COLUMBIA LAW REVIEW ONLINE

VOL. 118 OCTOBER 4, 2018 PAGES 135–52

TRUMPING RECIDIVISM: ASSESSING THE FCPA CORPORATE ENFORCEMENT POLICY

*Sharon Oded**

Bribery and corruption violations are often hard to detect. For this reason, the U.S. enforcement authorities typically struggle to produce the right incentives for corporations to cooperate with public enforcement efforts in anticorruption cases. In November 2017, following the successful implementation of an eighteen-month pilot program, the Trump Administration announced its revised Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. The new policy offers significant benefits to corporations that voluntarily self-report their involvement in corruption, cooperate with the Department of Justice's investigation, and take remediation actions. However, under the FCPA Corporate Enforcement Policy, corporate recidivists—repeat violators of the FCPA—are not eligible for the policy's benefits. Although in many respects the new policy may represent an important step toward the establishment of an efficient cooperative-enforcement regime, a closer examination of the policy reveals its major shortcoming—that is, the very exclusion of recidivists. This Piece assesses the expected effect of the new policy on a corporation's motivation to cooperate with enforcement authorities. In addition, this Piece suggests that the exclusion of FCPA recidivists not only weakens the overall positive impact of the revised policy but may also render the entire policy counterproductive to its own enforcement goals. Following a law and economics approach, this contribution proposes amendments to the policy that will increase its social desirability.

INTRODUCTION

Corporate involvement in bribery and corruption is challenging for public prosecutors to detect and therefore to credibly deter.[1] Corporate

* Professor of Corporate Compliance and Enforcement, Erasmus University Rotterdam, the Netherlands; formerly, Visiting Fellow, University of California, Berkeley School of Law. Gratitude goes out to Hein Koster and Casper van der Meulen for their research assistance.

1. See OECD, the Detection of Foreign Bribery 9 (2017), http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf [https://perma.cc/A9C5-YMWC] (discussing the unique challenges involved in detecting foreign bribery because even witnesses to the foreign bribery might not understand its criminal nature or realize the importance of reporting it); see also OECD, OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials 3 (2014) [hereinafter OECD, Bribery

corrupt actions are often concealed as seemingly legitimate activities. They may involve multiple actors within and outside the organization and may be disguised through deceptive arrangements, such as sham agency or consulting agreements.[2] Consequently, U.S. authorities have constantly struggled to reinvent the U.S. Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, seeking to generate attractive incentives for corporations to cooperate with the authorities (including through voluntary self-reporting) once they learn of suspected corporate misconduct.[3]

The attempts to motivate corporations to cooperate with enforcement authorities in fighting corporate misconduct began almost three decades ago, when the U.S. Sentencing Commission promulgated the Organizational Sentencing Guidelines (OSG).[4] The OSG offered a substantial mitigation of penalties—a unique offer at the time—for voluntarily self-reporting violations upon discovery, for cooperating with the authorities' investigation, and for accepting responsibility for misconduct, among other desirable actions.[5] Other noteworthy benefits were presented in later years by a series of Department of Justice (DOJ) memoranda, commencing with the well-known 1999 Holder Memorandum,

---

Report], https://www.oecd-ilibrary.org/oecd-foreign-bribery-report_5jxswc21z50t.pdf?itemID=%2Fcontent%2Fpublication%2F9789264226616-en&mimeType=pdf [https://perma.cc/R9WG-PALA (describing the complexity of the detection of bribery, which is often disguised through a series of offshore transactions, multiple intermediaries, and complex corporate structures); Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 180–81 (1968) (describing deterrence as a function of the probability of conviction and punishment); Sharon Oded, Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption, 35 Yale L. & Pol'y Rev. 49, 68 (2016) [hereinafter Oded, Rolling the Dice?] ("[E]ven when red flags have alerted authorities, reaching full detection and evidence-based findings of an FCPA violation requires substantial resources.").

2. See OECD, Bribery Report, supra note 1, at 8 (explaining that foreign bribery offenses might involve intermediaries, such as a local subsidiary of the bribing corporation, local sales agents, consulting firms, or other entities within or without the control of the bribing corporation).

3. See, e.g., id. at 19.

4. The U.S. Sentencing Commission initially issued the OSG in 1991 and has updated them several times since then. For the latest version, see U.S. Sentencing Guidelines Manual § 3E1.1 (U.S. Sentencing Comm'n 2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf [https://perma.cc/VW8B-5J5Q].

5. For further background information on the OSG, see Sharon Oded, Corporate Compliance: New Approaches to Regulatory Enforcement 144–51 (2013) [hereinafter Oded, Corporate Compliance]; Pamela H. Bucy, Organizational Sentencing Guidelines: The Cart Before the Horse, 71 Wash. U. L.Q. 329, 329–55 (1993); O.C. Ferrell, Debbie Thorne LeClair & Linda Ferrell, The Federal Sentencing Guidelines for Organizations: A Framework for Ethical Compliance, 17 J. Bus. Ethics 353, 353–63 (1998); Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 Iowa L. Rev. 697, 697–719 (2002); Ilene H. Nagel & Winthrop M. Swenson, The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future, 71 Wash. U. L.Q. 205, 205–59 (1993).

which instructed public prosecutors to consider corporate cooperative behavior—including voluntary self-reporting, cooperation with the investigation, and the implementation of remedial measures—when deciding whether to bring charges against culpable corporations.[6] The journey of motivating corporate cooperation continued in 2003 with the promulgation of yet another DOJ memorandum, the Thompson Memorandum, which first acknowledged the possibility of prosecution deferral in exchange for corporate cooperation.[7] Since then, corporate cooperation, including voluntary self-reporting and the execution of remediation actions, has played an important role in the DOJ's decision whether to enter into deferred-prosecution and nonprosecution agreements with corporations.

Because of the exceptional challenges that FCPA matters present, including the concealed nature of corruption violations and other factors, in April 2016 the DOJ issued an FCPA-unique pilot program, which aimed to provide corporations with additional incentives to cooperate with the DOJ in addressing FCPA violations.[8] Under the FCPA pilot program, corporations that voluntarily self-reported an FCPA violation, fully cooperated with the DOJ investigation, and adequately remediated the misconduct could receive a fine reduction of up to fifty percent off of the bottom end of the applicable OSG fine range.[9] Additionally, when all conditions were met, the DOJ would also consider a declination of prosecution altogether.[10] The pilot program also stipulated that corporations that did not voluntarily self-report the FCPA violation but otherwise met all other cooperation and remediation requirements might qualify for a fine reduction of up to twenty-five percent off of the bottom end of the applicable OSG fine range.[11] To qualify for either form of mitigation credit, the corporation was required to disgorge all profits from the

---

6. See Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads & U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.pdf [http://perma.cc/ZRA4-VWDH].

7. See Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [http://perma.cc/D574-4AQG].

8. See Memorandum from the U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download [http://perma.cc/3ET2-Y7Y4]. For further discussion of the pilot program, see generally Mike Koehler, Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program,' 11 White Collar Crime Rep. (BNA) 353, 11 WCR 353 (BL) (Apr. 29, 2016); Andrew B. Spalding, Pre-Existing Compliance Through the FCPA Pilot Program, 48 U. Tol. L. Rev. 519, 519–50 (2017).

9. Memorandum from the U.S. Dep't of Justice, supra note 8, at 8.

10. Id. at 9.

11. Id. at 8.

FCPA misconduct at issue.[12] The pilot program was initially entered into effect for a one-year period, and the DOJ announced that it would consider a possible extension or modification of the program in light of the pilot experience.[13]

The pilot program, which was eventually extended until November 2017,[14] coincided with an increase in voluntary self-reporting of FCPA violations. In November 2017, Deputy Attorney General Rod Rosenstein reported that the DOJ received twenty-two voluntary disclosures during the first year of the pilot program, nine more than the thirteen voluntary disclosures during the previous year.[15] Altogether, during the eighteen months the pilot program was in effect, the DOJ received thirty voluntary disclosures, twelve more than the eighteen such disclosures received during the previous eighteen-month period.[16] Rosenstein emphasized that the voluntary disclosures under the pilot program coincided with the actual benefits that the DOJ granted under the pilot program:

> Since 2016, the Fraud Section's FCPA Unit has secured criminal resolutions in 17 FCPA-related corporate cases, resulting in penalties and forfeiture to the Department in excess of $1.6 billion. Of those 17 corporate criminal resolutions, only two were voluntary disclosures under the Pilot Program.
>
> Significantly, each of the two voluntary disclosure cases was resolved through a non-prosecution agreement, and in neither case did [the DOJ] impose a compliance monitor.
>
> Of the 15 corporate resolutions that were not voluntary disclosures, all but three were resolved through guilty pleas, deferred prosecution agreements, or some combination of the two. In ten of those cases, the company was required to engage an independent compliance monitor.
>
> Over that same time period, seven additional matters that came to [the DOJ's] attention through voluntary disclosures were resolved under the Pilot Program through declinations with the payment of disgorgement.[17]

Based on the experience accumulated through operation of the pilot program, the new leadership at the DOJ, which President Donald Trump appointed, announced a revision of its FCPA Corporate

---

12. Id. at 2.

13. Id. at 3.

14. Kenneth A. Blanco, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national [http://perma.cc/8PH3-D5RD].

15. Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [http://perma.cc/A9QZ-JWCE].

16. Id.

17. Id.

Enforcement Policy in November 2017.[18] Whereas the revised policy strengthens the benefits conferred to corporations for voluntary self-reporting, cooperation, and remediation, the new policy also largely prohibits repeat corporate offenders from receiving any such benefits, even if they demonstrate meaningful cooperation with the DOJ in relation to FCPA matters.[19] The revised policy offers corporations a *one-time-only credit*, which only first-time FCPA offenders may use. That is, if a corporation has already faced an enforcement action with respect to an FCPA violation, it may not receive the benefits for voluntary disclosure, cooperation, and remediation under the revised policy.[20] According to the DOJ, "[t]he new policy enables the [DOJ] to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing."[21] This Piece questions those statements.

This Piece seeks to explore the expected impact of the newly announced FCPA Corporate Enforcement Policy on a corporation's motivation to police FCPA violations. A corporation might cooperate by voluntarily self-reporting FCPA violations, by participating in public investigations, or by undertaking meaningful remediation actions. Assessing the expected impact of the revised policy on a corporation's motivation to cooperate with the DOJ finds a major pitfall of the revised policy related to its exclusion of corporate recidivists from the application of the policy. The exclusion of recidivists jeopardizes the establishment of a socially desirable cooperative enforcement regime because it overlooks two important factors in FCPA enforcement: (1) the repeated—and often continuous—engagement of multinational corporations (which are the main targets of FCPA enforcement) in high-corruption-risk markets and circumstances; and (2) the inability of any corporate compliance program to categorically prevent corrupt practices by corporate employees and related third parties. This Piece suggests that, when considering these important dimensions of the FCPA space, one may identify two fundamental weaknesses of the newly announced FCPA Corporate Enforcement Policy. First, it is likely to chill cooperation by

18. See id.

19. See id.; see also U.S. Dep't of Justice, Justice Manual § 9-47.120 (Nov. 2017), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 [https://perma.cc/UC67-TBNC] [hereinafter Justice Manual].

20. See Remarks by Rod Rosenstein, supra note 15. The DOJ has recently announced that it will expand the FCPA Corporate Enforcement Policy beyond FCPA enforcement cases and will apply the policy as a guide in non-FCPA cases as well. See Jody Godoy, DOJ Expands Leniency Beyond FCPA, Lets Barclays Off, Law360 (Mar. 1, 2018), https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off (on file with the *Columbia Law Review*); Kelly Swanson, DOJ Expanding Use of FCPA Declination Policy Principles, Global Investigations Review (Mar. 2, 2018), https://globalinvestigationsreview.com/article/1166274/doj-expanding-use-of-fcpa-declination-policy-principles (on file with the *Columbia Law Review*).

21. Remarks by Rod Rosenstein, supra note 15.

recidivists and first-time offenders with the enforcement authorities. Second, it would create dynamic inefficiencies in the market for corporate ownership and control.

The remainder of this Piece proceeds as follows: Part I presents the new FCPA Corporate Enforcement Policy that the DOJ announced in November 2017. In addition, Part I highlights the new policy's deviation from preexisting practices, specifically with respect to the treatment of FCPA recidivists. Part II then critically examines potential outcomes of the revised policy's exclusion of recidivists. Part III discusses two law and economics streams of studies that have explored the socially desirable design of enforcement policies in a setting involving repeated wrongdoing. Applying the lessons learned from these studies to the FCPA enforcement context calls for a reconsideration of the exclusion for recidivists from the FCPA Corporate Enforcement Policy.

I. THE DOJ'S FCPA CORPORATE ENFORCEMENT POLICY

On November 29, 2017, Deputy Attorney General Rosenstein announced to the 34th International Conference on the FCPA that the DOJ had revised the FCPA Corporate Enforcement Policy.[22] The new policy, which the DOJ incorporated into the U.S. Attorneys' Manual shortly afterward,[23] sets out a new norm for lenient treatment offered to corporations that demonstrate a cooperative approach with respect to FCPA enforcement.[24] Specifically, when a company satisfies the conditions of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there is a presumption that the DOJ will resolve the company's matter through a declination.[25] Unlike the predecessor pilot program, which granted corporations satisfying the aforementioned conditions a fine reduction of up to fifty percent off of the bottom end of the applicable OSG fine range and a possible declination, the current policy recognizes a default presumption of declination of criminal charges.[26] That said, the new policy stipulates the following exceptions to this general norm:

1. Aggravating factors: When there are aggravating factors relating to the nature or the seriousness of the offence, the presumption may be overcome. In such cases, the DOJ will recommend a fine reduction of fifty

---

22. See id.

23. See Justice Manual, supra note 19, § 9-47.120. In 2018, the U.S. Department of Justice renamed the U.S. Attorneys' Manual as the Justice Manual. Justice Manual, Dep't of Justice, https://www.justice.gov/jm/justice-manual [https:/perma.cc/2QRC-6YRL] (last visited Sept. 19, 2018).

24. See Remarks by Rod Rosenstein, supra note 15.

25. See Justice Manual, supra note 19, § 9-47.120(1).

26. See id. Similarly to the pilot program, the current policy requires that in any case the accused violator must pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue. Id.

percent off of the bottom end of the applicable OSG fine range.[27] Such aggravating factors may include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; [and] pervasiveness of the misconduct within the company."[28]

2. Failure to voluntarily self-report: If the company *did not* voluntarily self-report its misconduct to the DOJ but otherwise fully cooperated and remediated timely and appropriately in accordance with the standards set forth by the policy, the company will receive—or the DOJ will recommend—a fine reduction of up to twenty-five percent off of the bottom end of the OSG fine range.[29]

3. Criminal recidivists: Criminal recidivists may be excluded from any fine reduction set forth by the new policy, even when they voluntarily self-report, fully cooperate, and timely and appropriately remediate in accordance with the standards set forth by the policy.[30] This exception lies at the heart of this contribution.

The revised policy's exclusion of criminal recidivists from any fine reduction adds a fatal limitation to the predecessor pilot program, and it appears to have changed the practice that the DOJ implemented while the pilot program was in effect. A review of the DOJ's FCPA docket during the pilot program reveals three instances in which the DOJ granted lenient treatment in the form of a fine reduction (Zimmer Biomet) or declination (Orthofix International and Johnson Controls) to repeat FCPA offenders.

In 2012, Biomet, Inc. (Biomet), which subsequently became part of Zimmer Biomet Holdings, Inc., entered into a deferred prosecution agreement (DPA) with the DOJ.[31] That DPA resolved an FCPA matter relating to improper payments that Biomet made to publicly employed healthcare providers in Argentina, Brazil, and China.[32] The DPA required Biomet to retain an independent compliance monitor and operate a compliance program that met requirements that the DPA specified.[33] But the independent compliance monitor did not certify that Biomet's compliance program met the requirements of the DPA.[34] Further, Biomet later disclosed to the DOJ (and to the Securities and Exchange Commission (SEC)) that it had become aware of further

27. Id.

28. Id.

29. Id. § 9-47.120(2).

30. Id. § 9-47.120(1); see also Remarks by Rod Rosenstein, supra note 15.

31. See Press Release, U.S. Dep't of Justice, Zimmer Biomet Holding Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act [http://perma.cc/297H-XH48].

32. Id.

33. Id.

34. Id.

improper payments in Brazil and Mexico.[35] As a consequence, in early 2017, the DOJ and SEC initiated enforcement actions against Zimmer Biomet, and the company agreed to pay $17.4 million to the DOJ and $13 million to the SEC for a total of $30.4 million.[36] The DOJ did not award Biomet a voluntary self-reporting credit because Biomet was, in fact, obliged to disclose the violation under the 2012 DPA, such that its report did not qualify as voluntary self-reporting.[37] Nevertheless, in spite of the company's status as a repeat FCPA offender, the DOJ provided the company with full credit for its cooperation with the investigation.[38]

In 2012, Orthofix International, N.V., entered into a DPA with the DOJ and SEC relating to improper payments made by the company in Mexico.[39] Following these resolutions, in 2013 the company conducted an internal investigation into allegations of corrupt payments that Orthofix made to doctors at government-owned hospitals in Brazil.[40] The company self-reported those allegations to the DOJ and SEC.[41] Consequently, the SEC brought charges against the company in relation to improper payments and keeping inaccurate books and records.[42] In January 2017, the company settled with the SEC and agreed to pay more

---

35. Id.

36. Id.; see also Press Release, SEC, Biomet Charged with Repeating FCPA Violations (Jan. 12, 2017), https://www.sec.gov/news/pressrelease/2017-8.html [http://perma.cc/TT24-BZ2L].

37. See Deferred Prosecution Agreement at 4, United States v. Zimmer Biomet Holdings, Inc., No. 12-cr-00080 (D.D.C. filed Jan. 12, 2017), https://www.sec.gov/Archives/edgar/data/1136869/000119312517011702/d328998dex101.htm [https://perma.cc/LMQ5-ZX9C] ("[A]lthough Biomet disclosed the conduct described in the Statement of Facts to the Fraud Section during the term of the 2012 DPA, Zimmer Biomet did not receive voluntary disclosure credit because the 2012 DPA obligated Biomet to disclose the conduct described in the Statement of Facts . . . .").

38. See id. at 5 ("[T]he Company received full credit for its cooperation with the Fraud Section's investigation, including conducting a thorough internal investigation, making regular factual presentations to the Fraud Section, voluntarily making employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for the Fraud Section.").

39. See Deferred Prosecution Agreement at 1, United States v. Orthofix Int'l, N.V., No. 4:12-cr-00150-ras-ddb-1 (E.D. Tex. filed July 10, 2012), https://www.justice.gov/sites/default//files/criminal-fraud/legacy/2012/08/15/2012-07-10-orthofix-dpa.pdf [https://perma.cc/R8LY-JP6Q]; Press Release, SEC, SEC Charges Orthofix International with FCPA Violations (July 10, 2012), https://www.sec.gov/news/press-release/2012-2012-133htm [https://perma.cc/327G-3RHH].

40. See Jaclyn Jaeger, Orthofix Braces for SEC Settlement in FCPA Case, Compliance Week: Enforcement Action (Aug. 16, 2018), https://www.complianceweek.com/blogs/enforcement-action/orthofix-braces-for-sec-settlement-in-fcpa-case [https://perma.cc/S6E8-EF5Z].

41. Id.

42. See Press Release, SEC, Medical Device Company Charged with Accounting Failures and FCPA Violations (Jan. 18, 2017), https://www.sec.gov/news/pressrelease/2017-18.html [https://perma.cc/W22D-W7ZR].

than $14 million to resolve those charges.[43] Unlike the SEC, the DOJ decided, after careful review, to decline any further action with respect to Orthofix's self-disclosed matter.[44]

In 2005, Johnson Controls purchased York International Corporation while the latter was under an FCPA investigation.[45] In 2007, York (then part of Johnson Controls) settled the charges with the SEC and entered into a DPA with the DOJ.[46] A few years later, in 2012, Johnson Controls discovered improper payments by its Chinese subsidiary.[47] It voluntarily self-reported its concerns to the SEC and DOJ.[48] The SEC initiated an enforcement action against Johnson Controls that resulted in a cease-and-desist order upon which the SEC and Johnson Controls agreed.[49] The cease-and-desist order required the company to pay a total of over $14.3 million as penalty, disgorgement, and prejudgment interest.[50] Unlike the SEC, the DOJ again considered the company's voluntary self-reporting, cooperation, and remediation and, based on the pilot program, declined prosecution.[51]

In sum, during the pilot program, the DOJ declined to prosecute corporations that voluntarily self-reported, fully cooperated, and remediated in a timely and appropriate manner, even when those companies were FCPA recidivists.[52] Further, the DOJ granted credit for full cooperation and remediation even to Zimmer Biomet, whose self-reporting was not considered voluntary.[53] The new FCPA Corporate Enforcement Policy amends these practices. It excludes corporate recidivists from the benefits previously offered to corporations for their cooperation with the DOJ in the form of voluntary self-reporting, cooperation with the

---

43. See id.

44. See Press Release, Orthofix Int'l, N.V., Orthofix Announces Resolution of SEC Investigations (Jan. 18, 2017), https://www.businesswire.com/news/home/20170118005964/en/ [https://perma.cc/YDR4-XGFL].

45. See Press Release, SEC, Global HVAC Provider Settles FCPA Charges (July 11, 2016) [hereinafter SEC, Johnson Controls Press Release], https://www.sec.gov/litigation/admin/2016/34-78287-s.pdf [https://perma.cc/KDE8-5CDB].

46. See Deferred Prosecution Agreement at 1, United States v. York Int'l Corp., No. 07-cr-00253 (D.D.C. filed Oct. 15, 2007), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/10-15-07york-agree.pdf [https://perma.cc/BN3A-WLPE].

47. See Richard L. Cassin, Johnson Controls Pays SEC $14 Million to Settle China Bribe Case, Receives DOJ Pilot Program Declination, FCPA Blog (July 12, 2016), http://www.fcpablog.com/blog/2016/7/12/johnson-controls-pays-sec-14-million-to-scuttle-china-bribe-c.html [https://perma.cc/WPL8-QZHW].

48. Id.

49. See SEC, Johnson Controls Press Release, supra note 45.

50. Id.

51. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Jay Holtmeier, WilmerHale (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download [https://perma.cc/6CG5-4JAU].

52. See, e.g., id.; Press Release, Orthofix Int'l, N.V., supra note 44.

53. See supra note 38 and accompanying text.

investigation, and proper remediation. Part II assesses some of the potential outcomes of the exclusion of recidivists from those benefits.

II. COMBATING RECIDIVISM THROUGH A ONE-TIME CREDIT APPROACH

Combating recidivism is a clear goal of any enforcement policy,[54] and the FCPA enforcement arena is no exception. Nevertheless, this Piece suggests that excluding recidivists from any credit offered by the FCPA Corporate Enforcement Policy will not necessarily promote that goal. To formulate a more socially desirable FCPA enforcement policy, this Piece suggests accounting for the two basic features of the universe of FCPA corporate compliance and enforcement. The first feature is that multinational corporations are frequently, if not continuously, exposed to significant risk of getting tangled up in corruption while conducting business. The second feature is that corporations, despite best efforts, often cannot exert sufficient control over their affiliates to eliminate the risk of violating the FCPA. Further, this Piece explains the potential negative consequences of the new FCPA Corporate Enforcement Policy. The new policy would likely discourage both first-time offenders and recidivists from cooperating with enforcement authorities. It would also distort the market for corporate control in a way that undermines FCPA compliance and enforcement.

A. *The Two Basic Features of the Universe of FCPA Corporate Compliance and Enforcement*

As explained above, the first feature of the universe of FCPA corporate compliance and enforcement is that multinational corporations are frequently, if not continuously, exposed to risk of being implicated in corruption. Multinational corporations, which throughout the last four decades have been the dominant focus of FCPA enforcement, repeatedly—and often continuously—operate in high-corruption-risk markets and circumstances. Such companies often operate in markets in which the existing business values and industry culture differ substantially from those that the FCPA endorses.[55] Additionally, because of legitimate

---

54. See, e.g., U.N. Office on Drugs & Crime, Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders 1 (2012), https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf [https://perma.cc/U9N2-HEXJ] ("No crime prevention strategy is complete without effective measures to address the problem of recidivism."); Qinqin Zheng & Rosa Chun, Corporate Recidivism in Emerging Economies, 26 Bus. Ethics 63, 63 (2017) (explaining that corporate recidivism might be more culpable than a single isolated violation and that underdeveloped business ethics might cause corporate recidivism).

55. Various organizations have created guidelines and indexes indicating the perceived level of corruption in different jurisdictions. Transparency International annually publishes the Corruption Perceptions Index, which measures the perceived level of corruption in each country's public sector. For Transparency International's 2017

business reasons or local regulatory requirements, these companies often promote their business through third parties, such as local agents, representatives, and consultants.[56] Such relationships might increase corruption risk. An OECD study of foreign bribery in member nations found that in three of four foreign-bribery cases that it examined, intermediaries were involved.[57] The DOJ's recent FCPA settlements also reflect this correlation.[58] Consequently, the risk of those corporations becoming implicated in corrupt practices, directly or indirectly, advertently or inadvertently, is necessarily significant.

The second feature of the universe of FCPA compliance and enforcement is that corporations have a limited ability to control the behavior of their employees (let alone the behavior of third parties operating on their behalf) when it comes to potential involvement in corrupt practices.[59] Corporate compliance programs used by corporations to direct and monitor employee and third-party behavior—even if corporations adequately designed and diligently implemented such programs—are unlikely to categorically prevent all corporate FCPA violations.[60]

Corruption Perceptions Index, see Corruption Perceptions Index 2017, Transparency Int'l (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017 [https://perma.cc/Z2UH-YCMW]. Such indexes may provide valuable estimates of a corporation's risk of encountering corruption while operating in a wide range of countries.

56. For instance, international companies seeking to operate in the United Arab Emirates are required to engage a local agent who is a U.A.E. national or a company wholly owned by U.A.E. nationals. See Baker & McKenzie Habib Al Mulla, Doing Business in the United Arab Emirates 22–23 (2017), https://www.bakermckenzie.com/-/media/files/insight/publications/2017/05/doingbusinessuae/bk_uae_dbi_2017.pdf?la=e (on file with the *Columbia Law Review*); see also Katie Fish & Michelle Man, Transparency Int'l U.K., Licence to Bribe: Reducing Corruption Risks Around the Use of Agents in Defence Procurement 22 (2016), https://www.transparency.cz/wp-content/uploads/Licence-to-bribe-Reducing-corruption-risks-around-the-use-of-agents-in-defence-procurement-2016.pdf [https://perma.cc/GXF5-N9KU] (explaining that some foreign governments require hiring a local agent and that the process of hiring a local agent "is rarely transparent and can be subject to government influence").

57. See OECD, Bribery Report, supra note 1, at 8.

58. See U.S. Dep't of Justice & SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act 21–23 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/L4WH-Y8GL] (explaining the risks of retaining a foreign agent with respect to potential FCPA liability and providing examples of FCPA cases in which a corporation's FCPA liability arose from acts that its foreign agent committed).

59. See, e.g., Reid J. Schar & Blake P. Sercye, Risk-Specific and Evolving FCPA Compliance Programs, Corp. Couns. (Sept. 23, 2013), https://law.com/corpcounsel/almID/1202620363948 (on file with the *Columbia Law Review*) (explaining that bribery of a foreign official by a "rogue" employee of Morgan Stanley nearly resulted in prosecution of Morgan Stanley under the FCPA).

60. See Maurice E. Stucke, In Search of Effective Ethics & Compliance Programs, 39 J. Corp. L. 769, 832 (2014) (doubting whether a compliance program, without an ethics component or an ethical organizational culture, can effectively prevent corporate crimes).

The combination of these two features means, in reality, that many multinational corporations repeatedly become aware of potential improper payments and other corrupt practices conducted, facilitated, promoted, or permitted by their employees and third parties acting on behalf of the corporation. For such corporations, dealing with potential irregularities and possible corrupt practices is not a one-time occurrence.[61] Instead, it is an ongoing challenge stemming from the nature of their activities, the industries in which they operate, and the difficulties involved in controlling hundreds of thousands of employees and representatives across the globe at all times.

B. *Likely Adverse Effects of the One-Time-Only-Credit Approach*

Considering those factors, this Piece suggests that following a one-time-only-credit approach of the revised FCPA Corporate Enforcement Policy may be counterproductive to the main goal of this policy—to prevent FCPA violations through a cooperative corporate approach.

1. *Chilling Cooperation with Recidivists.* — The cooperation between law enforcement authorities and culpable corporations in resolving corporate FCPA violations is often mutually beneficial.[62] From a corporation's perspective, an agreed-upon resolution of such matters may mitigate reputational damage associated with a criminal conviction.[63] Further, it allows the corporation to reduce uncertainty and often benefit from lenient treatment in the form of reduced penalties.[64] From a prosecutor's perspective—and also from a more general public interest perspective—cooperation with culpable corporations increases detection rates and lowers enforcement costs, thereby increasing the efficacy of enforcement and the prosecutor's ability to allocate their limited resources to a wider range of violations.[65] Hence, enforcement policies

---

61. See, e.g., EY, Corporate Misconduct–Individual Consequences: 14th Global Fraud Survey 20–24 (2016), http://www.ey.com/Publication/vwLUAssets/ey-global-fraud-survey-2016/$FILE/ey-global-fraud-survey-final.pdf [http://perma.cc/2D6Q-ENJV] (recommending that a corporation's board of directors "continuously assess their ability to identify and mitigate fraud, bribery and corruption risk").

62. See Oded, Rolling the Dice?, supra note 1, at 67–74 (explaining that bribery imposes social costs that society as a whole must bear but that the cost of antibribery enforcement is also significant).

63. Id. at 59.

64. See Oded, Corporate Compliance, supra note 5, at 53–56 (explaining the virtues of regulatory cooperation).

65. See, e.g., John Armour, Henry Hansmann & Reinier Kraakman, Agency Problems and Legal Strategies, *in* The Anatomy of Corporate Law 35, 40–41 (Reinier Kraakman et al. eds., 3d ed. 2017) (outlining the primary mechanisms of public enforcement of corporate entities). See generally Robert Baldwin, Martin Cave & Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice 238–40 (2d ed. 2012) (discussing the high cost of prosecution and time- and cost-saving benefits of cooperative mechanisms of enforcement); John T. Scholz, Cooperation, Deterrence, and the Ecology of Regulatory Enforcement, 18

that can generate an adequate level of deterrence, while motivating corporations to cooperate with the public prosecutor by way of voluntarily self-reporting, cooperating, and remediating, are socially desirable.[66]

The conclusion above holds especially true for corporations that were previously involved in an FCPA enforcement action. Typically, the "shock" generated by an FCPA enforcement action against a corporation increases the management's awareness of the corruption risks and encourages it to strengthen its commitment to enhancing the systems and controls to mitigate corruption risks more effectively.[67] Under these circumstances, building trust with enforcement authorities may motivate corporations not only to enhance their compliance programs but also to sustain their cooperation with the public enforcement efforts. That is, in the event of more irregularities, those corporate leaders would be more motivated to "walk the walk" and voluntarily self-report future incidents, cooperate in future investigations, and further enhance remediation actions.[68]

Conversely, when the enforcement policy does not account for the very reality that multinational corporations face—(1) repeated and continuous exposure to high risk of corruption and (2) a limited ability to control employee and third-party behavior—and thereby denies credit

---

Law & Soc'y Rev. 179, 184 (1984) [hereinafter Scholz, Ecology] (explaining the cost-saving and compliance advantages of cooperative enforcement regimes).

66. See Oded, Rolling the Dice?, supra note 1, at 70–71.

67. See, e.g., Deloitte, The Chief Compliance Officer: The Fourth Ingredient in a World-Class Ethics and Compliance Program 5 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-download-the-full-report-the-chief-compliance-officer-05012015.pdf [https://perma.cc/GLV6-T32E] (describing how corporations might ramp up their compliance efforts in the immediate period after a compliance crisis); Craig D. Galli, A Compliance Crisis Is a Terrible Thing to Waste: Counsel's Role to Enhance Corporate Culture, Nat. Resources & Env't, Winter 2016, at 8, 11–12 (describing the enhancement of compliance systems within organizations after a compliance crisis). The enhancement of corporate attention to compliance risks has also been a standard requirement in deferred-prosecution and nonprosecution agreements that the DOJ and SEC have executed with accused violators in recent years. For an analysis of such resolutions, see Wulf A. Kaal & Timothy Lacine, The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013, 70 Bus. Law. 61, 82–84, 112–14 (2015).

68. Several studies have investigated the impact that the style of enforcement may have on the motivation to cooperate with law enforcement. Generally speaking, those studies conclude that a strict and intransigent enforcement system may cause laws to lose their perceived legitimacy, thereby generating undesirable behavior. In contrast, a cooperative enforcement approach that is based on legitimacy is likely to increase subjects' willingness to cooperate with law enforcers. See, e.g., Tom R. Tyler, The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities, 1 Personality & Soc. Psychol. Rev. 323, 336–37 (1997) (discussing the importance of relationships between subjects and an authority—especially the perception of trustworthiness, interpersonal respect, and neutrality—on the authority's perceived legitimacy); see also Jonathan D. Casper, Tom R. Tyler & Bonnie Fisher, Procedural Justice in Felony Cases, 22 Law & Soc'y Rev. 483, 494–95 (1988) (explaining the importance of procedural justice in the perceived legitimacy of the criminal justice system).

to otherwise compliant, recidivist corporations, the policy would likely diminish the efficacy of FCPA enforcement. Because future self-reporting, cooperation, and remediation may not earn the corporation credit with enforcement authorities, the revised FCPA Corporate Enforcement Policy may push multinational corporations—which are, of course, the focus of FCPA enforcement—to reduce their exposure to liability in alternative ways, including evading enforcement and covering tracks.[69]

2. *Chilling Cooperation with First-Time Offenders.* — On its face, the revised policy offers significant benefits to first-time FCPA offenders and thereby might motivate them to cooperate. Nevertheless, because of its one-time-only-credit approach, the revised policy may chill even first-time corporate offenders' motivation to take advantage of the benefits through self-reporting and cooperating. Knowing that using the one-time-only credit will effectively eliminate the possibility of lenient treatment in a subsequent incident, corporations might consider preserving their privileges under the revised policy for a more significant future incident. To meet the DOJ's expectation of timely, voluntary self-reporting, a corporation must make that strategic decision—whether to self-report—at a relatively early stage in the internal discovery of potential misconduct. Often, a corporation might decide prematurely, before it appreciates the severity of the incident at hand.

This possible adverse effect on corporate motivation to voluntarily self-report, cooperate, and remediate is particularly relevant for large multinational corporations, which are more likely to detect potential FCPA violations on a regular basis.

3. *Dynamic Inefficiencies in the Market for Corporate Control.* — Once a company acquires another, the acquiring company assumes all regulatory and criminal liability of the target company.[70] Accordingly, any FCPA (and other) liability of the target company attaches to the new merged corporation. Therefore, under the FCPA Corporate Enforcement Policy's one-time-only-credit approach, a merged corporation—such as Zimmer Biomet and Johnson Controls—might not be entitled to lenient treatment due to the acquired company having already exhausted its one-time-only credit.

---

69. The credit that corporate liability regimes provide affects corporate incentives to report. For analysis of that effect on incentives to report, see generally Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687 (1997) (concluding that whereas "a mixed regime that includes elements of both strict and duty-based liability" typically produces the most socially optimal outcomes for inducing corporate compliance, some mixed regimes, such as the U.S. Sentencing Guidelines, are still suboptimal because they do not adequately incentivize self-policing); see also Oded, Rolling the Dice?, supra note 1, at 74; Sharon Oded, Inducing Corporate Compliance: A Compound Corporate Liability Regime, 31 Int'l Rev. L. & Econ. 272, 277–82 (2011).

70. See U.S. Dep't of Justice & SEC, supra note 58, at 28.

Consequently, corporations that have previously faced an FCPA enforcement action may be less attractive for others to acquire. That is, acquiring such a corporation entails the extra cost of forgoing the opportunity to benefit from lenient FCPA enforcement treatment. This extra burden would diminish the dynamic efficiencies of mergers and acquisitions in the global market. Further, it also jeopardizes exactly those changes in corporate control that are socially beneficial and promote FCPA compliance—namely, companies that are highly committed to FCPA compliance acquiring companies (or local subsidiaries) that are less committed to FCPA compliance. Such acquisitions enhance FCPA enforcement by subjecting previously noncompliant or negligent business units to more stringent FCPA compliance systems and controls.

In sum, the revised policy overlooks the two primary characteristics of the FCPA's target companies: continuous exposure to high risk of corruption and an inability to categorically prevent future FCPA violations. As such, the application of the revised policy in its current form may be counterproductive to its own goals. Rather than fighting corruption and reducing recidivism, it may chill the corporations' motivation to cooperate with enforcement authorities. Further, it may discourage efficient changes in corporate ownership, especially those that otherwise could increase FCPA compliance.

III. COOPERATIVE FCPA ENFORCEMENT: A LAW AND ECONOMICS VIEW

Given the repeated—and often continuous—exposure of multinational corporations to high risk of corruption, and given the hindered ability of corporate compliance programs to categorically prevent corporate corruption, the question arises: How should an FCPA enforcement policy motivate corporations to act upon discovery of yet another potential violation? The answer is straightforward. A socially desirable policy should ensure an adequate level of deterrence and encourage corporations to work together with the DOJ by voluntarily self-reporting, cooperating with the investigation, and undertaking remedial actions. The social benefits embedded in cooperative enforcement, as described in the previous section, support that answer. An FCPA enforcement policy that motivates corporations to voluntarily self-disclose, cooperate, and remediate—thereby reducing enforcement costs and increasing the productivity of enforcement—would maximize those social benefits and enhance social welfare.[71]

---

71. From a law and economics perspective, an enforcement policy is socially desirable when it minimizes the sum of the social costs associated with corporate misconduct and its prevention, including the cost of enforcement. See Robert Cooter & Thomas Ulen, Law & Economics 489–97 (6th ed. 2012) (explaining that the social cost of crime includes the losses to victims and the cost of crime-prevention measures); see also Arun S. Malik, Avoidance, Screening and Optimum Enforcement, 21 RAND J. Econ. 341, 341–42 (1990) (explaining that optimum enforcement depends on not only the punishment for

If this approach is correct, then the next natural question is: How should FCPA enforcement policy treat recidivists in order to produce an adequate level of deterrence, while at the same time motivating sustainable corporate cooperation with FCPA enforcement? To answer this question, this Piece considers two prominent streams of law and economics research, each of which made an invaluable contribution to understanding proper design of enforcement strategies in repeated enforcement scenarios.

John Scholz developed the first scholarly stream through a series of studies that began in the early 1980s. Scholz applied the famous Tit-for-Tat (TFT) strategy of game theory to the law enforcement context.[72] The TFT strategy, which Robert Axelrod developed, considers a simple prisoner's-dilemma setting of two players, in which both players gain the maximum combined payoff if they both choose to "cooperate" as their game strategy.[73] If only one player chooses to "cooperate," however, and the other opts to "defect," the defecting player gains more. Axelrod's unique contribution stems from his enhancement of the simple prisoner's-dilemma game into a *repeated-game* setting. Under this setting, Axelrod showed that a stable, mutually beneficial equilibrium in which both players choose to cooperate may emerge if players follow a reciprocal strategy—the TFT strategy.[74] Applying the TFT strategy means that one player chooses to cooperate during the first round of the game and then echoes the other player's previous move in the following round.[75]

Applying this analytical framework to the law enforcement ecology, Scholz has shown that, in enforcement interactions between public authorities and corporations, the enforcement authorities may promote beneficial cooperation if they apply the TFT strategy when exercising their enforcement powers.[76] By repeatedly echoing a corporation's choice between cooperation (compliance) and defection (violation), an enforcement authority can generate the required deterrence (that is, the threat of strong-armed enforcement in case of defection), while simultaneously motivating the corporation to stick to the cooperative strategy.

---

violations but also the ability to identify and permit violations whose social benefit exceeds the social cost).

72. See generally Scholz, Ecology, supra note 65; John T. Scholz, Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness, 85 Am. Pol. Sci. Rev. 115 (1991); John T. Scholz, Voluntary Compliance and Regulatory Enforcement, 6 Law & Pol'y 385 (1984).

73. See generally Robert Axelrod, The Evolution of Cooperation (1984); Robert Axelrod, Effective Choice in the Prisoner's Dilemma, 24 J. Conflict Resol. 3 (1980); Robert Axelrod, More Effective Choice in the Prisoner's Dilemma, 24 J. Conflict Resol. 379 (1980); Robert Axelrod, The Emergence of Cooperation Among Egoists, 75 Am. Pol. Sci. Rev. 306 (1981).

74. See Oded, Corporate Compliance, supra note 5, at 74–75.

75. See id.

76. Scholz, Ecology, supra note 65, at 193–99.

The second scholarly stream of interest is known as responsive regulation, which John Braithwaite and Ian Ayres developed in the early 1990s.[77] The responsive-regulation approach deals with improving efficiency of law enforcement in a repeated-offense setting. The enforcement model that Braithwaite and Ayres created originates from the understanding that, under certain circumstances, misconduct may not necessarily be a result of a conscious choice to break the law.[78] Their approach relies on what Ayres and Braithwaite call the Enforcement Pyramid and supports a gradual escalation of enforcement reactions to repeated violations.[79] According to this approach, an enforcement action against a first-time offender should consist of less aggressive measures, which lie at the bottom of the pyramid.[80] The enforcement reactions should then gradually escalate in severity to progressively increase the pressure on would-be wrongdoers—those more severe measures being at the higher levels of the pyramid.[81] The shape of the pyramid reflects the anticipated proportional use of each measure.[82] If the severity of a punitive measure is positively correlated with the social cost of implementing it, then the Enforcement Pyramid approach will incur less cost than an approach that levies the same punishment regardless of the repeated nature of the offense. The escalating nature of the enforcers' response reduces the risk of repeat offenders strategically abusing initial lenient treatment.

The twin scholarly streams discussed above shed important light on the design of enforcement policy in the FCPA arena. These streams of studies support the proposition that an enforcement policy may produce the preferred social outcomes when: (1) an enforcement authority is able to develop sustainable cooperation with potential corporate offenders by responding to their cooperation with a cooperative enforcement approach; and (2) enforcers adopt a gradual scale of enforcement reactions, allowing them to escalate their response with every reoccurrence of misconduct. Put simply, rather than excluding recidivists from the application of the revised policy, the FCPA Corporate Enforcement Policy is likely to achieve its goals if recidivists are included in the application of the policy but subject to a gradually escalating enforcement response.

The required escalation of the enforcement response toward recidivists can in fact be realized under the existing OSG, which currently consider recidivism as an aggravating factor in determining the fine range

77. See generally Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).

78. See, e.g., id. at 49–51 (explaining that effective regulation can use alternative sanctions to remedy wrongdoing that is not necessarily the result of a conscious choice, such as incompetence).

79. Id. at 35–37.

80. Id.

81. Id.

82. See Oded, Corporate Compliance, supra note 5, at 63.

applicable to culpable corporations. In section 8C2.6, the OSG specifically increase the culpability score (which determines the fine range applicable to corporations) when "the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct."[83] Additionally, the DOJ could consider reaching the required gradual escalation of enforcement measures against recidivists by offering those that voluntarily self-report, cooperate, and remediate a reduced credit in the event of reoccurring FCPA violations (just as currently done by the revised policy in the case of corporations that fail to voluntarily self-report but otherwise satisfy the requirements of the policy). Such an approach would maintain deterrence and increase the pressure on corporate recidivists, while sustaining their motivation to remain cooperative in combating corporate corruption.

CONCLUSION

Following an innovative, eighteen-month pilot, the new leaders at the DOJ announced a revised, permanent FCPA Corporate Enforcement Policy. In contrast with the DOJ practices during the pilot period, the revised policy offers a one-time-only credit to FCPA corporate offenders, thereby excluding FCPA recidivists from any credit for voluntary self-reporting, cooperation, and remediation. The new policy was intended to enable the DOJ to efficiently identify and punish criminal conduct and to provide guidance and greater certainty for companies struggling with the question of whether to voluntarily disclose wrongdoing.

This Piece casts doubts on the approach followed by the revised policy in its attempt to trump FCPA recidivism. It argues that the expected outcomes of the revised policy may be at odds with the goal of FCPA enforcement to nurture and motivate cooperation with corporations. Further, the revised policy might be especially inconsistent with the business realities of multinational corporations. Instead, the policy is likely to chill the motivation of corporations—both first-time offenders and corporate recidivists—to voluntarily self-report, fully cooperate, and properly remediate. Armed with prominent law and economics theories that explain the proper enforcement response in a repeated-game setting, this Piece calls for amending the FCPA Corporate Enforcement Policy. Rather than excluding recidivists from the application of the policy altogether, the Piece advocates applying gradually escalating enforcement responses to corporate recidivists.

---

83. U.S. Sentencing Guidelines Manual § 8C2.6 (U.S. Sentencing Comm'n 2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf [https://perma.cc/VW8B-5J5Q].