Justice and Micrus Corp. (Feb. 28, 2005), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-28-05micrus-agree.pdf.

b. Monsanto Co., Exchange Act Release No. 50,978, 84 SEC Docket 2199 (Jan. 6, 2005); SEC v. Monsanto Co., Litig. Release No. 19023, 2005 WL 477709 (Jan. 6, 2005).

c. Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company That Bribed Iranian Official (Oct. 13, 2006), *available at* http://www.justice.gov/opa/pr/2006/October/06_crm_700.html; *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006), *available at* http://www.sec.gov/news/press/2006/2006-174.htm.

d. *In re* Schnitzer Steel Indus., Inc., Exchange Act Release No. 54,606, 89 SEC Docket 302, at 2–5 (Oct. 16, 2006); SEC v. Si Chan Wooh, Litig. Release No. 20174, 2007 WL 1880064 (June 29, 2007).

e. Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html; *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-77.htm.

f. *In re* Bristow Grp. Inc., Exchange Act Release No. 56533, 91 SEC Docket 1825 (Sept. 26, 2007); *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations (Sept. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-201.htm.

g. Press Release, U.S. Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.justice.gov/opa/pr/2007/September/07_crm_751.html.

h. Press Release, U.S. Dep't of Justice, Justice Dep't Agrees to Defer Prosecution of York Int'l Corp. in Connection with Payment of Kickbacks under the U.N. Oil for Food Program (Oct. 1, 2007), http://www.justice.gov/opa/pr/2007/October/07_crm_783.html; *see also* SEC v. York Int'l Corp., Litig. Release No. 20319, 2007 WL 2827594 (Oct. 1, 2007).

i. Press Release, U.S. Dep't of Justice, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), *available at* http://www.justice.gov/opa/pr/2008/June/08-crm-491.html; *see also* Deferred Prosecution Agreement Between the U.S. Dep't of Justice & AGA Medical Corp. (June 3, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-03-08aga-agree.pdf.

j. Press Release, U.S. Dep't. of Justice, Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), *available at* http://www.justice.gov/opa/pr/2008/June/08-crm-505.html; Faro Tech. Inc., Exchange Act Release No. 2,836, 93 SEC Docket 1124 (June 5, 2008).

k. SEC v. Con-Way Inc., Litig. Release No. 20690, 2008 WL 3925208 (Aug. 27, 2008).

l. Press Release, U.S. Dep't of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/November/08-crm-1041.html.

m. SEC v. ITT Corp., Litig. Release No. 20896, 2009 WL 330269 (Feb. 11, 2009).

n. Press Release, U.S. Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://miami.fbi.gov/dojpressrel/pressrel09/mm040709.htm.

o. *In re* Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009); Press Release, Dep't of Justice, Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-741.html.

Figure 1

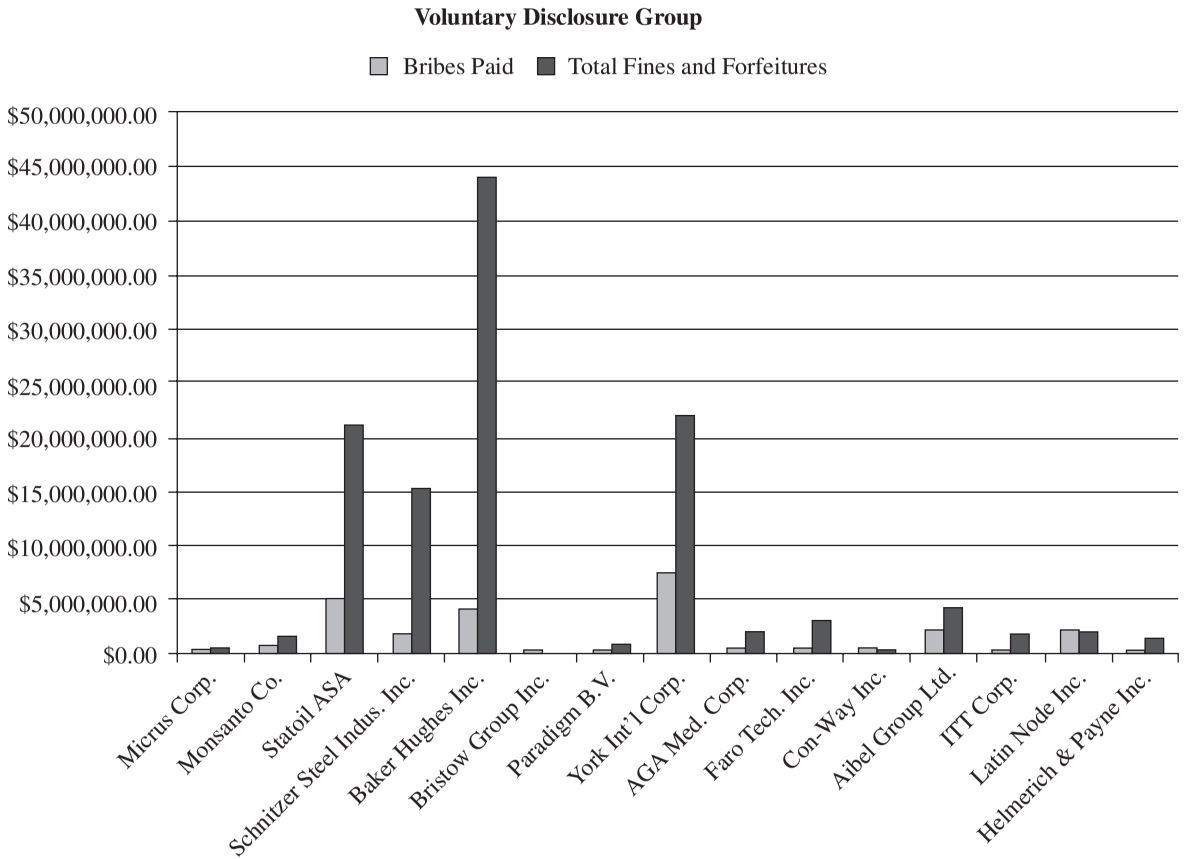
Voluntary Disclosure Group
Bribes Paid
Total Fines and Forfeitures
$50,000,000.00
$45,000,000.00
$40,000,000.00
$35,000,000.00
$30,000,000.00
$25,000,000.00
$20,000,000.00
$15,000,000.00
$10,000,000.00
$5,000,000.00
$0.00
Micrus Corp.
Monsanto Co.
Statoil ASA
Schnitzer Steel Indus. Inc.
Baker Hughes Inc.
Bristow Group Inc.
Paradigm B.V.
York Int'l Corp.
AGA Med. Corp.
Faro Tech. Inc.
Con-Way Inc.
Aibel Group Ltd.
ITT Corp.
Latin Node Inc.
Helmerich & Payne Inc.

Table 3: Self-Disclosure Resulting from a Merger and Acquisition

Corporations	Bribes Paid or to Be Paid*	Disgorgement and Interest	Total Penalty (DoJ and SEC Fines)	Fine-to-Bribe Ratio Without Disgorgement	Total Fines and Forfeitures Combined	Fine-and-Forfeitures-to-Bribe Ratio
ABB Ltd.[a]	$1,000,000	$5,915,405	$10,500,000	10.50	$16,415,405	16.42
InVision Tech.[b]	$203,000	$617,703	$1,300,000	6.40	$1,917,703	9.45
Titan Corp.[c]	$3,500,000	$15,479,000	$13,000,000	3.71	$28,479,000	8.14
Vetco Int'l Ltd.[d]	$2,100,000	$0	$26,000,000	12.38	$26,000,000	12.38

Table 4: Mergers and Acquisitions Group Totals

Total Bribes	Total Fines	Total Fines and Forfeitures	Total Fine-to-Bribe Ratio Without Disgorgement and Interest	Total Fine-and-Forfeitures-to-Bribe Ratio
$6,803,000	$50,800,000	$72,812,109	7.47	10.70

The mergers and acquisitions group is considered separately from the voluntary disclosure group in this Article. However, a table combining the two groups is included here to demonstrate how the voluntary disclosure group statistics would appear had the two groups been combined.

Voluntary Disclosure Group Combined with the Mergers and Acquisitions Group

Total Bribes	Total Fines	Total Fines and Forfeitures	Fine-to-Bribe Ratio Without Disgorgement	Fine-and-Forfeiture-to-Bribe Ratio
$33,209,656.00	$102,050,000.00	$193,812,521.54	3.07	5.84

*As reported by DoJ or the SEC.

a. SEC v. ABB Ltd., Litig. Release No. 18775, 2004 WL 1514888 (July 6, 2004); Press Release, U.S. Dep't of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004), *available at* http://www.justice.gov/opa/pr/2004/July/04_crm_465.htm.

b. Press Release, U.S. Dep't of Justice, InVision Technologies, Inc. Enters into Agreement (Dec. 6, 2004), *available at* http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm; *In re* GE InVision Inc., Exchange Act Release No. 51199, 84 SEC Docket 2986 (Feb. 14, 2005).

c. SEC v. Titan Corp., Litig. Release No. 19107, 2005 WL 474238 (Mar. 1, 2005); Plea Agreement at 25, United States v. Titan Corp., No. 05-CR-0314 BEN (S.D. Cal. Feb. 22, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/03-01-05titan-plea.pdf.

d. Press Release, U.S. Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), *available at* http://www.justice.gov/opa/pr/2007/February/07_crm_075.html.

Figure 2

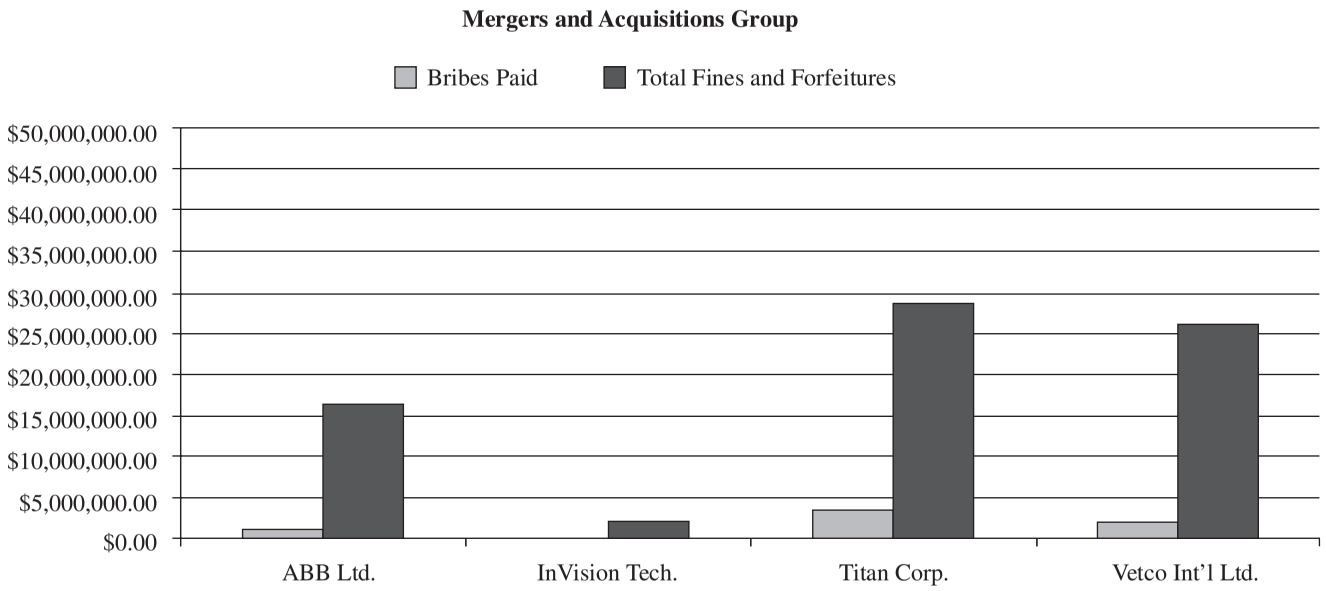
Mergers and Acquisitions Group
Bribes Paid
Total Fines and Forfeitures
$50,000,000.00
$45,000,000.00
$40,000,000.00
$35,000,000.00
$30,000,000.00
$25,000,000.00
$20,000,000.00
$15,000,000.00
$10,000,000.00
$5,000,000.00
$0.00
ABB Ltd.
InVision Tech.
Titan Corp.
Vetco Int'l Ltd.

Table 5: Nondisclosing Corporations

Corporations	Bribes Paid or to Be Paid*	Disgorgement and Interest	Total Penalty (DoJ and SEC Fines)	Fine-to-Bribe Ratio Without Disgorgement	Total Fines and Forfeitures Combined	Fine-and-Forfeitures-to-Bribe Ratio
Syncor Taiwan, Inc.[a]	$344,110	$0	$2,500,000	7.27	$2,500,000	7.27
Diagnostic Prods. Corp.[b]	$1,623,326	$2,788,622	$2,000,000	1.23	$4,788,622	2.95
Dow Chem. Co.[c]	$200,000	$0	$325,000	1.63	$325,000	1.63
El Paso Corp.[d]	$5,500,000	$5,482,363	$2,250,000	0.41	$7,732,363	1.41
Delta & Pine Land Co.[e]	$43,000	$0	$300,000	6.98	$300,000	6.98
Textron Inc.[f]	$650,539	$2,735,040.68	$1,950,000	3	$4,685,040.68	7.20
Ingersoll-Rand Ltd.[g]	$600,000	$2,270,987	$4,450,000	7.42	$6,720,987	11.20
Chevron Corp.[h]	$20,000,000	$25,000,000	$3,000,000	0.15	$28,000,000	1.40
Lucent Tech. Inc.[i]	$1,300,000	$0	$2,500,000	1.92	$2,500,000	1.92
Akzo-Nobel, NV[j]	$279,491	$2,231,513	$1,550,000	5.55	$3,781,513	13.53
Westinghouse Corp.[k]	$137,400	$288,351	$387,000	2.82	$675,351	4.92
Flowserve Corp.[l]	$604,651	$3,574,225	$7,000,000	11.58	$10,574,225	17.49
AB Volvo[m]	$6,206,331	$8,602,649	$11,000,000	1.77	$19,602,649	3.16
Novo Nordisk A/S[n]	$1,437,946	$6,005,079	$12,025,066	8.36	$18,030,145	12.54

(*Continued*)

Table 5: Nondisclosing Corporations *(Continued)*

Corporations	Bribes Paid or to Be Paid*	Disgorgement and Interest	Total Penalty (DoJ and SEC Fines)	Fine-to-Bribe Ratio Without Disgorgement	Total Fines and Forfeitures Combined	Fine-and-Forfeitures-to-Bribe Ratio
Willbros Group Inc.[o]	$6,300,000	$10,300,000	$22,000,000	3.49	$32,300,000	5.13
Fiat S.p.A.[p]	$4,300,000	$7,209,142	$10,600,000	2.47	$17,809,142	4.14
Avery Dennison Corp.[q]	$81,000	$318,470	$200,000	2.47	$518,470	6.40
Control Components Inc.[r]	$6,850,000	$0	$18,200,000	2.66	$18,200,000	2.66
AGCO Corp.[s]	$5,900,000	$15,907,393	$4,000,000	0.68	$19,907,393	3.37

Table 6: Nonvoluntary Disclosure Group Totals

Total Bribes	Total Fines	Total Fines and Forfeitures	Total Fine-to-Bribe Ratio Without Disgorgement and Interest	Total Fine-and-Forfeitures-to-Bribe Ratio
$62,357,794	$106,237,066	$198,950,900	1.70	3.19

*As reported by DoJ or the SEC.

a. Press Release, U.S. Dep't of Justice, Syncor Taiwan Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 10, 2002), *available at* http://www.justice.gov/opa/pr/2002/December/02_crm_707.htm; SEC v. Syncor Int'l Corp., Litig. Release No. 17887, 2002 WL 31757645 (Dec. 10, 2002).

b. Press Release, U.S. Dep't of Justice, DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act (May 20, 2005), *available at* http://www.justice.gov/opa/pr/2005/May/05_crm_282.htm; *In re* Diagnostic Prods. Corp., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005).

c. SEC v. Dow Chem. Co., Litig. Release No. 20000, 2007 WL 460874 (Feb. 13, 2007).

d. Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled Books and Records and Internal Controls Charges Against El Paso Corporation for Improper Payments to Iraq Under the U.N. Oil for Food Program (Feb. 7, 2007), *available at* http://www.sec.gov/news/press/2007/2007-16.htm.

e. SEC v. Delta & Pine Land Co. & Turk Deltapine, Litig. Release No. 20214, 2007 WL 2140178 (July 26, 2007).

f. Press Release, U.S. Dep't of Justice, Textron Inc. Agrees to $1.15 Million Fine in Connection with Payment of $600,000 in Kickbacks by Its French Subsidiaries Under the United Nations Oil for Food Program (Aug. 23, 2007), *available at* http://www.justice.gov/opa/pr/2007/August/07_crm_646.html; SEC v. Textron Inc., Litig. Release No. 20251, 2007 WL 2404252 (Aug. 23, 2007).

g. Press Release, U.S. Dep't of Justice, Ingersoll-Rand Agrees to Pay $2.5 Million Fine in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 31, 2007), *available at* http://www.justice.gov/opa/pr/2007/October/07_crm_872.html; SEC v. Ingersoll-Rand Co., Litig. Release No. 20353, 2007 WL 3196204 (Oct. 31, 2007).

h. Press Release, U.S. Sec. & Exch. Comm'n, Chevron to Pay $30 Million to Settle Charges for Improper Payments to Iraq Under U.N. Oil for Food Program (Nov. 14, 2007), *available at* http://www.sec.gov/news/press/2007/2007-230.htm.

i. Press Release, U.S. Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html; SEC v. Lucent Techs. Inc., Litig. Release No. 20414, 2007 WL 4481513 (Dec. 21, 2007).

j. Press Release, U.S. Dep't of Justice, Akzo Nobel Acknowledges Improper Payments Made by Its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007), *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html; SEC v. Nobel, Litig. Release No. 20410, 2007 WL 4460603 (Dec. 20, 2007).

k. Press Release, U.S. Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_116.html; SEC v. Westinghouse Air Brake Techs. Corp., Litig. Release No. 20457, 2008 WL 426087 (Feb. 14, 2008).

l. Press Release, U.S. Dep't of Justice, Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Feb. 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_132.html; SEC v. Flowserve Corp., Litig. Release No. 20461, 2008 WL 465171 (Feb. 21, 2008).

m. Press Release, U.S. Dep't of Justice, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (Mar. 20, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_crm_220.html; SEC v. AB Volvo, Litig. Release No. 20504, 2008 WL 746475 (Mar. 20, 2008).

n. Press Release, U.S. Dep't of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-for-Food Program (May 11, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-461.html; SEC v. Novo Nordisk A/S, Litig. Release No. 21033, 2009 WL 1288227 (May 11, 2009).

o. Press Release, U.S. Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay $22 Million Penalty for FCPA Violations (May 14, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08-crm-417.html; SEC v. Willbros Grp., Inc., Litig. Release No. 20571, 2008 WL 2050840 (May 14, 2008).

p. Press Release, U.S. Dep't of Justice, Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program (Dec. 22, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1140.html; SEC v. Fiat SPA & CNH Global NV, Litig. Release No. 20835, 2008 WL 5328787 (Dec. 22, 2008).

q. SEC v. Avery Dennison Corp., Litig. Release No. 21156, 2009 WL 2243830 (July 28, 2009).

r. Press Release, U.S. Dep't of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Fine (July 31, 2009), *available at* http://www.justice.gov/usao/cac/pressroom/pr2009/091.html.

s. Press Release, U.S. Dep't of Justice, AGCO Corp. to Pay $1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-for-Food Program (Sept. 30, 2009), *available at* http://www.justice.gov/opa/pr/2009/September/09-crm-1056.html; Press Release, U.S. Sec. & Exch. Comm'n, AGCO Corporation Agrees to Pay $18.3 Million to Settle SEC Charges of FCPA Violations (Sept. 30, 2009), *available at* http://www.sec.gov/news/press/2009/2009-212.htm.

Figure 3

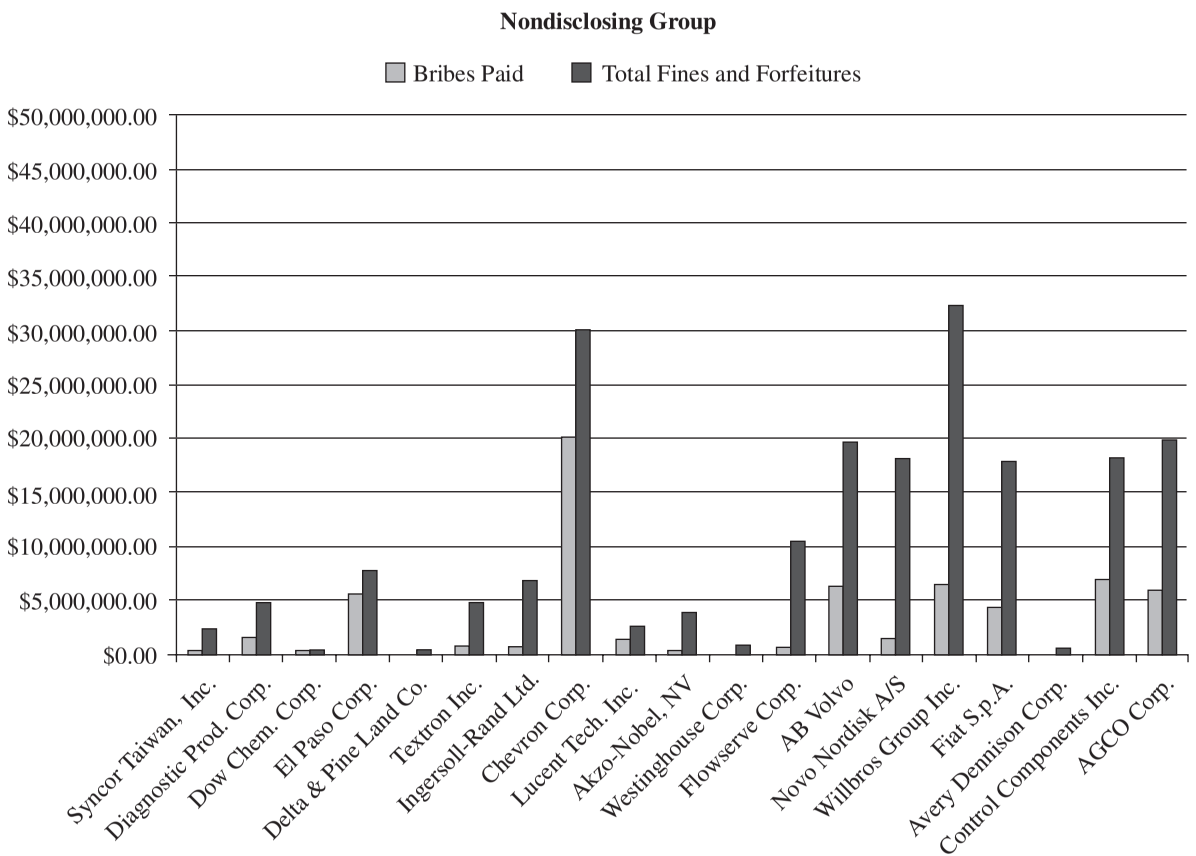
Nondisclosing Group
Bribes Paid
Total Fines and Forfeitures
$50,000,000.00
$45,000,000.00
$40,000,000.00
$35,000,000.00
$30,000,000.00
$25,000,000.00
$20,000,000.00
$15,000,000.00
$10,000,000.00
$5,000,000.00
$0.00
Syncor Taiwan, Inc.
Diagnostic Prod. Corp.
Dow Chem. Corp.
El Paso Corp.
Delta & Pine Land Co.
Textron Inc.
Ingersoll-Rand Ltd.
Chevron Corp.
Lucent Tech. Inc.
Akzo-Nobel, NV
Westinghouse Corp.
Flowserve Corp.
AB Volvo
Novo Nordisk A/S
Willbros Group Inc.
Fiat S.p.A.
Avery Dennison Corp.
Control Components Inc.
AGCO Corp.

Table 7: Companies Whose Fines Were Unprecedentedly Large Yet Did Not Correspond to the Nonvoluntary Ratios Above

Corporations	Bribes Paid or to Be Paid*	Disgorgement and Interest	Total Penalty (DoJ and SEC Fines)	Fine-to-Bribe Ratio Without Disgorgement	Total Fines and Forfeitures Combined	Fine-and-Forfeitures-to-Bribe Ratio
KBR LLC[a]	$182,000,000	$177,000,000	$402,000,000	2.21	$579,000,000	3.18
Siemens AG[b]	$1,360,000,000	$350,000,000	$450,000,000	0.33	$800,000,000	0.59

Table 8: Outlier Group Totals

Total Bribes	Total Fines	Total Fines and Forfeitures	Total Fine-to-Bribe Ratio Without Disgorgement and Interest	Total Fine-and-Forfeitures-to-Bribe Ratio
$1,542,000,000	$852,000,000	$1,379,000,000	0.55	0.89

*As reported by DoJ or the SEC.

a. Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html; SEC v. Halliburton Co. & KBR, Inc., Litig. Release No. 20897A, 2009 WL 416786 (Feb. 11, 2009).

b. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to FCPA Violations and Agree to Pay $450 in Combined Criminal Fines (Dec. 15, 2008); SEC v. Siemens Aktiengesellschaft, Litig. Release No. 20829, 2008 WL 5221040 (Dec. 15, 2008).