

## ***Sometimes No Evidence is Meaningless: Voluntary Disclosure under the FCPA***

The Foreign Corrupt Practices Act (FCPA) world went crazy last week with headlines along the lines of “No credit for self-reporting”; “No credit for cooperation”; and “Voluntary disclosure doesn’t change penalties”. All of these pronouncements were based upon a draft study done by Professors from the New York University School of Law (NYU School of Law) in an attempt to provide an answer. As reported by Sam Rubinfeld in *Corruption Currents*, in an article entitled “*Study Says Voluntary Disclosure Doesn’t Change FCPA Penalties*”, the study, which examines US anti-bribery enforcement actions from 2004 through 2011, found no evidence that voluntary disclosure of wrongdoing results in lesser penalties. He also quoted one of the study’s co-authors Kevin E. Davis, a Vice Dean at NYU School of Law, who said in an email, “We cannot rule out the possibility that voluntary disclosure does result in some form of leniency”.

However, if one reads the study by Davis and Stephen Choi, entitled “*Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*”, it becomes clear that the purpose of the study was to test “the extent to which four broad theories explain the recent pattern of enforcement of the FCPA.” Using a dataset of FCPA cases resolved from 2004 to 2011, the inquiry revolved around the extent to which these four theories explain variations in the treatment of actors who violate the FCPA.

### ***I. Proportionality Theory***

The first theory is described by the authors as the “most consistent with the text of the relevant legislation, guidelines and international conventions.” Not surprising given its names, this theory “suggests that differences in treatment of defendants will depend entirely on differences in their moral culpability. This may reflect the idea that the purpose of the FCPA is to make a statement that bribery is equally immoral regardless of where it takes place. Alternatively, proportionality may reflect an attempt to apply deterrence optimally (at least in a rough sense), imposing greater sanctions on more egregious and extensive harms all other things being equal (such as detection probability).” Interestingly, and I find somewhat unpersuasively, the authors believe that the Proportionality Theory contrasts with the three other theories because the Proportionality Theory “is inherently parochial because it suggests that patterns of enforcement will not be affected by foreign policy considerations or the presence (or absence) of foreign regulators.”

### ***II. Altruism Theory***

The second theory suggests that FCPA enforcement is influenced by foreign policy considerations. The authors believe that the Altruism Theory “suggests that the FCPA will be enforced with a view to the interests of foreign actors, with U.S. enforcement making up for the shortcomings of foreign states that are not capable of regulating transnational activity on their own. On this account, differences in treatment of defendants might be explained by the needs or institutional capacity of the country whose official has been bribed.”

### ***III. Self-Interest Theory***

This third theory suggests that US enforcement will tend to promote the interests of the US. This implies that factors such as the nationality of the defendant and the extent to which the misconduct prejudiced US firms ought to be taken into account.

#### *IV. Coordination Theory*

The fourth theory suggests that US officials' enforcement decisions will be influenced by the actions of foreign regulators, such as those at the UK Serious Fraud Office (SFO) or the German prosecutors in the Siemens case. The authors posit that these overseas regulators might "complement U.S. enforcement actions by helping to gather evidence. Alternatively, foreign regulators might impose sanctions that serve as substitutes for U.S. enforcement."

So what did the authors conclude? First, they found "support for the hypothesis that Proportionality drives the SEC [Securities and Exchange Commission] and DOJ [Department of Justice] in specific cases. Once a case is filed, the sanction imposed in a FCPA action increases with the size of the bribe, the profit related to the bribe, and the amount of business affected by the bribe. The sanction also increases with measures of the extensiveness of the FCPA violation, including, in particular, whether a subsidiary is sufficiently involved to face separate FCPA charges." Second, the authors found "mixed support for our Altruism theory. Sanctions in individual FCPA actions do not vary with the underlying economic development, as measured by GNI [Gross National Income] per capita, or strength of legal institutions, as measured by World Bank rule of law scores. In contrast, Altruism does appear important in how the DOJ and SEC distribute sanctions among violation countries." Third, the authors found "mixed evidence that Self-Interest motivates the SEC and DOJ. The SEC and DOJ impose greater sanctions, all other things being equal, on foreign companies." Finally, for the fourth theory the authors found there is "mixed evidence on the Coordination theory. At the level of individual FCPA actions, we find that the activity of a foreign regulator (both an investigation as well as a sanction) correlates with significantly higher and not lower sanctions."

The authors ultimately found "evidence that the magnitude of sanctions imposed on defendant companies in FCPA actions depends not only on what they did but where they are from and where they committed their violations." Personally I do not see such a finding as unreasonable, unwarranted or even surprising. FCPA prosecutions are based upon the US Sentencing Guidelines and the DOJ has, for some time, set out the formulas under which it determines a range of proposed fines and penalties. This range is certainly influenced by self-disclosure as it is one of the listed factors for determining the range. However, it is only one of many factors and it is possible to see the reduction in any number of recent Deferred Prosecution Agreements (DPAs). So quoting from the BizJet DPA is the following:

*(g)(1) The organization, prior to imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the*

*investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct*

This is not a DOJ guideline but was derived by the US Sentencing Guidelines, which are promulgated by the US Sentencing Commission and passed upon by Congress. Do I wish there was a specific line item for early, self-disclosure; you bet I do but there is not. Self-disclosure is lumped in with cooperation, recognition of responsibility for criminal conduct. How much is self-disclosure worth? It could be 25% or not, there is simply no way to know with the current system, under which the DOJ is mandated to operate. Conversely, will your company be penalized if they do not self-disclosure? Once again there is no way to know. So sometimes no evidence has meaning and sometimes it does not.

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