

INDECENT DISCLOSURE: HAS THE DEPARTMENT OF JUSTICE PROVIDED SUFFICIENT CLARITY TO INCENTIVIZE CORPORATIONS TO ADMIT WRONGDOING?

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INTRODUCTION

Your company's internal compliance program discovered that one of your employees bribed a foreign official to secure a contract in violation of the Foreign Corrupt Practices Act of 1977 (FCPA).¹ You have two choices: (1) remediate the problem and hope that the Department of Justice (DOJ) or the Securities and Exchange Commission (SEC) does not discover the FCPA violation, or (2) voluntarily disclose the violation. This dilemma leads companies to balance the costs and benefits of voluntary self-disclosure. In doing so, companies must weigh various factors—the likelihood of discovery, the level of punishment to which they may be subjected, other applicable laws, and the potential impact on their profits and shareholder relations—when considering the consequences of self-disclosure.² Over the years, to address the ambiguities of the factors considered while calculating the cost-benefit analysis of voluntary self-disclosure, attorneys general have issued memoranda and guidelines seeking to clarify the FCPA investigation and punishment process.³

In response to the interpretive issues of past memoranda, the DOJ recently made yet another attempt to clarify and emphasize the factors prosecutors consider in charging decisions. On November 29, 2017, the DOJ announced its new FCPA Corporate Enforcement Policy (Enforcement Policy);⁴ which, according to the DOJ, presents corporate officers and board members with a better understanding of how prosecutors make charging decisions.⁵ The Enforcement Policy intended to clarify the bene-

1. *See generally* Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff (2012) (prohibiting the offer or payment of something of value to foreign officials for the benefit of your organization as well as the subsequent covering up of such a transaction or failure to properly maintain accurate records in accordance with the Generally Accepted Accounting Principles (GAAP)).

2. The benefits associated with voluntary self-disclosure are outlined in the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (Enforcement Policy) which is codified in the Justice Manual. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-47.120 (2018) [hereinafter JM]. The Justice Manual was formally the United States Attorneys' Manual and will be referenced as the USAM in the majority of the sources cited within; however, this Comment will refer to it as the JM. *See generally id.*

3. *See infra* Part II, pp. 22–28.

4. Rod Rosenstein, Deputy Att'y Gen., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) [hereinafter Rosenstein Remarks]. Prior to the Enforcement Policy, the DOJ issued a temporary Pilot Program which provided similar benefits and shared the goals of the Enforcement Policy. *See infra* notes 107–108 and accompanying text (discussing the Pilot Program).

5. *See* Rosenstein Remarks, *supra* note 4.

fits of disclosure, remediation, and cooperation, as well as to provide guidance as to how the DOJ defines those requirements to receive the incentives provided for in the Policy.⁶ The DOJ maintains that the Enforcement Policy facilitates more trust in the investigation and prosecution process; therefore, companies will be more likely to come forward with violations.⁷ In turn, the DOJ believes it will be able to more efficiently detect, penalize, and deter future violations.⁸

The Enforcement Policy, however, does not make clear that the benefits of voluntary self-disclosure outweigh the potential unfavorable outcomes.⁹ Despite the relative success achieved under the DOJ Criminal Division's temporary FCPA Pilot Program (Pilot Program)¹⁰ and the Enforcement Policy,¹¹ it is debatable whether those policies adequately incentivize corporations to disclose FCPA violations, or deter future crimes.¹² This Comment addresses the legal issues surrounding the DOJ's power to implement guidelines, such as the Enforcement Policy, and whether its interpretive rulemaking can adequately address the FCPA's interpretive gaps. Part I of this Comment will provide commentary on the history and purpose of the FCPA. Part II will discuss the DOJ's role in enforcing the FCPA and its power to promulgate guidelines, memoranda, and policies. Part III will address the development, implementation, gaps, and impact of the Enforcement Policy. Finally, Part IV will recommend that the DOJ issue a guideline clearly defining the factors set forth in the Enforcement Policy, as well as provide more detailed information in declination letters. Further, Part IV also argues that the DOJ and the SEC should update the

6. *Id.* The greatest available incentive is a declination with disgorgement, under which the DOJ will not file charges against the corporation. See JM, *supra* note 2, at § 9-47.120(1). The other possible benefits included the DOJ's recommendation for a reduced monetary fine and not appointing a monitor to oversee the corporation's internal practices. *Id.*

7. Rosenstein Remarks, *supra* note 4.

8. *Id.*

9. See *infra* Part III, pp. 34–39.

10. See *infra* notes 107–108 and accompanying text (discussing how the temporary Pilot Program first incentivized voluntary self-disclosures of FCPA violations and evolved into the current Enforcement Policy).

11. See Rosenstein Remarks, *supra* note 4 (discussing the successes of the DOJ Enforcement Policy); Rahul Kohli, *Foreign Corrupt Practices Act*, 55 AM. CRIM. L. REV. 1269, 1326–28 (2018) (noting that “[v]oluntary disclosure also continues to play an integral role in FCPA enforcement. There has been a marked increase in self-reporting in recent years . . .”).

12. See Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense*, 55 AM. BUS. L.J. 475, 525 (2018) (explaining circumstances under which prosecutorial leniency for voluntary disclosure provides a limited incentive to companies to self-disclose and questioning whether existing incentive benefits are enough).

2012 Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA Guide).¹³ This Comment will conclude that the DOJ's FCPA Corporate Enforcement Policy still lacks transparency with regard to filing criminal charges and potential fines; therefore, to best meet its goal of deterring and prosecuting violations of the FCPA, the DOJ should issue a clarifying memorandum, release more detailed declination letters, and publish a new version of the FCPA Resource Guide.

I. DETERRING AND PUNISHING FOREIGN CORPORATE CORRUPTION¹⁴

In May 2012, Donald J. Trump, as a private citizen, stated that the FCPA is a “horrible law and it should be changed.”¹⁵ Despite President Trump's apparent distaste for the FCPA, the DOJ continues its robust enforcement of the law, reiterating that it remains dedicated to the deterrence and prevention of economic crimes.¹⁶ Since its enactment in 1977, the FCPA has undergone two amendments, multiple interpretive memoranda, and several policy changes in response to political party changes.¹⁷ Throughout this evolution, the DOJ and the SEC have continuously emphasized the importance of deterring and rebuking corruption.¹⁸

13. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012) [hereinafter FCPA GUIDE].

14. The FCPA targets both corporate and individual corruption; however, the Enforcement Policy relates only to corporate criminal charges. *See id.* at 90 (“The FCPA was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes.”); *see also* JM, *supra* note 2.

15. Mike Koehler, *Foreign Corrupt Practices Act Continuity in a Transition Year*, 70 S.C.L.R. 143, 144 (2018). Economic crimes are property offenses including: theft, embezzlement, fraud, forgery, counterfeiting (not including bearer obligations of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. U.S. SENTENCING GUIDELINES MANUAL ch. 3, pt. B, introductory cmt. (U.S. SENTENCING COMM'N 2018) [hereinafter SENTENCING GUIDELINES].

16. *See generally* Rosenstein Remarks, *supra* note 4 (discussing deterrence and prevention of crimes). Notably, “2018 was the third most active year for enforcement in FCPA history.” *See* Mike Koehler, *Corporate FCPA Enforcement in 2018 Compared to Prior Years*, FCPA PROFESSOR (Jan. 3, 2019), <http://fcprofessor.com/corporate-fcpa-enforcement-2018-compared-prior-years/>.

17. The FCPA was amended in 1988 and 1998. *See* FCPA GUIDE, *supra* note 13, at 3–4; *see also* Mark, *infra* note 42, at 1596–97 (discussing five predecessor interpretative memoranda).

18. *See, e.g.*, Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads & U.S. Att'ys 2 (Sept. 9, 2015) [hereinafter Yates Memo-

A. History and Purpose of the FCPA

Corruption hinders economic growth: it derails public resources, impedes competition, discourages individual participation in the marketplace, subverts development, and stifles innovation.¹⁹ Further, corruption chips away at the rule of law, undercuts democratic values, and lowers public accountability.²⁰

Congress enacted the FCPA in response to the Watergate scandal, extensive global corruption, and millions of dollars in bribes paid to foreign government officials to secure overseas business.²¹ The FCPA was intended to deter corrupt practices, “create a level playing field for honest businesses, and restore public confidence in the integrity” of the free market.²² The FCPA prevents corruption by outlawing payments to foreign officials to gain corporate benefits.²³

The FCPA consists of two main provisions: the anti-bribery provision and the accounting provision.²⁴ The anti-bribery provision applies to issuers,²⁵ domestic concerns,²⁶ and persons or entities other than issuers or do-

randum] (reiterating the importance of redressing and deterring misconduct).

19. See Beverley Earle & Anita Cava, *The Mystery of Declinations Under the Foreign Corrupt Practices Act: A Proposal to Incentivize Compliance*, 49 U.C. DAVIS L. REV. 567, 593 (2015) (emphasizing the consequences of corruption on greater global societies).

20. See FCPA GUIDE, *supra* note 13, at 2 (discussing corruption as a global problem).

21. See *id.* at 3 (introducing the FCPA’s historical background and context).

22. *Id.* at 2.

23. See *id.* at 10.

24. *Id.*

25. As a practical matter, a company is classified as an “issuer” if it has a class of securities registered under § 12 of the Exchange Act or is required to file periodic and other reports with Securities and Exchange Commission (SEC) under § 15(d) of the Exchange Act. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012); FCPA GUIDE, *supra* note 13, at 10–11. Essentially, an issuer is any company that has securities listed on a national securities exchange or is quoted in the over-the-counter market in the United States and required to file periodic reports with SEC. This includes foreign companies. See 15 U.S.C. § 78dd-1; FCPA GUIDE, *supra* note 13, at 10–11; Randall Dodd, INTERNATIONAL MONETARY FUND, Markets; Exchange of Over-the-Counter 2 (Dec. 18, 2018), <https://www.imf.org/external/pubs/ft/fandd/basics/markets.htm> (explaining that an over-the-counter market is a less formal network of securities trading relationships).

26. A “domestic concern” is “any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or with its principal place of business in the United States.” See 15 U.S.C. § 78dd-2(h).

mestic concerns.²⁷ The anti-bribery provision prohibits the knowing payments, offers, promises, or authorizations of any money or anything of value, either directly or indirectly, to foreign officials, political parties, or candidates for political office.²⁸ Such actions violate the FCPA if they are intended to induce or influence the actions or decisions of a foreign official, government, or instrumentality thereof to obtain, retain, or to direct business to any person, or to secure an improper business advantage.²⁹

The FCPA accounting provision consists of two portions which prohibit and prevent improper accounting.³⁰ First, the books and records provision prevents off-the-books accounting³¹ and requires issuers to preserve a detailed account of the nature of all transactions and assets.³² Second, the internal controls provision requires issuers to create and maintain adequate internal accounting controls.³³ Failure to follow any of these provisions can lead to harsh penalties.

B. General Penalties for FCPA Violations

The DOJ looks to several sources to determine the appropriate penalties for FCPA violations.³⁴ The FCPA provides upper limits for both criminal³⁵

27. Other foreign persons or foreign entities which are neither issuers nor domestic concerns may be subject to the anti-bribery provision of the FCPA if they commit either directly or through an agent, any act in furtherance of a corrupt payment, offer, promise, or authorization to pay while in the territory of the United States. *Id.* § 78dd-3.

28. *Id.*

29. *See id.*

30. FCPA GUIDE, *supra* note 13, at 38–40 (explaining the details of each of the FCPA’s accounting provisions). Improper accounting includes the falsifying of records or mischaracterization of bribes to make these transactions appear to be legitimate payments. *Id.* at 39.

31. Off-the-books accounting is a form of nondisclosure where transactions are not recorded. *See* MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/off-the-books> (last visited May 4, 2019).

32. *See* 15 U.S.C. § 78m; FCPA GUIDE, *supra* note 13, at 39.

33. FCPA GUIDE, *supra* note 13, at 40.

34. *See generally id.* at 53–56, 68–69 (describing the factors that DOJ considers when deciding whether to charge or initiate an investigation); SENTENCING GUIDELINES §§ 2B1.1, 2C1.1 (U.S. SENTENCING COMM’N 2018) [hereinafter SENTENCING GUIDELINES]; JM, *supra* note 2, at §§ 9-27.000, 9-28.000, 9-47.120.

35. Criminal penalties for corporations and individuals vary. *See* FCPA GUIDE, *supra* note 13, at 68–69 (outlining the differences for individual and corporate penalties). Corporations face up to a \$2,000,000 fine for violations of the anti-bribery provision and up to a \$25,000,000 fine for violations of the accounting provision. *See id.* at 68. On the other hand, individuals can be fined up to \$250,000 and imprisoned for up to five years for violations of the anti-bribery provision and fined up to \$5,000,000 and imprisoned for up to twenty years.

and civil³⁶ penalties for violations. In addition to the mitigation credits available in the Enforcement Policy,³⁷ prosecutors look to the United States Sentencing Guidelines (Sentencing Guidelines) to determine the appropriate penalties for criminal violations.³⁸ The Sentencing Guidelines provide calculations for criminal penalties by establishing an initial offense level which is then adjusted after examining several factors to determine the final offense level.³⁹ The Sentencing Guidelines make recommendations regarding the amount of monetary fines, whether incarceration is appropriate, and if so, the duration of imprisonment based on the final offense level.⁴⁰

The Principles of Federal Prosecution of Business Organizations also direct prosecutors to consider enumerated factors when making charging decisions for corporate criminal violations.⁴¹ In June 1999, then Deputy Attorney General Eric Holder articulated the first Principles of Federal Prosecution of Business Organizations.⁴² The Holder Memorandum was the first advisory policy to standardize the factors considered when deciding whether and how to charge a corporation for violations of criminal statutes.⁴³ The Holder Memorandum relayed that corporations should be treated the same as individuals during the course of a criminal investiga-

Id.

36. Civil penalties for violations of the anti-bribery provision are up to \$16,000 per each violation and can also lead to collateral consequences such as suspension or debarment. *See* FCPA GUIDE, *supra* note 13, at 69–70 (explaining that decisions to temporarily suspend or permanently bar a corporation from doing business with the federal government is to individual agencies' discretion).

37. *See* JM *supra* note 2, at § 9-47.120

38. *See id.*

39. The U.S Sentencing Guidelines (Sentencing Guidelines) provide different initial offense levels for both provisions of the FCPA. *See* SENTENCING GUIDELINES, *supra* note 34, at §§ 2B1.1, 2C1.1. This initial level is then either decreased or increased according to factors in the Sentencing Guidelines. *See id.* at §§ 5K, 8C (providing the factors considered for individual and organizational offenders). When determining the final offense level for organizations, prosecutors consider: the size of the organization, involvement in or tolerance of criminal activity by high-level personnel, prior misconduct or obstructive behavior, voluntary disclosure, cooperation, a preexisting compliance program, acceptance of responsibility, and remediation. *See id.* at § 8C2.5. The Enforcement Policy directs prosecutors to make adjustments based on this final level. *See* JM *supra* note 2, at § 9-47.120.

40. *See* FCPA GUIDE, *supra* note 13, at 68–69.

41. *See generally* JM, *supra* note 2, at § 9-28.300.

42. *See* Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1597–98 (2018); Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999) [hereinafter Holder Memorandum].

43. *See generally* Mark, *supra* note 42, at 1597; Holder Memorandum, *supra* note 42.

tion.⁴⁴ As such, prosecutors should consider all of the factors outlined in the Justice Manual (JM).⁴⁵ Specifically, prosecutors evaluate whether the company cooperated, made a voluntary self-disclosure, and took remedial actions.⁴⁶

C. *The Difficulties of Enforcement*

Enforcing the FCPA is not an easy task. First, discovering violations is difficult from the outside because the evidence of a violation is found within the corporation.⁴⁷ Second, because violations involve foreign corporations and contracts, evidence of the alleged crime(s) is frequently located outside of the United States.⁴⁸ Finally, the DOJ does not have adequate resources to unveil and investigate all FCPA violations.⁴⁹ The DOJ remains focused

44. Prosecutorial decisions regarding criminal charges for individuals are outlined in the DOJ's Principles of Federal Prosecution and JM §§ 9-27.230, 9-27.420. The Sentencing Guidelines allow for sentence reductions where the defendant voluntarily discloses the violation and substantially cooperates with the investigation. See SENTENCING GUIDELINES, *supra* note 34, at §§ 5K1.1, 5K2.16.

45. See Mark, *supra* note 42, at 1597–98; Holder Memorandum, *supra* note 42.

46. These factors are more fully expanded upon in the JM. For example, the self-disclosure must be both voluntary and timely. See FCPA GUIDE, *supra* note 13, at 54. For all of the charging factors considered by prosecutors when deciding to charge a corporation, see JM *supra* note 2, at §§ 9-28.300.A; 9-28.700.B; 9-28.900. The Sentencing Guidelines provide similar factors which are considered in determining corporate charging decisions. See SENTENCING GUIDELINES, *supra* note 34, at §§ 8B, 8C. Some of these factors include remediation, an effective compliance program, an update to such program, self-reporting, cooperation, and an acceptance of responsibility. *Id.* at § 8C2.5. However, delaying disclosure may diminish the benefits of having a compliance program. See *id.* at § 8C2.5(f)(2).

47. See Earle & Cava, *supra* note 19, at 591; Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 184 (discussing the difficulties related to the general lack of legal obligation to disclose internal compliance information). It is important to note that while the FCPA does not mandate disclosure, other statutes might require a company to disclose violations. See William M. Sullivan, Jr., et al., PILLSBURY WINTHROP SHAW PITTMAN LLP, *New SEC Payment Disclosure Rules Raise FCPA Concerns for Energy Companies* (July 12, 2016), <https://www.pillsburylaw.com/images/content/1/0/v2/104407/AlertJuly2016CorpInvestNewSECPaymentsDisclosureRules.pdf> (examining the relationship between the FCPA and the disclosure requirements under Section 13(q) of the Securities Exchange Act of 1934).

48. See Mark, *supra* note 42, at 1606 (discussing the complexities of obtaining evidence overseas).

49. For example, Wal-Mart recently disclosed that it expended \$6 million in FCPA and compliance related costs. See *Financial Presentation to Accompany Management Transcript*, WALMART, https://s2.q4cdn.com/056532643/files/doc_financials/2019/Q4/Q4FY19-Earnings-Presentation-Final.pdf (reflecting on the \$3 million for ongoing investigations and \$3 million for global compliance program and organizational enhancements). Based on the-

on emphasizing the importance of voluntary self-disclosure⁵⁰ because “the DOJ is confident that there are lots of FCPA violations that do not come to the DOJ’s attention.”⁵¹

II. THE ROLE AND POWERS OF THE DOJ

The DOJ and the SEC both play vital roles in investigating, enforcing, and interpreting the FCPA.⁵² In the 1998 amendment, Congress directed the Attorney General to provide guidance regarding the DOJ’s enforcement of the FCPA.⁵³ The FCPA expressly mandates that the DOJ abide by the Administrative Procedure Act (APA) when it issues such guidance.⁵⁴ The DOJ actively participates in enforcement actions through the Fraud Division and implements policies and procedures related to the FCPA.⁵⁵

se numbers, it costs “approximately \$97,000 per working day” to investigate an FCPA claim and conduct other compliance-related changes. Mike Koehler, *Checking In On Wal-Mart’s Pre-Enforcement Action Professional Fees And Compliance Enhancements Expenses*, FCPA PROFESSOR (Feb. 19, 2019), <http://fcprofessor.com/checking-wal-marts-pre-enforcement-action-professional-fees-compliance-enhancements-expenses/#more-26894>; see also Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 213 (2010) (discussing Siemens Aktiengesellschaft’s estimated \$1 billion expenditure to settle an FCPA claim which included 1.5 million billable hours expended by outside counsel and accountants, collection and preservation of over 100 million documents, and the reorganization of its global operation).

50. See Eric Volkman et al., *DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations*, COMPLIANCE & ENF’T BLOG, https://wp.nyu.edu/compliance_enforcement/2017/12/04/doj-expands-and-codifies-policy-incentivizing-corporations-to-voluntarily-self-disclose-fcpa-violations/ (last visited July 19, 2019); see also Salbu, *supra* note 12, at 478 (discussing the increasing awareness that a public-private partnership to combat corrupt business transactions is necessary).

51. Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 184.

52. See generally FCPA GUIDE, *supra* note 13, at 4–5, 52–53, 74–77. See also Larry D. Thompson, *Reducing Corporate Criminality: Evaluating Department of Justice Policy on the Prosecution of Business Organizations and Options for Reform: Article: In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 199, 214 (2014) (explaining that the DOJ and SEC share enforcement and investigation authority for some FCPA provisions).

53. See Daniel R. Wilson, *Administrative Procedure and Foreign Antibribery Enforcement: “Restoring Balance” Through Procedural Transparency*, 36 HASTINGS INT’L & COMP. L. REV. 289, 299, 307–10 (2013) (discussing Congress’s desire to have the DOJ provide transparent enforcement guidance with the public’s input).

54. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–59, 561–70a, 701–06 (2012); FCPA, 15 U.S.C. § 78dd-1(d) (2012) (requiring the Attorney General to comply with notice and comment procedures).

55. *About the Fraud Section*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal->

A. *The DOJ's Enforcement Role*

The DOJ's mission is to uncover, prevent, and punish illegal conduct.⁵⁶ In 1955, the DOJ established the Criminal Division Fraud Section to investigate and prosecute complex white collar crime cases and to develop DOJ enforcement policies.⁵⁷ Along with the SEC, the DOJ enforces the FCPA and is solely responsible for criminal enforcement.⁵⁸ Criminal actions can be initiated against issuers and any officers, directors, employees, agents, and stockholders acting on the issuer's behalf who violate the accounting provisions of the FCPA.⁵⁹ The DOJ can initiate both criminal and civil actions for violations of the FCPA's anti-bribery provisions.⁶⁰

Prosecutors have several means of enforcing FCPA violations:⁶¹ the DOJ can indict, litigate, issue a declination, or negotiate a plea agreement, deferred prosecution agreement (DPA), or non-prosecution agreement (NPA).⁶² Unlike a plea agreement, corporations do not have to admit guilt under DPAs and NPAs.⁶³ Plea agreements, DPAs, and NPAs are all frequently used enforcement methods.⁶⁴ Prosecutors who choose to enter into

fraud (last visited July 19, 2019).

56. See Rosenstein Remarks, *supra* note 4.

57. *Historical Timeline*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/criminal/history/historical-timeline> (last visited July 19, 2019).

58. The SEC is not involved in criminal prosecution; it only has authority to investigate and charge civil violations. See FCPA GUIDE, *supra* note 13, at 4–5.

59. *Id.*

60. *Id.* at 4.

61. In addition to these enforcement options, the DOJ also engages in an Opinion Procedure. See Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80 (2018). This procedure allows corporations to submit an inquiry about future actions that they intend to take to see whether the DOJ finds that the action would conform with the current enforcement policy. See *id.* § 80.1.

62. Earle & Cava, *supra* note 19, at 569. Because the DOJ often settles FCPA cases, corporate prosecutions rarely go to trial. See Wilson, *supra* note 53, at 301 (explaining that the DOJ has broad discretion to decide what resolution vehicle to use in settlement).

63. Nonprosecution agreements (NPAs) and Deferred prosecution agreements (DPAs) “occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.” JM, *supra* note 2, at § 9-28.200.

64. DPAs and NPAs are contracts entered into between the DOJ and corporations that typically “dominate the DOJ's FCPA recent enforcement activitie[s]; the contracts constituted nearly eighty-six percent of the agency's enforcement work since 2010. Salbu, *supra* note 12, at 490. This is unsurprising because it allows the DOJ to be more ambitious and overcome some of the challenges of international criminal activity in a more efficient manner. See *id.* (suggesting that the DOJ can spend less time meeting the high standard of proof required to obtain a criminal conviction).

a plea agreement should not plea to a lesser charge; rather, they should generally require that corporations plead guilty to the most egregious and readily provable offense.⁶⁵ Under DPAs and NPAs, the government and a company enter into a negotiated agreement where the company stipulates to certain facts and legal conclusions regarding the alleged misconduct.⁶⁶ Pursuant to these agreements, the corporation agrees to remedy harm caused by the misconduct and implement compliance undertakings for a set term.⁶⁷ The main difference between a DPA and an NPA is that a DPA is filed with the court while an NPA is not.⁶⁸ When a company signs a DPA, criminal charges are usually filed against the company; if it then satisfies the terms of a DPA, the DOJ will dismiss the charges.⁶⁹ Because the majority of these violations do not go to trial, there is little judicial interpretation or oversight of the FCPA.

B. *The DOJ as a Rulemaking Agency*

The FCPA authorizes the Attorney General, after going through notice-and-comment procedures, to determine to what extent further clarification of the provisions of the statute would enhance statutory compliance and assist the business community.⁷⁰ To the extent necessary, the Attorney General may then issue guidelines that describe specific types of corporate conduct associated with common types of export sales arrangements and business contracts that conform with the FCPA.⁷¹ The Attorney General may also issue precautionary procedures for issuers and domestic concerns to use voluntarily to conform their conduct with the present enforcement

65. See JM, *supra* note 2, at § 9-27.400.

66. See Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 934 (2010); Mark, *supra* note 42, at 1626–27 (discussing the implications that these agreements have on judicial supervision and review).

67. See Koehler, *The Facade of FCPA Enforcement*, *supra* note 66, at 934 (noting that the typical duration of a DPA is two to four years).

68. *Id.*

69. See *id.* at 934–35 (stating that there is no judicial scrutiny of NPAs because they are not filed with the court). While DPAs and NPAs do not immediately implicate a corporation's guilt, they “preserv[e] the government’s ability to prosecute a recalcitrant corporation that materially breaches the agreement.” JM, *supra* note 2, at § 9-28.1100.

70. See, e.g., FCPA, 15 U.S.C. § 78dd-1(d)(1) (2012); Wilson, *supra* note 53, at 308–10 (critiquing the DOJ’s current guidance documents because they are not governed by the APA’s informal rulemaking procedures).

71. See 15 U.S.C. § 78dd-1. The DOJ underwent the mandated notice-and-comment period but declined to issue a guidance because the DOJ deemed it unnecessary. See Wilson, *supra* note 53, at 308–10 (stating that the lack of input by interested persons is the “fatal flaw” of the DOJ’s current guidance document effort).

policy regarding the FCPA.⁷² However, any such issuance must be in compliance with the APA, meaning the DOJ must follow either formal or informal procedures to implement a rule.⁷³

The DOJ may use one of two informal avenues provided in the APA to promulgate rules.⁷⁴ The DOJ can issue either substantive rules or interpretive rules; however, the distinction between the two is minor.⁷⁵ Substantive rules are issued pursuant to statutory authority and have the force and effect of law.⁷⁶ The DOJ must undergo the general notice-and-comment process for any substantive proposed rulemaking.⁷⁷ Interpretive rules, on the other hand, are statements that advise the public about how an agency interprets the statutes that it enforces and how the agency will exercise its discretionary power in implementing the statutes.⁷⁸ The DOJ may prom-

72. 15 U.S.C. § 78dd-1(d).

73. See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 553–559, 561–570a, 701–706 (2012); 15 U.S.C. § 78dd-1(d).

74. See 5 U.S.C. § 553. In addition to this informal rulemaking process, the APA provides for a formal rulemaking process. See *id.* §§ 553, 556, 557. Formal rulemaking procedures are more complex and are akin to a court proceeding. See Eduardo Jordao & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 16 (2014). Because agencies have discretion as to which rulemaking proceeding they utilize, they rarely use the formal procedure unless it is statutorily mandated. See *id.* at 17.

75. The distinctions between agency rulemaking is central to many debates and litigation. See, e.g., William Ortman, *The Yates Memo Versus Administrative Law*, 165 U. PA. L. REV. ONLINE 191, 196 (2017) (discussing how courts determine the category of rulemaking).

76. See generally DEP'T OF JUSTICE, ATT'Y GEN.'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 22 (1947). Substantive rules “purport[] to impose legally binding obligations or prohibitions on regulated parties” or “sets forth legally binding requirements for a private party to obtain a benefit.” *Nio v. U.S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 65 (D.D.C. 2017).

77. If a rule “supplements a statute, adopts a new [inconsistent position], or otherwise effects a substantive change in an existing law or policy,” then it must undergo the formal notice-and-comment process. See *Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 69 (D.D.C. 2017) (distinguishing between legislative and interpretive rules); see also Ortman, *supra* note 75, at 195–96./

78. Interpretive rules are non-binding and do not have the force and effect of law; they simply clarify an agency's interpretation of a pre-existing law. See Ronald M. Levin, *Rule-making and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266 (2018) (discussing policy statements that explain an agency's intended use of discretionary power are excepted from notice-and-comment). For example, the Enforcement Policy explains the DOJ's interpretation on FCPA enforcement. The key “feature of interpretive rules is that they are [used] by agencies to advise the public of [its] construction of the statutes and rules which it administers.” *Soundboard Ass'n*, 251 F. Supp. 3d at 69.

ulgate interpretive rules without undergoing the notice-and-comment process by issuing general statements of policy or rules of agency organization, procedure, or practice.⁷⁹ Typically, agencies promulgate these interpretive rules through the issuance of memoranda, guidelines, and opinion letters.⁸⁰

Although it is within the DOJ's power to articulate new rules, policies, and guidelines related to the laws that it may enforce, a recent memorandum released by former Attorney General Jeff Sessions made clear that the DOJ cannot circumvent required rulemaking processes by using guidance memoranda to create de facto regulations.⁸¹ The Sessions Memorandum prohibits the DOJ from issuing guidance documents that purport to be interpretive but in reality adopt new regulatory requirements or amend laws.⁸² Importantly, the Sessions Memorandum explicitly states that it is inapplicable to the DOJ's internal directives, memoranda, litigation positions, or advice provided by the Attorney General.⁸³ Associate Attorney General Rachel Brand reiterated the importance of following the proper notice-and-comment process for rulemaking by clarifying that guidance documents can only explain existing law and cannot change or impose new standards to determine compliance with the law.⁸⁴ The DOJ's rulemaking authority, particularly its use of informal interpretive rulemaking, is critical

79. See 5 U.S.C. § 553(b)(A) (2012).

80. The Holder Memorandum is one example of the DOJ using memoranda to issue an interpretive rule. Holder Memorandum, *supra* note 42; see also Ortman, *supra* note 75, at 192 (explaining that the DOJ's use of memoranda to announce enforcement policy is "nothing new"); Wilson, *supra* note 53, at 295 (discussing the DOJ's issuance of opinion letters to announce its interpretation of the FCPA).

81. Specifically, the Sessions Memorandum provides that guidance documents should not use mandatory language unless such language is citing to "statutes, regulations, or binding judicial precedent," and that each guidance document "should clearly identify" whatever statute it is explaining. Memorandum from Jeff Sessions, Att'y Gen. to All Components 2 (Nov. 16, 2017) [hereinafter Sessions Memorandum].

82. See *id.* at 1–2; see also Ortman, *supra* note 75, at 204 (explaining that boilerplate language will not prevent an agency's announcement from being a substantive rule if it contains otherwise mandatory language).

83. See Sessions Memorandum, *supra* note 81, at 2–3. This implies that the Sessions Memorandum is inapplicable to the JM and other DOJ policies. See David Chaiken, *DOJ Guidance Is Dead, Long Live DOJ Guidance*, LAW360 (Nov. 22, 2017, 10:43 AM), <https://www-law360-com.proxy.wcl.american.edu/articles/987760/doj-guidance-is-dead-long-live-doj-guidance?copied=1>.

84. See Memorandum from Rachel Brand, Assoc. Att'y Gen. to Heads of Civil Litig. Components U.S. Att'ys 1 (Jan. 25, 2018) [hereinafter Brand Memorandum]; see also Mark, *supra* note 42, at 1595–97. The primary difference between interpretive and substantive rulemaking "is whether the new rule effects a 'substantive' regulatory change to the statutory or regulatory regime." *Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 69 (D.D.C. 2017).

for it to make the changes necessary to clarify the Enforcement Policy.

C. *The DOJ's Past Actions: Attorney General Memoranda and the Evolution of Enforcement and Deterrence*

Since 1999, the DOJ has issued numerous guidance documents and policy memoranda regarding the criminal enforcement against corporations, although until the Pilot Program, none that directly related to the FCPA. Although it was not mandatory, the first memorandum, the Holder Memorandum, standardized the factors that the DOJ considered when making corporate charging decisions.⁸⁵ The Holder Memorandum advised prosecutors to treat corporations in the same manner as individuals and to closely follow the factors enunciated in the JM in addition to eight additional factors.⁸⁶ In 2003 a memorandum by former Deputy Attorney General Larry Thompson supplemented the Holder Memorandum.⁸⁷ The Thompson Memorandum reflected a more stringent approach to corporate enforcement.⁸⁸ Unlike the advisory Holder Memorandum, the Thompson Memorandum *required* prosecutors to follow outlined factors when making charging decisions and to scrutinize the authenticity of a corporation's cooperation.⁸⁹ The Thompson Memorandum reflected the belief that there was a strong need to increase corporate enforcement and also increased the emphasis on and scrutiny of the authenticity of a corporation's cooperation in making charging decisions. The requirement for prosecutors to consider certain factors, combined with the newly available alternate resolutions, many of which forced companies to make substantial concessions to prevent an indictment, furnished corporations with incentives to voluntarily

85. See Mark, *supra* note 42, at 1595–97.

86. See *id.* at 1597–98.

87. The revisions reiterated the factors addressed in the Holder Memorandum and added a ninth factor regarding the adequacy of the prosecution of an individual, placing an emphasis on the importance of pursuing individual charges against whomever was responsible for the corporation's violation. See *id.* at 1598–99.

88. See generally MARTIN WEINSTEIN ET AL., THE FOREIGN CORRUPT PRACTICES ACT: COMPLIANCE, INVESTIGATIONS, AND ENFORCEMENT § 1.03 (Law Journal Press ed., 2016). See also Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Departments Components and U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memorandum]; Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS L.J. 1, 14 (2006).

89. See Mark, *supra* note 42, at 1599. Some controversial factors included considering a waiver of the attorney-client privilege and the non-payment of attorneys' fees. See Thompson Memorandum, *supra* note 88, at 12–13.

disclose potential FCPA violations.⁹⁰

In the second revision to the DOJ's charging policy, Deputy Attorney General Paul McNulty issued a memorandum that expressly superseded and replaced prior memoranda.⁹¹ The DOJ issued the McNulty Memorandum in part to restrain prosecutorial discretion after a rise in the number of NPAs and DPAs entered into under the Thompson Memorandum.⁹² Although it largely drew from the Thompson Memorandum verbatim, the McNulty Memorandum provided updates regarding the cooperation and voluntary disclosure factors.⁹³ In 2008, former Deputy Attorney General Mark Filip issued a memorandum that further revised the Holder Memorandum.⁹⁴ The Filip Memorandum provided prosecutors with nine broad and context-based factors, commonly called the Filip Factors, to consider when making charging decisions.⁹⁵ The Filip Memorandum's most relevant revision shifted the focus when evaluating the sufficiency of cooperation to a corporation's willingness to disclose relevant facts and the sufficiency of such disclosure.⁹⁶

90. See Mark, *supra* note 42, at 1598, 1600. The Thompson Memorandum enabled prosecutors to resolve corporate violations through NPAs and DPAs. See Thompson Memorandum, *supra* note 88; see also Finder & McConnell, *supra* note 88, at 15–17.

91. See Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Department Components and U.S. Att'ys 2 (2006) [hereinafter McNulty Memorandum]; see also Mark, *supra* note 42, at 1600.

92. See WEINSTEIN ET AL., *supra* note 88, at § 1.03.

93. This section was renamed "The Value of Cooperation," and provided two substantive changes on when and how prosecutors can consider the waiver of attorney-client privilege and attorneys' fees in determining a corporation's the level of cooperation. See Mark, *supra* note 42, at 1600. Under the McNulty Memorandum, prosecutors were not supposed to consider a "company's refusal to waive the privilege as a factor in its charging calculus." See WEINSTEIN ET AL., *supra* note 88, at § 1.03.

94. See Mark, *supra* note 42, at 1601; Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Department Components and United States Attorneys (Aug. 28, 2008). The Filip Memorandum's revised principles were incorporated for the first time into the JM and became binding on all federal prosecutors. See WEINSTEIN ET AL., *supra* note 88, at § 1.03.

95. These revisions were in large part related to the DOJ's investigation and prosecution policies relating to business entity cooperation. See Mark, *supra* note 42, at 1601–02. Although these factors were essentially the same as those provided in the previous Attorney General memoranda, the broadness of the factors enumerated in the Filip Memorandum gave prosecutors wide discretion to make charging decisions. See *id.*

96. See *id.* Prior to the Filip Memorandum, prosecutors considered whether the corporation waived the attorney-client privilege to determine if it had sufficiently cooperated. See, e.g., McNulty Memorandum, *supra* note 91, at 8. The disclosure of relevant facts remains an important part of a prosecutor's calculus when evaluating potential criminal charges. See *infra* Part

In September 2015, Sally Yates emphasized the importance of pursuing individuals involved in violations to “combat corporate misconduct.”⁹⁷ The Yates Memorandum outlines six steps that enable the DOJ to pursue culpable individuals.⁹⁸ Importantly, under the Yates Memorandum, a corporation has to provide all relevant facts regarding the individuals involved in the corporate misconduct before the prosecutor would consider or provide any credit for cooperation.⁹⁹

The policy changes that were addressed in the aforementioned memoranda were incorporated in the Principles of Federal Prosecution of Business Organizations and are reflected in the JM.¹⁰⁰ In 2012, the DOJ and the SEC released the FCPA Guide, which summarized the FCPA and the factors considered by the DOJ and the SEC when determining charging decisions.¹⁰¹ The FCPA Guide includes examples, opinion letters, agency interpretations, and enforcement considerations in one location. Although the FCPA Guide contains no substantive changes to the DOJ or the SEC policies, it compiles all of the internal guidelines into a single document and provides hypotheticals to assist companies and attorneys to understand the prosecutorial decisionmaking process.

While the previous memoranda addressed criminal and civil charges against corporations and related individuals for violations of the law, they were not specific to the FCPA.¹⁰² In April 2016, former Assistant Attorney General Leslie Caldwell announced the DOJ Criminal Division’s new tem-

III.

97. The Yates Memorandum was issued in response to the backlash received after 2007 financial crisis. *See* Mark, *supra* note 42, at 1592. The DOJ was harshly and commonly criticized for failing to prosecute senior officers employed by financial institutions. *See id.* at 1591; *cf.* Yates Memorandum, *supra* note 18, at 1.

98. The Yates Memorandum articulated that individual accountability for FCPA violations is one of the most effective ways to combat corporate misconduct, deter future illegal activity, and incentivize a change in corporate behavior. *See id.* Although a focus on individual accountability could possibly distract from corporate responsibility, many of the steps in the Yates Memorandum assign corporations the responsibility to cooperate. *See id.* at 2–4 (requiring a great amount of disclosure on behalf of a corporation).

99. *See* Yates Memorandum, *supra* note 18, at 3.

100. This codification becomes critical in determining the scope of the DOJ’s rulemaking authority because the JM explicitly states that it only “provides internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” *See* JM, *supra* note 2, at § 1-1.200.

101. *See generally* FCPA GUIDE, *supra* note 13.

102. *See* Mark, *supra* note 42, at 1638.

porary Pilot Program.¹⁰³ The Pilot Program was designed to provide transparency and accountability.¹⁰⁴ The transparency was meant to motivate companies to disclose violations, to fully cooperate with investigations, and to remediate their compliance programs when needed.¹⁰⁵ The DOJ believed that the increased transparency in how prosecutors make charging decisions would encourage voluntary corporate self-disclosure of overseas bribery, and thus more prosecutions of the individuals responsible for those crimes.¹⁰⁶ The DOJ Fraud Section designed the Pilot Program to describe what prosecutors consider when evaluating corporate conduct,¹⁰⁷ as well as to outline what potential credits are available to corporations that meet those standards.¹⁰⁸ To continue the DOJ's desire to encourage coordination with corporations, the agency took steps to expand the Pilot Program.

III. THE ENFORCEMENT POLICY AND CRIMINAL CHARGES

In November 2017, the DOJ implemented the FCPA Corporate Enforcement Policy (Enforcement Policy). The Enforcement Policy is a more fully-developed version of the Pilot Program and is incorporated in the JM.¹⁰⁹ Much like the Pilot Program and previous DOJ memoranda, the Enforcement Policy is designed to guide prosecutors when making charging decisions and to “combat the perception that prosecutors act in an arbitrary manner” by providing greater clarity about the decisionmaking process.¹¹⁰

103. See Press Release, Leslie Caldwell, Assistant Att’y Gen., Criminal Division Launches New FCPA Pilot Program (April 5, 2016) [hereinafter Caldwell Release]; Memorandum from Andrew Weissman, Chief Fraud Section Crim. Div., U.S. Dep’t of Justice 1 (April 5, 2016) [hereinafter Pilot Program].

104. See Caldwell Release, *supra* note 103.

105. *Id.*

106. See Caldwell Release, *supra* note 103; see also Rosenstein Remarks, *supra* note 4, at 3–4 (stating that the Pilot Program’s purpose was to encourage good corporate behavior).

107. This was meant to provide transparency about the benefits of early voluntary self-disclosure and full cooperation. See Mark, *supra* note 42, at 1639–40.

108. The Pilot Program provided corporations with the potential for a full range of mitigation credit—up to a fifty percent fine reduction from the low end of the Sentencing Guidelines and generally no corporate monitor requirement—if a corporation voluntarily self-disclosed, fully cooperated, and remediated the violation. See Pilot Program, *supra* note 103, at 8. However, if the company fully cooperated and remediated, but did not voluntarily self-disclose, the Pilot Program only allowed limited mitigation credit, which is “markedly less than that afforded to companies that do self-disclose wrongdoing.” Caldwell Release, *supra* note 103.

109. See JM, *supra* note 2, at § 9-47.120.

110. See Rosenstein Remarks, *supra* note 4.

A. *The Enforcement Policy: Outline of the Incentives and Criteria*¹¹¹

The Enforcement Policy articulates the charging benefits that the DOJ is willing to provide to corporations if they meet the standards defined within the policy.¹¹² The Enforcement Policy enumerates what is required for the DOJ to issue a declination or recommend a sentencing credit by defining voluntary self-disclosure,¹¹³ full cooperation,¹¹⁴ and remediation.¹¹⁵ The En-

111. Notably, the DOJ amended the Enforcement Policy on March 12, 2019. See *US Department of Justice Revises FCPA Corporate Enforcement Policy to Encourage Adoption of Guidance and Controls Around WeChat, WhatsApp and Other Messaging Services*, BAKER MCKENZIE (Mar. 14, 2019), <https://www.bakermckenzie.com/en/insight/publications/2019/03/us-department-of-justice-revises>. Generally, these changes provide updates regarding the retention of electronic documents and communications, de-confliction, and Enforcement Policy's applicability to mergers and acquisitions. *Id.*; see also, JM, *supra* note 2, at §§ 9-47.120.3(b)-(c), 9-47.120.4.

112. See JM, *supra* note 2, at §§ 9-47.120.2, 9-47.120.3.

113. The Enforcement Policy primarily refers back to the definitions provided in the Sentencing Guidelines to define voluntary self-disclosure and states that to qualify the disclosure must: occur before an imminent threat of disclosure or government investigation; include all relevant facts known; and occur within a reasonably prompt time after the corporation is aware of the violation. See JM *supra* note 2, at § 9-47.120(3)(a) (citing Sentencing Guidelines, *supra* note 34, at § 8C2.5(g)(1)). The pressure to disclose early requires companies to make a decision prior to making a full investigation which could take weeks or months. See Olga Greenberg et al., *Considerations Before Self-Reporting Under New FCPA Policy*, LAW360 (Dec. 08, 2017, 12:00 PM), <https://us.eversheds-sutherland.com/portalsresource/Considerations-Before-Self-Reporting-Under-New-FCPA-Policy.pdf>.

114. The Enforcement Policy requires corporations to comply with the thresholds articulated in Principles of Federal Prosecution of Business Organizations and to take other additional steps in order to reach maximum credit. See JM, *supra* note 2, at § 9-47.120(3)(b). The Enforcement Policy goes into slightly more detail regarding the additional steps required; however, it is not an exclusive list of potential actions needed to qualify under the Enforcement Policy. See JM *supra* note 4, at § 9-47.120(3)(b); Greenberg et al., *supra* note 113. The additional steps include the timely and on-going disclosures of all relevant facts and documents, preservation of documents, witness interviews, de-confliction, and attorney-client privilege relating to cooperation. See JM, *supra* note 4, at § 9-47.120(3)(b). Further, once the threshold requirements provided for in JM § 9-28.700 are met, the DOJ then assesses the scope, quantity, quality, and timing of cooperation based on the specific circumstances when assessing how to evaluate a company's cooperation under the Enforcement Policy. See JM, *supra* note 2, at § 9-47.120(4).

115. When considering the timeliness and appropriateness of remediation, prosecutors consider whether a company has conducted a thorough analysis of what caused the underlying misconduct, remediated those causes, disciplined employees, retained business records, or taken other steps that demonstrate that the corporation accepts responsibility and recog-

forcement Policy rewards companies for certain behaviors once they become aware of the misconduct.¹¹⁶ Therefore, there is a rebuttable presumption that a company that violates the FCPA will receive a declination with disgorgement when it crosses the thresholds set out in the Enforcement Policy.¹¹⁷ This presumption, however, disappears when there is an aggravating circumstance involving the nature of the offender or the seriousness of the violation.¹¹⁸ If the DOJ goes forward with charges, the Enforcement Policy provides for credits in addition to those provided in the Sentencing Guidelines.¹¹⁹ Although the potential for declination or reduced fines seems appealing, the Enforcement Policy does not eliminate all other potential costs associated with disclosure.¹²⁰ These costs include collateral consequences such as disbarment, exposure to wider investigatory scope, shareholder suits, liability to foreign authorities, reputational harm, and potential impact on

nizes the seriousness of the misconduct. *See* JM, *supra* note 2, at § 9-47.120(3). Prosecutors also consider whether there is an effective compliance and ethics program. *Id.* (providing some guidance; however, the DOJ's Evaluation of Corporate Compliance Programs explains the factors more fully); *see* U.S. DEP'T OF JUSTICE, CRIM. DIV., FRAUD SECTION, Evaluation of Corporate Compliance Programs 16 (Feb. 8, 2017) [hereinafter Compliance Program Guide].

116. *See* JM, *supra* note 2, at § 9-47.120(1).

117. *Id.* This requires a company to voluntarily self-disclose the violation in a timely manner, fully cooperate, and appropriately remediate. While the Enforcement Policy might appear to provide companies with a free pass, even if a corporation is issued a declination, they are still required to pay "disgorgement, forfeiture, [or] restitution." Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 187.

118. The Enforcement Policy provides a non-exclusive list of potential aggravating circumstances including involvement of executive management, significant profit to the company, pervasiveness of the misconduct, and criminal recidivism. *See* JM, *supra* note 2, at § 9-47.120(1). Only first-time offenders may reap the benefits of the Enforcement Policy, which arguably may lead to less disclosure and cooperation. *See* Sharon Oded, *Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy*, 118 COLUM. L. REV. ONLINE 135, 139, 146-48 (2018).

119. Where all other factors are met, but there is an aggravating circumstance, the DOJ will recommend a fifty percent reduction from the low end of the Sentencing Guidelines fine range and generally will not require a monitor if there is an effective compliance program implemented. *See* JM, *supra* note 2, at § 9-47.120(1). The Enforcement Policy provides a more limited recommendation of up to only twenty-five percent reduction off of the low end of the Sentencing Guidelines fine range if a corporation did not initially voluntarily self-disclose, but later fully cooperated and timely and appropriately remediated. *Id.* at § 9-47.120(2).

120. *See* Justin C. Danilewitz & Albert F. Moran, *Happy Birthday, FCPA: Implications of DOJ's New FCPA Corporate Enforcement Policy on the Act's 40th Anniversary*, 42 CHAMPION 36, 42 (2018).

stocks.

The Enforcement Policy also does not explain how the DOJ evaluates and weighs the mitigating factors when a corporation's cooperation and remediation is not fully satisfactory.¹²¹ The Enforcement Policy, therefore, leaves unclear how prosecutors consider partial cooperation and remediation when making charging decisions.

B. *The Successes and Gaps of the Enforcement Policy*

Approximately fifty percent of corporate FCPA enforcement actions initiated each year are based on voluntary disclosures.¹²² However, the Enforcement Policy's standards for receiving potential declination or mitigation are insufficiently defined and, therefore, do nothing to spur increased voluntarily self-disclosure.¹²³

Despite the DOJ's continued statements that the Enforcement Policy provides transparency, the Enforcement Policy does not actually provide unambiguous guidance.¹²⁴ This ambiguity is in part because the DOJ (admittedly) must continue to provide prosecutors with discretion in their deci-

121. The Enforcement Policy does note that not all companies will satisfy full cooperation under the Enforcement Policy. See JM, *supra* note 2, at §§ 9-47.120(2), 9-47.120(3)(b). But generally, companies will still be eligible for some cooperation credit if they meet the JM § 9-28.700 criteria; however, depending on the extent of the deficiency, it will be "markedly less" than the credits available for full cooperation. See JM, *supra* note 2, at § 9-47-120(4).

122. Although the number of FCPA enforcement actions in 2017 was less than 2016's record breaking year of enforcement, there was still a sufficient number of FCPA enforcement actions. See Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 157–58 (providing statistics for the DOJ corporate enforcement actions and settlement amounts for the years 2012–2017).

123. See Rosenstein Remarks, *supra* note 4; John P. Cronan, Principal Deputy Assistant Att'y Gen. of Dep't of Justice Crim. Div., Remarks at the Latin Lawyer/Global Investigations Review Anti-Corruption and Investigations Conference (Oct. 18, 2018) (discussing the very positive results of the policy); cf. Kohli, *supra* note 11, at 1326 (speculating that the increased number of enforcement actions is in large part due to the prosecution's consideration of voluntary self-disclosure). Compare Mike Koehler, *The Origins of 2018 Corporate FCPA Enforcement Actions*, FCPA PROFESSOR (Jan. 4, 2019), <http://fcpaprofessor.com/origins-2018-corporate-fcpa-enforcement-actions/#more-26407> (providing statistics for enforcement actions in 2018), with Mike Koehler, *The Origins of 2016 Corporate FCPA Enforcement Actions*, FCPA PROFESSOR (Jan. 4, 2017), <http://fcpaprofessor.com/origins-2016-corporate-fcpa-enforcement-actions/> (providing statistics for enforcement actions in 2016).

124. See Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 187–90; see also Greenberg et al., *supra* note 113 (detailing the "noteworthy" aspects of the new policy); Mark, *supra* note 42, at 1659.

sionmaking process.¹²⁵ While discretion is necessary for prosecutors to consider the facts in any particular case, the vagueness in the guidance presents a challenge for corporations that want to understand how to fully appreciate the benefits which they may realize when evaluating whether the costs of voluntary disclosure outweigh the potential credits.¹²⁶

The Enforcement Policy provides definitions of what prosecutors consider sufficient voluntary self-disclosure, full cooperation, and remediation, but¹²⁷ each of these definitions contains additional terms.¹²⁸ These multi-layer terms create more impediments to understanding what is included within a prosecutor's calculation of deciding whether to go forward with criminal charges.¹²⁹ Additionally, the presumption of declination only ex-

125. Deputy Attorney General Rosenstein openly stated that the policy is not a guarantee and cannot eliminate all uncertainty because prosecutorial discretion is essential to ensure justice. *See* Rosenstein Remarks, *supra* note 4.

126. *See* Earle & Cava, *supra* note 19, at 584 (discussing the challenges practitioners have in clearly delineating all the benefits of voluntary disclosure). It is further noted that if even those directly involved may not have a full understanding as to why a declination was issued, then it must be nearly impossible for those not directly involved in a matter to realize why the agencies have decided not to pursue an enforcement action. *See id.* at 601.

127. *See* JM *supra* note 2, at § 9-47.120

128. The Enforcement Policy leaves open the definitions and thus provides "absolute, unreviewable discretion" for the following terms: "imminent threat of disclosure," "reasonably prompt time," "all relevant facts," "timely basis," "proactive cooperation," "timely preservation, collection, and disclosure of relevant documents and information," "deconfliction of witness interviews and other investigative steps," "demonstration of thorough analysis of causes of underlying conduct," "appropriate discipline of employees," "appropriate retention of business records," and "any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks." Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 187-88.

129. The Enforcement Policy provides the DOJ considerable freedom to assess threshold questions for credit eligibility even for companies that have voluntarily self-disclosed. *See* Kolodner et al., *DOJ Releases FCPA Corporate Enforcement Policy*, CLEARY GOTTlieb STEEN & HAMILTON LLP 3 (Dec. 1, 2017), <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/alert-memos/doj-releases-fcpa-corporate-enforcement-policy-12-1-17.pdf> (discussing that while the Enforcement Policy provides some transparency, it is unclear how DOJ will interpret certain terms in practice). Further, many law firms raised issues regarding document retention requirement relating to certain messaging platforms as well as the Enforcement Policy's applicability in the context of successor liability. *See, e.g.*, COVINGTON & BURLING LLP, *DOJ Announces Revised FCPA Corporate Enforcement Policy*, https://www.cov.com/-/media/files/corporate/publications/2017/12/doj_announces_revised_fcpa_corporate_enforcement

ists if there are no aggravating circumstances.¹³⁰ While the Enforcement Policy provides some examples about what aggravating circumstance warrant criminal resolution, the list is not exclusive and the DOJ does not explain how each circumstance is evaluated by prosecutors.¹³¹

The current Enforcement Policy does not address the weight of the factors.¹³² While the JM characterizes certain factors as “obviously primary”¹³³ and states they may carry more weight than others, it also makes clear that a single factor is not dispositive.¹³⁴ It is within the prosecutor’s discretion to balance the factors and consider the relevant policies when making charging decisions.¹³⁵ This means that the prosecutor can choose to prosecute a company to ensure justice even if a primary factor is sufficiently met.¹³⁶ This creates ambiguity about how the factors contribute when determining the proper level of credit.¹³⁷ Even if a company does not voluntarily disclose, there is still a possibility of prosecutorial leniency, but there is no apparent way to determine where on the spectrum the company’s behavior will land based on the language of the Enforcement Policy.¹³⁸

_policy.pdf (Dec. 13, 2017) [hereinafter Covington Announcement].

130. Aggravating circumstances that can prevent declination involve “seriousness of the offense or the nature of the offender.” See JM, *supra* note 2, at § 9-47.120(1).

131. The circumstances provided include: “involvement by executive management; a significant profit to the company from the misconduct; pervasiveness of the misconduct; and criminal recidivism.” See JM, *supra* note 2, at § 9-47.120(1). The Enforcement Policy does not explain who is considered executive management, what level of profit is considered significant, or what constitutes criminal recidivism. See Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 188–89 (questioning whether “criminal recidivism” refers explicitly to FCPA violations or if it includes violations of any criminal statute and if the form of resolution is relevant). See also F. Joseph Warin, et al., *2017 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP 17 (Jan 2, 2018), <https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-fcpa-update-1.pdf> (characterizing the Enforcement Policy as a “positive step forward” but noting that many questions remain unanswered).

132. See Earle & Cava, *supra* note 19, at 607–08.

133. See JM, *supra* note 2, at § 9-28.400(A).

134. *Id.* at § 9-28.720(a); see also Danilewitz & Moran, *supra* note 120, at 42 (“Of course, given the highly fact-specific nature of the analysis, and the important role that prosecutorial discretion must play, ‘all other things’ may well not always be equal.”).

135. See JM, *supra* note 2, at § 9-28.720(a).

136. *Id.*

137. This gap leaves the prosecutor with “extreme leverage and absolute, unreviewable discretion as to what the disgorgement/forfeiture/guidelines range amounts will be.” Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 189.

138. The final determination as to what level of credits will be recommended is “the product of and contingent upon several less than transparent discretionary calls made by the

When the DOJ makes a declination under the Enforcement Policy, it releases the declination letters on its website.¹³⁹ The Enforcement Policy provides that declinations awarded under the FCPA Corporate Enforcement Policy will be available to the public, but it does not provide any requirement as to what must be included in the document.¹⁴⁰ The declination letters which have been released to the public thus far¹⁴¹ give very little detail and resemble more of a recitation of the standard that is already provided for in the Enforcement Policy than a factual determination.¹⁴² The declination letters also fail to provide sufficient guidance.

IV. RECOMMENDATION

The DOJ must clarify its policy because corporations cannot ascertain whether they are qualified to receive the full benefits of voluntary self-disclosure provided under the current Enforcement Policy. For nearly twenty years, the DOJ has attempted to clarify its policy regarding enforcement and charging decisions for corporations through the issuance of policy memoranda, which have been incorporated into the JM.¹⁴³ Although these memoranda provide insight into how prosecutors interpret certain mitigating factors, the most recent guidance relating to the FCPA, the Enforcement Policy, still does not go far enough because the definitions are incomplete and the weight of mitigating factors is unestablished. Although the DOJ's most recent March 2019 amendment to the Enforcement Policy

DOJ.” *Id.*; see also Salbu, *supra* note 12, at 525 (reiterating that there is not an established set of standards for a company to adhere to that will guarantee prosecutorial leniency).

139. See U.S. DEP'T OF JUSTICE, DECLINATIONS, <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations> (last updated Feb. 15, 2019) (providing copies of declination letters).

140. See JM, *supra* note 2, at § 9-47.120(4).

141. To date, there have been thirteen declination letters published on the DOJ website, seven were issued pursuant to the Pilot Program and five under the Enforcement Policy. See generally U.S. DEP'T OF JUSTICE, DECLINATIONS, *supra* note 139 (providing access to copies of the thirteen published declination letters).

142. See Earle & Cava, *supra* note 19, at 569, 598, 602, 612–13 (noting that the boilerplate language does not enable the public or often even those involved in the misconduct to determine upon which facts the DOJ decided to decline to prosecute); see, e.g., Letter from Craig Carpenito, U.S. Att'y & Robert Zink, Acting Chief, Fraud Section, Crim. Div. U.S. Dep't of Justice, to Cognizant Technology Solutions Corp. (Feb. 13, 2019) (providing recitations of the standard such as “full and proactive cooperation . . . including its provision of all known relevant facts” as reasons for the declination).

143. See *supra* Part II; see also Joan Meyer, *The Evolving Calculus of Corporate Voluntary Disclosure in FCPA Cases*, 49 REV. SEC. & COMMODITIES REG. 149, 150, 154 (2016) (discussing the government's attempt to expand the benefits of voluntary disclosure).

provided some clarifications driven by the complaints from many practitioners, these too did not go far enough.¹⁴⁴

The DOJ has the authority to issue an interpretive rule without undergoing a full notice-and-comment period.¹⁴⁵ More specifically, the DOJ has the authority to promulgate rules and policies regarding the FCPA and its enforcement.¹⁴⁶ To address the definitional gaps that may prevent a corporation from voluntarily self-disclosing an FCPA violation, the DOJ should issue a memorandum that clearly articulates and defines the mitigating factors for corporations that disclose. The memorandum should also allow for anonymous declination letters with a more detailed factual explanation regarding the determination to issue a declination. In addition to being codified in the JM, these updates should be incorporated into a new version of the FCPA Guide which explains how prosecutors have weighed the mitigating factors during the decisionmaking process.¹⁴⁷

The DOJ should issue a memorandum that articulates a comprehensive enforcement policy that addresses the gaps in the Enforcement Policy. First, the new memorandum should provide definitions for the more discrete elements provided in the current Enforcement Policy's definitions of the mitigation factors. Specifically, the new policy should define: "executive management," "significant profit," and "criminal recidivism." This will enable corporations who have had either FCPA or other criminal enforcement actions, such as DPAs, NPAs, or settlement agreements, to better understand whether they are criminal recidivists for the purposes of the Enforcement Policy.¹⁴⁸ The current definitions of the factors implicate additional considerations that corporations must evaluate before determining if the presumption of declination is available,¹⁴⁹ and if not, what possible mitigation credits will be available.¹⁵⁰ The new memorandum must include definitions for what the DOJ considers: imminent, reasonably prompt,

144. Specifically, while the March 2019 Enforcement Policy provided some clarification regarding electronic messaging, de-confliction, and successor liability. It did not make changes to the definitions included in the Enforcement Policy. See JM, *supra* note 2.

145. See *supra* Part II (discussing the DOJ's rulemaking authority).

146. *Id.*

147. The current FCPA Guide is considered a "must read" for professionals addressing related issues to gain insight into the DOJ's current interpretation of the FCPA. See Paul E. McGreal, *Corporate Compliance Survey*, 73 BUS. LAW. 817, 819 (2018). Because the current FCPA Guide is regarded as having a wide scope and detailed compilation, it is a prime medium to convey the updated policies and procedures. See *id.*

148. See Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 188–90.

149. *Id.* at 187–89.

150. See JM, *supra* note 2, at § 9-47.120.3(c); see also Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 190.

timely, and proactive particularly in relation to when a company is aware of the offense. The policy must expand upon what are considered relevant facts, documents, and information that need to be disclosed and how those should be timely preserved and collected.¹⁵¹ Further, the new policy should better explain the types of discipline that are appropriate, the types of steps a company can take that will demonstrate their recognition of the seriousness of the misconduct, acceptance of responsibility, and the compliance measures needed to satisfy remediation.¹⁵²

Though the March 2019 Enforcement Policy provided some clarification regarding the retention of personal and other electronic messaging, in doing so, the DOJ created further uncertainty.¹⁵³ The March 2019 Enforcement Policy added an entire section regarding Mergers and Acquisitions,¹⁵⁴ but this section does not assist corporations that are analyzing the Enforcement Policy for their own violations, rather it addresses how to address FCPA violations of the recently acquired company. The provision of these expanded definitions will better enable corporations to make decisions regarding disclosures and how to behave during the investigation process.¹⁵⁵

The new memorandum should require the publicly released declination letters to be anonymous so that they can include more specific details regarding factual determinations made during the decisionmaking process.¹⁵⁶

151. See JM, *supra* note 2, at § 9-47.120.3(b); see also Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 187–88.

152. See JM, *supra* note 2, at § 9-47.120.3(c); see also Koehler, *Foreign Corrupt Practices Act*, *supra* note 15, at 187–88.

153. The DOJ needs to underscore what is considered “appropriate guidance and control,” in relation to these messaging systems. See JM, *supra* note 2, at § 9-47.120(3)(c); see also Covington Announcement, *supra* note 129.

154. See JM, *supra* note 2, at § 9-47.120.4.

155. See Meyer, *supra* note 143, at 150 (explaining that the DOJ’s evaluation of “the complicated and dynamic factors” makes the decision difficult); Michael DeAgro, Note, *The Foreign Corrupt Practices Act and Self-Disclosure in the Health and Life Sciences Industry: Is Honesty the Best Policy?*, 14 GEO. J.L. & PUB. POL’Y 309, 322 (2016) (explaining that the newfound clarity will enable companies to operate efficiently and make better informed decisions). These definitional gaps raise obvious concerns amongst the defense community, who will advise corporations in their decisionmaking process. Therefore, clarification will be beneficial through that manner. See Covington Announcement, *supra* note 129; Warin et al., *supra* note 131, at 16. Further, there is a recognized value to remove such uncertainty and it provides greater incentive to implement a compliance program that will properly address potential violations. See Salbu, *supra* note 12, at 523–24.

156. In regard to the public release of declination letters, the current Enforcement Policy states only that they will be posted publicly. See JM, *supra* note 2, at § 9-47.120(4). The

Specifically, these declination letters should provide more exact information regarding the number of interviews provided, type and quantity of documents provided, amount of misused funds, and timeframe within which disclosure was made.¹⁵⁷

The new memorandum should be incorporated into a revised FCPA Guide. As the FCPA Guide was issued five years ago and does not reflect the various changes in the DOJ's policies, the DOJ and the SEC must issue a revised guide.¹⁵⁸ Since releasing the FCPA Guide in 2012, the DOJ has issued the Yates Memorandum, the Pilot Program, and the Enforcement Policy, as well as further policy changes reflected in the JM.¹⁵⁹ Much like the 2012 FCPA Guide, the DOJ and SEC should compile a new guide which reflects all of the policies and factors considered when making charging decisions. Specifically, this memorandum should include language that better explains the weight of the factors.¹⁶⁰ Although the prosecutor must retain discretion and make decisions in the interest of justice, the current Enforcement Policy simply states that some factors are more important than others; however, in reality, the importance of those factors is irrelevant, which causes confusion amongst companies and their attorneys.¹⁶¹

anonymization is preferential because many companies would prefer to maintain privacy and avoid bad publicity. See Earle & Cava, *supra* note 19, at 602.

157. See Samuel W. Buell, *Secrecy: Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 856–57 (2018).

158. Cf. CHARLES DUROSS & KARA NOVACO BROCKMEYER, *40 Years Of FCPA: The Untold Story Of The Resource Guide*, LAW360 (Dec. 8, 2017, 3:55 PM), <https://www-law360-com.proxy.wcl.american.edu/articles/992781/40-years-of-fcpa-the-untold-story-of-the-resource-guide> (stating that the FCPA Guide has held up well, but in the future, the DOJ and SEC may update the guide after the United States is reviewed pursuant to the OECD Antibribery Convention of the United States in December 2019).

159. See Yates Memorandum, *supra* note 18; Pilot Program, *supra* note 103; JM, *supra* note 2, at §§ 1-12.000, 4-3.100, 9-47.120. Additionally, since its release the DOJ has also issued its Evaluation of Corporate Compliance Programs. See Compliance Program Guide, *supra* note 115; Policy on Coordination of Corporate Resolution Penalties, Memorandum from Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components, U.S. Att'ys, and DOJ Working Group on Corporate Enforcement & Accountability, (May 9, 2018).

160. The March 2019 Enforcement Policy seemingly complicates a corporation's evaluation of mitigation factors outside of the mergers and acquisitions context. The March 2019 Enforcement Policy states that an acquiring company that discloses misconduct may still receive a declination, even if an aggravating circumstance existed as to the acquired entity. See JM, *supra* note 2, at § 9-47.120.4. In the M&A context, this seems to minimize the weight an aggravating circumstance carries; however, it provides no clarity to its weight otherwise.

161. See Earle & Cava, *supra* note 19, at 607.

Finally, the policy should provide some details and guidance as to how prosecutors balance cooperation and remediation so that companies can better understand what the likely reductions will be if they self-disclose, thus creating more incentive to do so.¹⁶² Further, this new guideline should provide updated factual hypotheticals with explanations based on their recent declinations, NPAs, DPAs, and settlements.

Opponents may try to argue that by providing expanded definitions, weight considerations, and more detailed declination letters the DOJ is not engaging in an interpretive rulemaking, but rather is enacting a new substantive law which requires notice-and-comment.¹⁶³ One commentator has argued that the “fatal flaw of the DOJ’s guidance document effort is that it is not governed by the APA’s informal rulemaking procedure that requires the agency address the views of interested persons before issuing the guidance,” which was envisioned when Congress amended the FCPA in 1988.¹⁶⁴ While one might argue that changing the declination letters to be anonymous and more detailed or explaining the weight considerations is a substantive change which will bind prosecutors to a certain standard, that is not the case. This recommendation does not provide for the DOJ to issue a standardized weight to each factor that binds prosecutors and corporations to that matrix. This will simply clarify the internal policies that are already in place and outlined in the Enforcement Policy and JM, which does not create any enforceable rights by any party in any matter civil or criminal.¹⁶⁵

162. Both corporations and the government benefit from clear and predictable rewards. DeAgro, *supra* note 155, at 322. Giving corporations clear insight into the severity of their consequences for voluntarily disclosing, it is likely more good faith violators will come forward with the discovered misconduct. *Id.*; see also Salbu, *supra* note 12, at 523–24 (discussing the wide prosecutorial discretion to evaluate cases as they see fit and even ignore the Enforcement Policy credit principles).

163. See generally Ortman, *supra* note 75 (finding the Yates Memorandum to be legislative rulemaking). There the author found that the Yates Memorandum leverages these consequences to push companies to do something they are not otherwise required to do, voluntarily disclose misconduct. *Id.* at 207. Further, the author found that while the Department’s “stick” to compel compliance, the denial of cooperation credit, was something less than a formal legal sanction, but was practically coercive. *Id.* Finally, the author found that the Yates Memorandum was also binding on prosecutors as it set a restriction on their ability to utilize their discretion. *Id.*

164. See Wilson, *supra* note 53, at 308–10 (arguing that Congress intended for the DOJ to undergo notice-and-comment procedures to enact guidance documents).

165. See JM, *supra* note 2, at § 1-1.200. Further, when “an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends . . . that interpretive rule.” Soundboard Ass’n v. FTC, 251 F. Supp. 3d 55, 70, (D.D.C. 2017). Here, the initial Enforcement Policy is an interpre-

Other commentators suggested that the DOJ should make annual or bi-annual disclosures regarding declination decisions which would provide the number of FCPA declinations issued in the previous year, an anonymous list of the basic facts of the cases; and any major reasons for the actions taken.¹⁶⁶ The regular publication of the statistics and anonymous facts surrounding declinations is inefficient.¹⁶⁷ Although the commentators noted that because the JM “already requires the prosecution to collect ‘Records of Prosecutions Declined,’” and all this would require is someone anonymizing and shortening the report for public disclosure on a regular basis, this suggestion seems to forget the added costs associated with creating an annual or biannual publication.¹⁶⁸

CONCLUSION

Although the DOJ has provided some clarifications in its new FCPA Corporate Enforcement Policy, its decisionmaking process in regard to filing criminal charges and potential fines associated with such charges still lacks transparency. In order to best meet its goal of deterring and prosecuting violations of the FCPA, the DOJ should issue a memorandum that articulates a policy which clearly defines the mitigating factors and allows for anonymous declination letters which include a more detailed factual explanation regarding the determination to issue a declination. Additionally, this policy should be incorporated into a new version of the FCPA Resource Guide which explains how prosecutors have weighed the mitigating factors during the decisionmaking process.

tive document that clarifies how the DOJ intends to use its discretion to enforce the FCPA.

166. Earle & Cava, *supra* note 19, at 619.

167. The prosecution has limited time and financial resources. *See* Salbu, *supra* note 12, at 512; *cf.* DeAgro, *supra* note 155, at 320 (discussing the need for voluntary self-disclosure due to the DOJ’s limited resources).

168. One must consider whether the DOJ should spend its resources on additional salaries, statistical analysis, editing, and publications. Where the prosecution’s resources are used elsewhere, they will inevitably lead to cutbacks elsewhere. Lena E. Smith, Note, *Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery?*, 79 BROOK. L. REV. 1801, 1818 (2014).