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Changing Winds and Shifting Sands:

Enforcement, a Driver for Corporate Behavioural Transition Towards Compliance, Even in Cases of Voluntary Disclosure

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Abstract

Pursuant to the study of the geneses of voluntary disclosures of corruption by corporations under the Foreign Corrupt Practices Act (FCPA) of the United States of America, the author attempts to situate corporate behaviour within the theoretical framework of regulatory compliance. The germinal hypothesis was that the compliance programmes of disclosing corporations were not isomorphic, ritualistic, or stereotyped programs. Rather the compliance programs had unique and efficient capabilities, which capacitated voluntarily disclosing corporations to self-discover their transgressions of the FCPA and thus voluntarily disclose briberies. Although these compliance programs were not optimal, they had winning elements that enabled their corporations to avoid prosecution and get non-prosecution and deferred prosecution agreements. Initial thinking was that such self-disclosing corporations were essentially compliers, who respond to an external stimulus of agreements, thus acting on their intrinsic motivation. More precisely, ex-ante, the author premised that corporate voluntary disclosures stemmed from normative beliefs rather than utilitarian calculations. Per contra, ex post, in the first two years, the agreements resulting from voluntary disclosures were the products of, in the coinage of the author, particularistic deterrence. The disclosing corporations were investigated for some transgression. Thereafter, the elevated FCPA enforcement produced a general deterrent effect (changing winds), thereby inducing corporate behavioural transitions (shifting sands) towards compliance. The corporations making voluntary disclosures of bribery under the FCPA were responding to the stick and carrot policy of the regulators. Enforcement was maintained through ingenuous methods by the limber regulators, and similarly, the incentives were sanitized and augmented. This paper concludes by introducing the concept of agile compliance.

Key words: Agile compliance, behavioural transitions, corruption, deferred prosecution agreement, FCPA, general deterrence, non-prosecution agreements, panopticonic review, particularistic deterrence, voluntary disclosures

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1. Introduction

The Foreign Corrupt Practices Act of 1977 (FCPA) of the Unites States of America (USA) is the harbinger of modern anticorruption laws, targeting the supply side of corruption and proscribing business gains by corrupting foreign public officials. During the first two decades, the Act was nearly dormant because enforcement was non-existent. This lack of enforcement created corporate ambivalence regarding its legal requirements. During the early period of the FCPA, the United States Department of Justice (DOJ) instructed United States (US) attorneys to only pursue bribery investigations with "express approval from Washington" because it could potentially offend or embarrass officials in allied countries. The enforcement of the FCPA started gaining momentum from 2002 (Krever, 2007). After Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention (1997), the DOJ and Securities and Exchange Commission (SEC) started enforcing the FCPA. In 2003, they initialised the incentives of the deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) under the FCPA. The NPA and DPA under the FCPA are between the DOJ and/or SEC and corporations. Under the DPA and NPA, the government agrees to defer or to refrain from filing criminal charges against corporations, contingent upon the satisfactory remediation of the compliance programme of corporations after a set time period. Corporations that voluntarily disclose bribery cooperate with the regulators and/or undertake effective remediation are under the NPA and DPA (Resnick & Dougal, 2006). This paper indicates that the carrot and stick policy of the DOJ and SEC is crucial in displacing the inertia of corporate FCPA non-compliance.

2. Background and Purpose

Profit maximization and voluntary compliance behaviour of corporations are presumably inversely related. Anticorruption laws with extraterritorial jurisdictions may not engender voluntary compliance among profit-maximizing firms conducting business in highly corrupt countries. The author attempts to uncover the reasons that encouraged certain corporations for voluntarily disclosing their bribery misdemeanour to the DOJ. Therefore, the author has focused on the agreements relating to corporate voluntary disclosure. Did the corporations that voluntarily disclosed bribery under the FCPA act on a strong social and legal desire to

comply with the FCPA? Was the previous noncompliance caused by ignorance regarding FCPA violations? When this knowledge-gap was bridged with the aid of an efficacious component of their compliance programmes, did these corporations immediately comply with the FCPA? Did the FCPA enforcement result in the corporate voluntary disclosure1 of foreign bribery? The author aims to situate corporate voluntary disclosures of FCPA violations within the theoretical framework of compliance. The deterrent theory of Gary Becker and George Stigler (Stigler, 1974), intrinsic motivation theory propounded by Bruno Frey (Etienne, 2010), and combination models of cooperative enforcement by John Scholz (Scholz, 1997) and Margaret Levi (Levi, 1989) are examined as compliance theories.

The NPA and DPA are two alternate resolution vehicles under the FCPA. As suggested by their names, the NPA and DPA agreements are leniency agreements signed with the criminal division of FCPA administration, that is, the DOJ. The civil enforcement authority of the FCPA, that is, the SEC started signing DPAs and NPAs with corporations under the FCPA from 2010. The agreements interpolate between the two extremes of declination and prosecution. Moreover, they came under the FCPA from 2003 as a consequence of the fall of the Arthur Andersen firm. Although the firm was ultimately acquitted by the Supreme Court in 2005, the conviction of Arthur Anderson in 2002 caused considerable collateral damage, including a loss of billions of dollars of shareholder wealth and thousands of jobs. Consequently, in 2003, the DOJ updated its guidance on corporate prosecution by way of the 'Thompson Memorandum', which is named after the Deputy Attorney General Larry Thompson. The Thompson Memo instructs prosecutors to explicitly consider granting a corporation immunity, amnesty, or pre-trial diversion in exchange of cooperation when necessary to public interest, and other means of obtaining the desired cooperation are unavailable or ineffective. (Resnick & Dougal, 2006). The existence of NPAs and DPAs has remarkably increased in the foreign bribery area, from an average of 2.5 in 2003–2006 to 14.6 annually in 2007–2011 (Alexander & Cohen, 2015). According to the Principles of

[1] The terms voluntary disclosure and self-disclosure are used interchangeably, to denote that the corporations made disclosure of FCPA transgressions on their own, and that the DOJ did not detect the violations of the FCPA by these corporations. The term self-discovery denotes the period when the corporations first learnt of the FCPA transgressions within themselves.

Federal Prosecution of Business Organizations, these agreements have strong linkages with the voluntary disclosure of bribery, cooperation with the authorities, and remediation efforts from these corporations (U.S. Government Accountability Office, 2009). The penchant of prosecutors and corporations for these agreements as restitution for corruption is succinctly stated by the United Kingdom Solicitor General, who explained that the adoption of the DPA was to avoid lengthy and expensive prosecution that brings prolonged uncertainty for the victims, blameless employees, and others dependent on the fortunes of the company (Government Digital Service, 2012).

3. Literature Review

The author focuses on the motivation of corporates for the voluntary disclosure of FCPA violations, which allows them to negotiate these agreements with the DOJ. This aspect has not been studied in the literature on these agreements. These agreements are strongly criticized by those, who consider that these two alternate resolution vehicles undermine the deterrent effect of prosecutions. Matthew E. Fischbein regards the NPA and DPA as an overreach by prosecutors with less leverage over individuals than that over corporations. Corporations settle for the DPA and NPA because of risk aversion. Individuals are more likely to fight the version of facts provided by the government, and thus, prosecutors are unwilling to prosecute them (Fischbein, 2014). Mike Koehler argues against the widespread use of these agreements because they undermine effective prosecution. He dissuades other countries from adopting these strategies (Koehler, 2015). In a rebuttal, Barry and Richard argue that because of the globalization of corruption and limited resources of law enforcement agencies worldwide, the DPA and NPA are essential (Barry & Richard, 2012). Moreover, the Government Accountability Office report studied the number of NPAs and DPAs signed by various U.S. government offices to measure their effectiveness and to study the role of courts in the NPA and DPA process. The report indicates that these agreements were not tracked, and no impact analysis of these agreements is available, and courts are not involved in NPAs and are nominally involved in DPAs (U.S. Government Accountability Office, 2010). Cindy R. Alexander and Mark A. Cohen compared three types of agreements, including plea agreements in terms of their usage

the types of offences and offenders covered by them and difference in the outcome between the three (Alexander & Cohen, 2015). Peter Reilly examines the pros and cons of self-reporting by companies and concludes that in the absence of predictability and transparency in the DOJ and SEC decisions, several factors remain for a company to withhold the disclosure of wrongdoing (Reilly, 2015). Jeffrey R. Boles states that from 2016 recent SEC policy guidelines stipulate self-reporting as a prerequisite for the eligibility of the DPA and NPA (Boles, 2016). Krever examines the economic effect of the FCPA on U.S. businesses (Krever, 2007). In addition, the numerous government memorandums detailing guidelines for prosecutors and details of NPA and DPA are available online. Moreover, Phase 3 FCPA Audit Report published by OECD in 2010 examined the disposition of global bribery by using informal arrangements, including the NPAs and DPAs. OECD stated, “It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S. However, their actual deterrent effect has not been quantified, although the DOJ hears anecdotally from companies that their use has made FCPA compliance a high priority" (OECD 2010, p. 19). This paper aims to bridge this gap and understand motivations for the corporate voluntary disclosure of FCPA violations. Moreover, it attempts to comprehend whether the corporate discovery of FCPA violations was sudden and caused by some changes in their compliance program or were corporates always aware of the violations of the FCPA.

4. Research Methodology

A historical and desk research was conducted on all agreements from 2007 to 2017. Here, two filters were applied to the agreements, namely the agreements originating from voluntary disclosure and signed under the FCPA with the DOJ. The FCPA website of the DOJ was used as a primary data source (U.S. Department of Justice, 2007). The website included plea agreements and individual agreements. Therefore, this data were collated with other data sources, such as the Foreign Corrupt Practices Act Clearinghouse (FCPAC) developed by Stanford University (Stanford University, 2018), SEC website (U.S. SEC, 2018), and year-end lists of these agreements provided by the law firm of Gibson Dunn (Gibson Dunn, 2018a,b). In total, 46 agreements satisfying the aforementioned criteria were culled out. The agreements, particularly their Statement of Facts (SOF), were

perused for discerning the dates of self-discovery and voluntary disclosure of bribery as also the components of compliance programmes that enabled it. Concomitantly, primary data was collected by emailing enquiries to corporations and the DOJ. An enquiry was sent to the DOJ under the Freedom of Information Act on June 5, 2018. The DOJ extended the response time because the request represented unusual circumstances. The DOJ did not respond. Furthermore, only three corporations responded to the enquiries, and two refused. One of the corporations responded to a customised questionnaire with most answers expressing an inability of disclosing more information than that available in public domains. Because the SOFs were not replete with the information sought by the author, they were supplemented by studying the financial records of corporations. The author located and perused the Form 10K or Form 20F Annual Filings for all corporations, excluding four2. These annual filings were available on the website of corporations. The Electronic Data Gathering, Analysis, and Retrieval or EDGAR website of the SEC was used to obtain the financial filings (U.S. SEC, 2008).3 Full disclosures were observed in most cases and were considerably helpful in this study. A combination of descriptive and quantitative methods is used in the paper.

To determine the genesis of the voluntary disclosures of FCPA violations by corporations, each voluntary disclosure is examined in their corresponding year of disclosure. The author considered the year of voluntary disclosure, rather than that in which the NPA and DOA were signed, to situate the agreements within in the theoretical framework of regulatory compliance. The rationale was that the DPAs and NPAs were signed by the DOJ after the completion of investigations by the DOJ. These investigations require 2–3 years, depending on the scope of investigation and cooperation by corporations. Temporal placement allows the examination of corporate behavioural transitions in the context of enforcement and/or incentive sanitization and augmentation. Corporate behavioural transitions indicate a change in the corporate

2 A 20F Filing is by a foreign company whose less than 50% shares are traded on the US stock exchange. If more than 50% shares are traded on the US stock exchange it must file a 10K return like a domestic company

3 EDGAR means Electronic Data Gathering, Analysis and Retrieval System. It's a public electronic platform of the SEC through which all corporations are required to file their reports and returns. It can be accessed by the public free of cost.

behaviour from FCPA noncompliance to FCPA compliance. The details of each agreement demonstrate the changing concept of corporate profit maximization in the absence/presence of enforcement and incentives.

Among the 46 agreements, the dates of voluntary disclosure by corporations in 40 agreements were discerned using SOFs in the agreements or financial records of corporations, (i.e., 10K or 20F filings). Financial records of four corporations, namely Armor Holdings, Biznet, Lufthansa Technik, and the NORDAM Group Inc., were unavailable for the relevant periods because of mergers and acquisitions during the process of the disclosure or negotiations of agreements. One of the corporations disclosed violations; however, it was not provided either agreement by the DOJ on an account of late disclosure (over a year). Another corporation was inadvertently included in the dataset of the FCPA clearinghouse although it did not make voluntary disclosure.

5. Data Analysis and Findings

5.1 Particularistic and General Deterrence Effects

Kagan et al. used general deterrence to indicate when firms take compliance measures in response to 'general deterrence messages, such as news or perceptions of regulatory enforcement actions and penalties against other companies, particularly companies in the same industry.' (Kagan, et al., 2011, p. 4).

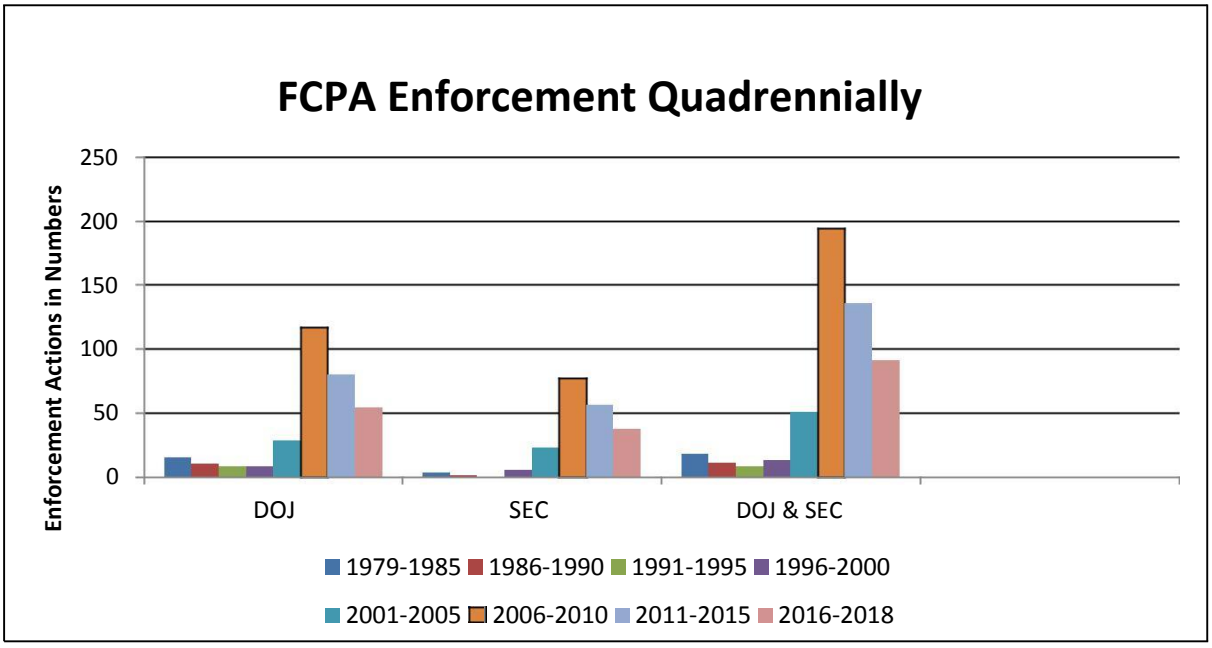
The paper indicates that pioneering agreements under the FCPA resulted from particularistic deterrence. The author coined the term particularistic deterrence to denote the investigations of any aspect of a corporation that prompts fear within the same corporations regarding the discovery of other irregularities. Corporations facing enforcement in their backyards undertook a panopticonic review of their compliance and made voluntary disclosures. Investigations in some aspects or geographical parts of their corporations made these corporations wary of being found to be FCPA non-compliant. From 2006, onwards, however, corporations made behavioural transitions without undergoing particularistic deterrence. The relation between this behavioural transition and externalities of enforcement and incentive

[4] Panopticon is a circular prison with the prisoners' cells arranged in a circle. This arrangement enabled observation of the prisoners from the guards' room. Panopticonic is used here by the author to mean a 360-degree compliance review.

augmentation provide a theoretical explanation for considering general deterrence as a primary factor in this period. The metaphor used in the title of this paper corresponds to the changing winds of enforcement shifting the sands of compliance, which is elaborated in the subsequent text.

5.2 Elevated FCPA Enforcement

The following chart demonstrates that the enforcement of the FCPA indicates a remarkable elevation from 2001. The primary milestones precedent of this elevation were the signing of the first multilateral convention, which targets corruption by members of the Organization of American States in 1996, and the coming into force of the OECD Anti-Bribery Convention in 1997 (Krever, 2007).



Source: Author

The increased enforcement with the enticement of the agreements should have engendered general deterrence.

Evidence regarding the ten corporations that made voluntary disclosures to the DOJ during the initial two years of 2004–2005 do not support this natural path. These corporations signed the agreements in response to particularistic deterrence, that is, when enforcement reached their backyard.

To elaborate, two of the three disclosures made in **2004** were derivatives of internal reviews conducted by corporations because of foreign investigations.

Alliance One International disclosed in their 10K filing that they were defendants in an antitrust class action litigation alleging that they rigged bids in tobacco auction markets

(essentially the same subject matter of the NPA). Moreover, they underwent an administrative investigation and were charged with subsequent fines by the European Union (EU) for tobacco buying and selling practices in some countries within the EU, including Spain and Italy. In May 2004, they voluntarily reported FCPA violations to the DOJ. Thereafter, they implemented remediation, such as adding new finance and internal audit staff and enhanced existing training programmes (Alliance One International, 2009).

Tyco International alerted the DOJ in 2004 when its two subsidiaries in Italy were charged by a public prosecutor in Milan regarding an investigation into alleged improper payments to certain Italian entities. Tyco International conducted a companywide baseline review of its policies, controls, and practices in compliance with the FCPA (Tyco International, 2011). Tyco admitted to the DOJ in paragraph 19 of the NPA that before 2004, it did not have a compliance programme.

The voluntary disclosure by the third corporation was the result of the SEC and DOJ alerting the corporation of an impending investigation. In their 10K filing, **Baker Hughes** reported that on March 29, 2002, they were warned that the SEC and the DOJ were conducting investigations into their alleged FCPA violations in Nigeria. The SEC had issued subpoenas seeking information regarding their operations in Angola (subpoena dated August 6, 2003) and Kazakhstan (subpoenas dated August 6, 2003 and April 22, 2005) as a part of its investigation. Apart from providing documents to the SEC, they conducted internal investigations, which identified concerns regarding the propriety of certain payments, apparent deficiencies in their books and records, and internal controls of their operations in Angola, Kazakhstan, and Nigeria (U.S. SEC, 2008, p. 78).

Among the seven voluntary disclosures by corporations in **2005**, four were adjuncts of the Volcker Committee Report by the Oil for Food Programme (OFFP) of United Nations (UN). These four corporations were **ABB-Jordan, York International, Akzo Nobel, and Textron.** On the basis of the Volcker Report, these companies conducted investigations of FCPA violations in their global operations and self-disclosed their findings to the DOJ. Textron reported 39 transactions in different countries involving bribery (paragraph 19 of the SOF of the NPA).

Pfizer Inc. and Willbros International Inc., made voluntary disclosures pursuant to foreign investigations. In its 10K filing, Pfizer disclosed that Pfizer Italia, a completely owned subsidiary in Italy, was notified that it was under criminal investigation by the office of Public Attorney in Bari, Italy, for gifts and payments, which were allegedly provided to certain doctors in the national healthcare system of Italy. (Pfizer Inc., 2005).

Willbros International Inc. disclosed in their 10K filing that in late December 2004, they learned that tax authorities in Bolivia charged their Bolivian subsidiary with failure to pay taxes, filing of improper tax returns, and falsification of tax documents. A preliminary investigation by the company indicated that the then President of Willbros International Inc. Mr. Tillery was aware of the circumstances responsible for these charges. Mr. Tillery resigned from the company on January 6, 2005. On January 18, 2005, the audit Committee of the company commenced an investigation into all activities that were previously under the control of Mr. Tillery. The investigation by the audit committee validated the allegations of the Bolivian tax authorities and identified payments conducted under the direction of Mr. Tillery in Bolivia, Nigeria, and Ecuador, which violated the FCPA (Willbros Group Inc., 2004).

The 10K filing of **AGA Medical,** which is the last case of voluntary disclosures in 2005, does not reveal significant information. The 10K filing stated that they initiated an investigation of improper payments. The primary conspirator was a co-owner of AGA Medical. The DPA at paragraph 5 of the SOF mentions that he was a co-owner of the corporation with an authority to set company policy, contract with distributors, hire and fire employees, set sales prices, and approve sales practices in foreign countries (Stanford University, 2008).

In summary, ten corporations made voluntary disclosures of bribery in 2004–2005. Four cases were adjuncts of the UN Independent Inquiry Committee report, whereas four other cases were adjuncts of foreign investigations. One case was an adjunct of an impending SEC and DOJ investigation alert. Only one corporate exhibited an inexplicable behavioural transition. These investigations were performed by countries that were signatories to the Inter-American Convention against Corruption, 1996 or OECD Anti-Bribery Convention, 1997. Italy conducted two foreign

investigations, had ratified the OECD Anti-Bribery Convention in 2000. Moreover, in 2000, it actualised the implementing legislation (OECD, 2000). The other two investigations that prompted corporations to enter into these agreements were conducted by Bolivia and Mongolia. In 2003, Mongolia endorsed the Istanbul Anti-Corruption Action Plan, within the OECD anti-bribery network for Eastern Europe (OECD, 2015). Bolivia signed the OAS Anti-Corruption Convention in 1996 and ratified it in 1997. (OAS, 1996). Therefore, inceptive agreements under the FCPA in 2004–2005 largely emanated from the globalization of the anti-corruption movement.

5.3 Shifting of Sands: Manifestation of General Deterrence (2006–2009)

A significant manifestation of a general deterrence effect started from 2006. An increase in the probability of detection increased the risk of conducting business through bribery. Industrial segment sweeps by the DOJ and SEC, foreign investigations, and newspaper reports of DOJ enforcement actions against corporations violating FCPA made several long-time transgressors of the FCPA complaint. In this phase, four corporations made voluntary disclosures of bribery pursuant to an enforcement action by the SEC or DOJ, and only one voluntary disclosure resulted from foreign investigation. All other seventeen corporate voluntary disclosures can be attributed to the effects of general deterrence.

UTStarcom initiated an internal investigation in December 2005, the U.S. Embassy in Mongolia informed the corporation that it forwarded allegations to the DOJ regarding a joint venture of UTStarcom Mongolia offering payments to a Mongolian government official in the possible violation of the FCPA. They authorised an independent investigation with their audit committee, which identified FCPA violations in Mongolia, Southeast Asia, India, and China (U.S. SEC, 2010).

The voluntary disclosure **of Johnson & Johnson DePuy** in 2007 was an offshoot of an SEC investigation. They were investigated by the SEC for bribery in Poland and the OFFP in in 2003 and 2005, respectively (Johnson & Johnson, 2005). Their corporate culture demonstrated a high tolerance for bribery until then. The DPA provides the long period of bribery from 1998 to 2005 involving senior executives, including President of DePuy. When any employees raised concerns regarding bribery, the Vice President of Marketing overruled the objections on the ground of losing market.

Pride International Inc. disclosed in its 10K filing for 2008 that the DOJ asked them to provide information regarding their relation with a freight and customs agent for importing their rigs into Nigeria. Pursuant to this, the corporation conducted an internal audit and investigation of their Latin American operations, from where they had received allegations of improper payments to foreign government officials. The investigation found evidence of FCPA violation in India also. They voluntarily disclosed the information found in the investigation and a compliance review to the DOJ and SEC (Pride International Inc., 2008, pp. 12,13).

In their 10K filing, **Aon Corporation** disclosed that after enquiries from regulators, they commenced an internal review of their compliance with the FCPA (Aon Corporation, 2008).

Louis Berger International (LBI) conducted an internal review in 2008. According to paragraph 4 of the DPA, after the government informed LBI of an investigation regarding a False Claims Act, it conducted an internal investigation, discovering potential FCPA violations, which they voluntarily reported to the DOJ (Louis Berger, 2015).

The manifestation of general deterrence effects through various methods was the most crucial development in this phase. General deterrence effects can be observed with the occurrence of inexplicable corporate behavioural transitions. The hitherto nonchalant corporate compliance programmes become FCPA compliant, seemingly overnight. **Faro Technologies** disclosed in its 10K filing that when it received information regarding bribery in 2006, it not only conducted an internal investigation but also made extensive changes to its compliance programme. It established an in-house internal audit function, including hiring a Director of Internal Audit. Moreover, it implemented a quarterly internal certification process to ensure adherence to the company policy and all applicable laws. It further implemented additional training on the FCPA for employees and a confidential compliance reporting system (Faro Technologies, 2006, p. 18).

Abrupt corporate behavioural transition was also exhibited by **Universal Corporation**. No audit of financial records of their subsidiaries was observed for 2000–2004 (Paragraph 71 of the NPA). However, the company investigated a bribery scheme when they received a tip on internal ethics complaint hotline in early 2006 (Universal Corporation, 2009).

General deterrence is observed when corporates understand from newspaper reports and start self-investigations because they operated through the same third parties, in the same countries, or were in same business lines. Tidewater Inc. and Noble Corporation showed general deterrence. In 2007, **Tidewater Marine** disclosed in their 10K filing that their audit committee commissioned an internal investigation in late February 2007 after management highlighted a settlement earlier that month of a well-publicised criminal FCPA proceedings involving Vetco Gray Controls, which is a Houston-based oil service company with substantial operations in Nigeria. The management and Audit Committee of Tidewater were concerned that the Nigerian affiliate of their company used the same third-party to process its temporary importation permits in Nigeria, which was significantly implicated in Vetco Gray proceedings in 2007. Because the company used the same third-party agent in other countries, where its vessels were deployed, the audit committee commissioned a special counsel to assess the FCPA compliance of the company in the selected countries, such as Angola, Azerbaijan, Egypt, Indonesia, and countries in West Africa (Tidewater Inc., 2007).

Noble disclosed in its 10K filing for 2009 that their audit committee commissioned an internal investigation after it was informed by management regarding a news release issued by another company. The news release disclosed that the other company was conducting an internal investigation into the FCPA implications of certain actions by a customs agent in Nigeria with respect to the temporary importation of their vessels into Nigeria. Noble's drilling units that conduct operations in Nigeria imported the vessels under temporary import permits, and management considered reviewing their own practices in this regard. By contrast, in July 2004, when after an audit committee indicated FCPA violation, the company continued their bribery scheme (Noble Corporation, 2009).

The general deterrence effect becomes apparent when corporates self-investigate after being alleged of FCPA violations, whereas they had previously demonstrated nonchalance on this problem. In its 20F filing for 2006, **ABB** disclosed that in response to the information provided by their employees during *2002 and 2003*, it conducted an internal investigation of potentially improper business conducts in their oil, gas, and petrochemical division. Improper payments were

uncovered in Africa, Central Asia, and South America and were disclosed to the DOJ (ABB Inc., 2007). ABB further disclosed in this document that on April 19, 2005, it discovered bribery made by employees of ABB network management, which was disclosed to DOJ and SEC. Upon this discovery, an internal inquiry was conducted, which led to the dismissal of two employees in *2004* (ABB Inc., 2007) (Italics added).

The general deterrence effect is discerned when corporates disclose bribery after prolonged years and spending large sums of money on bribery. **The** DPA of **Magyar Telekom** and NPA of its parent company **Deutsche Telekom** were made when an independent auditor discovered bribery during an audit of their annual financial report for 2005. This discovery was made after two years (2005 and 2006) of rampant bribery of Macedonian and Montenegrin officials (FCPA Clearinghouse, 2011). More than 12 million euros were spent on bribing through shell companies, indicating a high corporate tolerance of bribery in this period. The 20F annual filing by Deutsche Telekom indicated a high-level involvement of Magyar employees and their employees assigned to Magyar in bribery (Deutsche Telekom AG, 2009).

Abrupt and inexplicable behavioural transition was also witnessed in the case of **Westinghouse Air Brake Technologies**. In their 10K filing for 2007, it disclosed that they discovered bribery by a subsidiary during an internal compliance review (Westinghouse Air Brake Technologies, 2007). The bribery scheme was going on from 2001 to 2005.

The general deterrence effect is manifested when corporations seriously consider bribery allegations and commence FCPA investigations, whereas in earlier years, FCPA violations were generally neglected.

In **Avon**, the Gibson Dunn update (Gibson Dunn, 2015) mentions that a letter from a putative whistle-blower in 2008 prompted the Chief Executive Officer to start investigation and self-report. This behavioural transition was abrupt, and was in contrast with the corporate compliance behaviour in 2004–2008 when the corporate culture was tolerating and even encouraging bribery. The DPA categorically mentions that Avon did not have a dedicated compliance officer or compliance personnel. Although Avon operated in over 100 countries, including several countries with high corruption risks, Avon neither had a particular anticorruption policy nor did it provide stand-alone FCPA-related training.

In their 10K filing of 2008, **Helmerich & Payne** disclosed that during FCPA training in 2008, some questions were raised regarding previous payments, which prompted them to investigate FCPA violations (Helmerich & Payne, 2009). The bribery scheme had been going on since 2003.

In **RAE Systems**, the NPA indicates an evident complicity of most senior officers. The reports from the audit and senior level employees were neglected. An investigative committee was formed; however, it did not submit any report. The bribery scheme was present from 2004 to 2008. In 2008, the audit findings were abruptly considered. During fiscal year 2008, their internal audit department identified certain payments and gifts that may have violated the FCPA.

Following this discovery, the audit committee of their Board of Directors initiated an independent investigation (RAE Systems Inc., 2010).

In their 10K filing, **Maxwell Technologies** disclosed that an internal review conducted an inquiry into the nature of certain payments in China (Maxwell Technologies, 2009). This behaviour was in contrast with their previous behaviour. Paragraph 15 in the DPA mentions that Maxwell management in the U.S. discovered, tacitly approved, and concealed the bribery scheme. After the senior management of Maxwell in the US discovered these payments, an increase was observed in payments to the third-party agent, who was a conduit for bribing officials at Chinese state-owned entities. The bribery scheme existed from 2002 to 2009.

General deterrence is observed when a corporation is investigated for some concern but conducts an FCPA compliance review by own volition. LBI performed an internal review in 2008 as after a False Claims Act investigation by the government (Louis Berger, 2015). In this case, bribery was going on from 1998 with an active connivance of senior executives.

In its 10K filing of 2012**, Archer Daniels Midland Company** mentions that since August 2008, the company has been conducting internal reviews of its policies, procedures, and controls regarding the adequacy of its anti-corruption compliance programme and of certain transactions, which may have violated the FCPA and other U.S. and foreign laws (Archers-Daniels-Midland Company, 2012). The bribery scheme was used from 2002 to 2009, and no explanation was provided for sudden behavioural transition in the NPA or financial records.

In **Tyson Foods,** the bribery scheme was used from 1994 to

2006. Accountants and internal audits exposed the payments of salaries to ghost employees, who were wives of veterinarians. This exposure prompted a change in the form of bribes from payments of salaries to payments of honorarium to the veterinarians. However, in November, 2006, Tyson voluntarily investigated and reported these bribes to the DOJ.

The general deterrence effect is evident when corporates demonstrate sudden behavioural transitions when their principal place of business is changed. The NPA mentions that Paradigm BV self-discovered FCPA violations as due diligence before initial public offering. However, the SOF mentions that from July 1, 2005, the company became a domestic concern and thus was under the jurisdiction of the FCPA. It shifted its principal place of business from Israel to Houston, Texas. Its bribery scheme was used from 2003 to 2006 (U.S. Department of Justice, 2007).

The general deterrence effect is further observed when corporations try to camouflage bribery for years and abruptly disclose it. The bribery scheme in Comverse Technology was used from 2003 to 2006. Numerous indications, such as a single distributor receiving retainer-ship fees and reimbursement of his travel expenses, were neglected. Paragraphs 21 and 23 of the NPA mention an incident of an agent of Comverse, who was apprehended at an airport in Rome with a cash envelope, and senior managers strategized to hide his association with the corporation (Stanford University, 2011). Tenaris S.A. considered a tip by a customer and self-investigated, whereas in November 2007, they bribed an Uzbek agency to prevent an investigation regarding bribery. Paragraphs 7 and 8 of the DPA disclose the elaborate scheme of bribery discussed in emails among senior officers. The scheme involved studying rival bids and subsequently reducing and replacing its bids. The scheme was active from 2006 to 2008, and the Regional Sales Director for Caspian Sea Area was the senior-most person involved in the bribery (U.S. SEC, 2011).

5.4 Mens Rea or Amnesia?

The author originally hypothesised that when corporations became aware of FCPA violations through their compliance programmes, they promptly made voluntary disclosures of these violations to the DOJ acting on their social conscience. However, this research indicates the wilful ignorance of FCPA transgressions by corporations and not the lack of knowledge.

Faro Technologies admitted to the fear of FCPA enforcement. In April

8, 2004, an employee emailed other Faro China personnel that the paperwork concerning a particular order must be altered by changing the term "customer referral fee" to "referral fee" when describing a payment to a government employee. In the email, the employee explained that this deception was necessary because American executives of a particular U.S. telecommunications company were investigated for "bribing their customers and that he did not "***want to end up in jail***" (U.S. Department of Justice, 2008) (Emphasis added).

Universal Corporation voluntarily disclosed FCPA violation to the DOJ in 2006, although their bribery scheme ended in April 2005 when Thailand Tobacco Monopoly started using an electronic auction process to award orders. Nevertheless, the company investigated the bribery when they received a tip on their internal ethics complaint hotline in early 2006 (Paragraph 68 of the NPA).

In its 10K filing for 2008, Pride International disclosed that when the DOJ asked to provide information regarding a freight and customs agent in Nigeria, they conducted an internal audit and investigation of their Latin American operations. It received allegations of improper payments to foreign government officials, which were voluntarily disclosed to the DOJ and SEC (Pride International Inc., 2008). This behavioural transition was abrupt as opposed to their previous behaviour detailed in paragraphs 48– 53 of the DPA. In or around February 2005, a new Country Head sent a draft document through email to his Houston-based supervisor, which included information regarding kickback payments. The supervisor deleted all references to the bribes and provided the guised version of a draft actionplan to internal and external auditors of Pride International. He instructed the Country Manager to further use the guised version and delete prior copies of the draft action plan.

Similarly, Noble internally investigated FCPA violations after learning from a newspaper report of a similar internal investigation by another company. This behaviour is in direct contrast with their conduct in July 2004 when the audit indicated FCPA violations, and the company continued the bribery scheme.

The agreement of Avon mentions that in December 2006, Avon China bribed an official of a government newspaper to not publish an unfavourable article. Paragraphs 63 and 64 of the DPA detail that in October and November, 2005, an Avon internal auditor was sent to China to obtain information regarding FCPA violations; however, he was

instructed by headquarter executives to not create any electronic records or send any emails when gathering this information. Moreover, they instructed him to not use the term "FCPA" in any documents or emails. The internal auditor of Avon gathered the requested information, which documented the bribery scheme in handwritten format and provided it to Avon executives in China.

Executives at Avon China then hand-carried the handwritten papers to Avon headquarters in New York. The executives at Avon headquarters did not stop the conduct identified in the Draft Audit Report. Paragraph 68 of the DPA disclosed that in December 2006, internal auditors of Avon again observed that the bribery scheme continued and FCPA compliance language was not incorporated in consulting contracts. However, this conduct of bribery was not stopped. In January 2007, the compliance committee of Avon was reported that potential FCPA violations by Avon China executives and employees were "unsubstantiated" and thus disregarded. An abrupt behavioural transition is observed in 2008 when a letter from a putative whistle-blower prompted the Chief Executive Officer to start investigation and self-report bribery to the DOJ.

Abrupt corporate behavioural transitions detailed in the preceding paragraphs illustrate that compliance resulted from general deterrence, which was caused by FCPA enforcement. Judicial pronouncements acted as a sustaining fillip for enforcement. The Frederic Bourke case in 2009 was a significant judgement in the framework of enforcement maintenance. In this case, *mens rea* for the criminal prosecution of the FCPA included *a head in the sand* attitude. The significance of this case requires elaboration. The conviction of Bourke stemmed from his $8 million investment in a business partnership that sought the control of the State Oil Company of Azerbaijan Republic (SOCAR). Viktor Kozeny, who was the co-conspirator of Bourke, masterminded a scheme to bribe Azeri government officials to ensure the privatization of SOCAR, generating substantial windfall profits for Kozeny and his investment partners. Although Bourke was not accused of paying any bribes or directing others to pay bribes, he was charged with conspiring to violate the FCPA by investing and participating in a business partnership, which he knew or strongly believed to be engaged in a bribery scheme. Prosecutors summarised the case theory of the government to the jury by stating that Bourke knew that Kozeny was bribing Azeri officials or Bourke "had enough understanding to know that

something was occurring," and yet "kept his head-in-the-sand." This theory was upheld by the judge, who explained that "knowledge may be established if a person is aware of a high probability [that corrupt payments are being offered or made but consciously and intentionally avoided confirming that fact … because he wanted to be able to deny knowledge…" (Gibson Dunn, 2009, p. 9). The Bourke case established that almost any inkling of corrupt actions of a business partner may be sufficient to impose liability and that failure to investigate such indications is not a defence (Gibson Dunn, 2009, p. 10). In December 2011, the U.S. Court of Appeals for the Second Circuit upheld this decision, reaffirming the ability of the DOJ to successfully establish the knowledge of corruption through the circumstantial evidence of "conscious avoidance," which allows for similar cases to be brought in the future (US versus Bourke, 2011).

The incentive structure of the agreements was simultaneously sanitized in this phase through the Filip and Morford Memorandums. In 2008, the agreements experienced adverse media attention because of prosecutorial indiscretions. For example, a company agreed to endow an ethics chair to the alma mater of the prosecutor, and another prosecutor selected a former U.S. Attorney General as a monitor of the DPA, raising concerns regarding the selection process (Gibson Dunn, 2008). The DOJ addressed both indiscretions with alacrity. Restitution was proscribed to uninjured third parties through the Filip Memorandum. Moreover, the Filip Memorandum stated that cooperation credit to a corporation was not predicated upon the waiver of attorney client privilege or work-product protection. The Filip Memorandum further clarifies that only the discipline of employees deemed culpable by the company—not the prosecutor—would be considered in evaluating remedial measures of the company. In 2008, the Morford Memorandum standardised practices involving monitors. Any agreement requiring a monitor must be approved by the U.S. Attorney or DOJ Component Head. Prosecutorial discretion in selecting a monitor is replaced by a standing or ad hoc committee, and the Office of the Deputy Attorney General must approve all monitors. Monitors are prohibited from employment or affiliation, including representation with the corporation for one year from the date of the end of monitorship. The Morford Memo clarifies that the role of the monitor is to evaluate ongoing compliance and not investigate historical misconduct. In case of a difference

of opinion between the corporate and its monitor, the DOJ may be informed of this conduct and will consider it when evaluating the fulfilment of the obligations of the corporation under the agreement. Furthermore, the Morford Memo directs prosecutors to provide an extension or early termination of the monitor of the DPA should the circumstances so require (Gibson Dunn, 2008).

5.5 Elevated Domestic Enforcement of FCPA and Corporate Voluntary Disclosures of Bribery during 2010 to 2014:

Re-Emergence of Particularistic Enforcement

In this phase, the voluntary disclosures of FCPA violations by four corporations resulted from DOJ sweeps of the medical device industry and can represent the re-emergence of particularistic enforcement. The corporations that made voluntary disclosures to the DOJ did not have even the ritualistic compliance programmes until 2010.

Biomet and **Smith & Nephew** were alerted after the SEC and DOJ informed that they were conducting industrial sweeps regarding potential FCPA violations in the sale of medical devices in certain foreign countries by companies in the medical device industry. Biomet conducted an internal review related to these matters (Biomet Inc., 2011).

Smith & Nephew disclosed in its 20-F annual filing that the SEC and DOJ notified them of an informal investigation of companies, including them, in the medical device industry for potential FCPA violations regarding sale of products in certain foreign countries. The group then conducted a broader review on its initiative and disclosed the violation to the DOJ (Smith & Nephew, 2011).

A behavioural transition by **Orthofix** was observed pursuant to the industry sweeps by the DOJ. It conducted an internal management review of its subsidiary in Mexico (Orthofix International, 2010).

Bio-Rad Laboratories exhibited related behavioural transition, and their 10-K filing mentions an internal review of their FCPA compliance (Bio-Rad Laboratories, 2010).

5.6 Wilful Amnesia of FCPA by Corporations (2010–2014)

The aforementioned corporations were in the medical devices industry, and they were nonchalant of FCPA compliance until industrial sweeps. Paragraphs 30–33 of the NPA indicate that although Orthofix framed its anticorruption policy, it was neither translated into Spanish nor implemented at its subsidiaries.

Orthofix did not provide FCPA-related training to several of its personnel, including Orthofix executives. Moreover, it failed to provide FCPA-related training to the subsidiary personnel for years nor did it audit particular transactions or ensure to ensure that its subsidiary maintained controls sufficient to detect and deter illicit payments to government officials. In 2003, it is discovered that an executive of its subsidiary charged approximately $100, 000 in cash advances against his corporate credit card. Orthofix write-off the expenses although neither the subsidiary nor its executive couple provide its sufficient receipts. Until 2010, it did not implement any policy changes to prohibit such cash advances. From 2003 to 2010, the monthly reports of the subsidiary indicated that its expenditures regularly exceeded the budgeted amounts in several categories, including promotional expenses, travel expenses, and meetings for doctors. These categories were all high risk; however, they received no extra scrutiny. The subsidiary made bribe payments from these budgeted funds. Orthofix audits of its subsidiary comprised of standard audits mandated by a Mexican statute and were excluded from the audit scope, an anticorruption review. (Para34).

In their 2010 10-K filing, Bio-Rad Laboratories admitted to their lack of a comprehensive FCPA compliance policy and training programme, and other inadequate entity-level controls. The compliance programme was not widely disseminated or available in the local language. In their remediation, they stated that in the future, FCPA compliance will be a point of emphasis to be evaluated quarterly by their internal legal and audit groups, and a report on their FCPA compliance will be regularly provided to the audit committee (Bio-Rad Laboratories, 2010, pp. 6,76).

Paragraphs 21–33 of the DPA mention that the internal audit of Biomet indicated violations in 2003 and 2005–2008 in Argentina. However, only in August 2008, Biomet distributed new compliance guidelines, which emphasised on the FCPA and related concerns.

In Smith & Nephew, internal lawyers questioned commission payments in 1999; however, the Vice President of Marketing ensured that bribes continued. In 2008, this corporation suddenly stopped bribe payments. In Biomet and Smith & Nephew, bribes were used since 2003 and 1998, respectively.

5.7 General Deterrence in case of Four Other Corporations

FCPA violations were disclosed by two corporations after they were

investigated by the SEC for their financial statements regarding revenue booking and bill-and-hold sales. According to the DPA, **Diebold** discovered bribery during pre-acquisition due diligence in Russia. Therefore, it conducted a global internal review and identified certain transactions within Asia-Pacific operations over the past several years, which may be potentially transgressing the FCPA. The company then voluntarily reported its findings to the SEC and DOJ. However, in 2007, Diebold disclosed in their 10-K filing that it was informed about an informal inquiry conducted by the SEC regarding its revenue recognition policy (Diebold Inc., 2007, p. 17). Diebold expressed fear that SEC and DOJ investigations may find the evidence of FCPA transgression. It mentioned that because the SEC and DOJ investigations are ongoing, there can be no assurance that their review will not include any evidence of additional transactions, which potentially implicates the FCPA (Diebold Inc., 2012).

In in their 10-K filing of 2014, **General Cable** disclosed that they were investigated by the SEC for some inaccurate statements, such as revenue booking and bill-and-hold sales, thus requiring to issue financial restatements. In 2015, its 10-K filing reported that the corporation was investigating some commission payments in Angola. The bribery was performed since 2003 and discovered in four other countries apart from Angola during the investigation (General Cable Corporation, 2014).

In this phase, the general deterrence effect was observed in two corporations that exhibit abrupt behavioural transitions. In **Ralph Lauren Corporation** (RLC), the bribery scheme was used from 2004 to 2008 and involved complicity and connivance by the general manager himself. Paragraph 15 of the NPA mentions that RLC did not have a FCPA compliance programme in place nor provided any training on it since last 5 years. In February 2010, its Board of Directors adopted a new FCPA policy, which was thus disseminated in the local language through the intranet site of RLC. During spring or summer of 2010, RLC Argentina employees reviewed the FCPA policy and raised concerns regarding the customs broker of the company in Argentina. Thus, RLC conducted an internal investigation of the allegations and discovered that improper payments and gifts were provided to the customs officials and Argentine government officials, respectively (U.S. SEC, 2013). Within two weeks of uncovering the payments and gifts, RLC self-reported its preliminary findings to the SEC and DOJ (U.S. SEC, 2013).

Another corporation that voluntarily disclosed FCPA transgression in 2011 showed abrupt behavioural transition. **BK Medical ApS** ignored numerous indications of FPCA violations raised by the internal audit since May 2004 according to paragraph 13 of its NPA. In 2012, in their 10-K filing, Analogic Corporation, which is the parent company, disclosed that it identified certain transactions involving B-K Medical as FCPA noncompliant in the fiscal year 2011. This finding prompted an internal review and subsequent disclosure to the DOJ (Analogic Corporation, 2012).

The aforementioned disclosures by eight corporations may not be the complete representatives of this phase because more agreements may be under development. However, it is postulated that the aforementioned disclosures resulted from enforcement maintenance and incentive sanitization and augmentation by the DOJ.

In this phase, enforcement maintenance was affected by opening a direct line with whistle-blowers. The Dodd-Frank Wall Street Reform and Consumer Protection Act signed in 2010 externalised the hitherto internality of whistleblowing with regulators. This act has been effective from May 25, 2011, encouraging whistle- blowers to directly report misconduct to the regulators instead of internally reporting it to their employers. Whistle-blowers, who report misconduct externally to the regulators, are protected by the Dodd-Frank Act from retaliation. Although the informer may be a complicit person, he is eligible for monetary rewards of 10%-30% of any monetary sanction higher than $1 million collected in enforcement. Corporations are under constant threat of exposure of their bribery schemes because of this mechanism.

The DOJ and SEC launched another measure of enforcement maintenance through the Yates Memorandum, which was announced on September 9, 2015. In this memorandum, the DOJ stated that corporations will receive cooperation credit only if they provide "all relevant facts relating to the individuals responsible for corporate misconduct" (DOJ, 2015). This disincentivizes employees from devising bribery schemes for self-promotion. This system is analogous to good compliance practiced by banks in an anti-money laundering area, where bonuses are disbursed for fulfilling compliance requirements and not for garnering business for the banks.

In 2010, FCPA enforcement underwent another maintenance through the judiciary. The U.S court of Appeals for the Fifth Circuit held in *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010) that the OECD Anti-Bribery Convention does not bar multiple prosecutions for the same conduct in different nations

subject to the treaty. This declaration created the risk of prosecution in multiple countries for the corporations (Gibson Dunn, 2010).

Simultaneously, the DOJ and SEC embarked on another bout of incentive sanitization in 2010 by the requirement to clearly mention relevant considerations in each agreement. The relevant considerations part of the agreements described reasons for a particular corporation obtaining the agreement. This introduced transparency and standardization in the agreements and further provided a template for other corporations to emulate.

Incentives were further augmented in April 2016 when the DOJ initiated an "FCPA Pilot Programme". Under the pilot programme, a corporation that voluntarily disclosed FCPA-related misconduct, cooperated in ensuing investigation, and appropriately remediated the misconduct became eligible for a declination of criminal prosecution.

And even for some stated reasons, if no declination of prosecution was obtained, companies that self-disclosed became eligible for a reduction of up to 50% from the bottom of the fine range of applicable U.S. Sentencing Guidelines, whereas companies that did not self-disclose were provided maximum 25% discount. However, companies that engaged in misconduct resulting in financial gain were required to disgorge these gains (Gibson Dunn, 2017). In November 2017, the pilot programme was manifested into a policy. The new policy introduced a "presumption" of declination that was rebutted by "aggravating circumstances," which included recidivism (Gibson Dunn, 2018a). If because of any aggravating circumstances, the corporation was denied the declination, it will still yield the reductions in baseline fines in ensuing prosecution. Furthermore, the exception was an act of recidivism (Gibson Dunn, 2018b). In 2016, the DOJ signed five declinations under its pilot programme. These declinations included Johnson Controls, Nortek, Akamai Technologies, NCH Corporation, and HMT LLC. This measure of incentive augmentation will certainly result in more disclosures in the future.

5.8 FCPA Voluntary Disclosures Within Theoretical Framework of Regulatory Compliance

The Chart graphically illustrates the juxtaposition of abrupt behavioural transition between two peaks of enforcement, namely foreign and SEC/DOJ enforcement. This enforcement is a subset of the overall FCPA enforcement, which peaked at the same time. However, these enforcement actions were directly related to the corporations, which

then made voluntary disclosures of FCPA violations. Through this differentiation, the author delineates that in corruption, particularistic deterrence precedes general deterrence. The legal or regulatory license was effective in the corporations only when it reached their backyard. The corporations were not acting on a social conscience or normative values. They were profit-maximizing units responsible to their shareholders, and in cross-border business transactions, they faced the baffling burden of aligning their normative values with the country-level regulations of their incorporation and practices prevalent in the foreign country. ABB Inc. officials used the term *3 WT* or *Third World Tax* for bribes (Stanford University, 2010). The voluntary corporate disclosures of bribery were in contrast with tax studies, which have consistently indicated that self-reported compliance behaviour is generated from internalised guilt and social approbation, supporting the perspective of duty (Scholz, 2003). Bribery will be considered a victimless crime, until the citizenry of the bribed countries is aware of the nexus between bribery or corruption and loss of their human rights. In the absence of a victim, the FCPA cannot rely on victim enforcement or social corporate conscience. For example, people, who are burgled of their possessions, report the crimes because they anticipate a return of their possessions. Laws against shoplifting are primarily enforced by stores, which frequently use private police because the shopkeepers are immediate beneficiaries (Becker & Stigler, 1974). Therefore, expecting the voluntary compliance of anticorruption laws by corporations is unrealistic. All corporations were thus regulatory laggards, who were forced to comply when encountered by an immediate threat of regulatory enforcement. In 2004-2005, the pioneering corporations were induced to sign the agreements primarily by coercion. The deterrence or semi deterrence calculus of 2004-2005 has changed and metamorphosed corporations as Quasi-Voluntary Compliant or adaptive contractarian as termed by Margaret Levi or John Scholz, respectively (Scholz, 2003). The theory of Margaret Levi states that quasi-voluntary compliance comes from corporations that desire collective goods or lumpy goods5 (Levi, 1989). Lumpy goods are material inducements and include incentives and reciprocity practices apart from financial rewards (Levi, 1989). The FCPA substituted lumpy goods with the alternative resolution vehicles of the agreements. Moreover, the corporate metamorphosis was the result of the general deterrence effect

[5]. Public goods such as bridges, ports etc., which can only be made when taxpayers voluntarily pay taxes because they realize that they cannot individually make these goods and these goods, can only be made when they all pay their taxes and therefore the revenue production bargain is fair. (Levi, 1989)

generated by FCPA enforcement. A trust heuristic evolved on two premises. The first premise was that regulatory enforcement will expose recalcitrant corporations, and the second premise was that future compliers of the FCPA can be forgiven for previous violations through the agreements. These premises provide a cognitive basis for adaptive contractarians or quasi-voluntary compliers to pursue FCPA compliance (Scholz, 2003).

FCPA enforcement induced corporate behavioural transitions towards compliance. Compliance with the law was dependent on enforcement increasing the pain associated with getting caught to the point that it cancelled out the profits associated with breaking the FCPA. This is in consonance with the deterrence calculus models developed by Becker, Stigler, and Posner (Scholz, 1997). The sanctions in these agreements were heavy with the highest being 3500% of the bribe sum in the case of Noble and lowest being 424% of the bribe sum in Alliance One's case. Besides this the corporations had to pay disgorgement fines, conduct expensive investigations, incorporate changes in their corporate compliance changes and in some cases they had to engage external monitors all of which cast huge financial burdens on them.

However, the NPA/DPA were cost minimization devices for corporations as they did not face criminal indictment (if they complied with the terms of the agreement), avoided criminal conviction, associated collateral damages of a long-term fall in share prices (Wong & Conroy, 2009), class action law-suits and debarment from government contracting. In case of medical products manufacturers, there was the additional threat of excluding them from receiving Medicare payments for their products.

With coterminous use of coercion and incentives the DOJ could crowd in voluntary disclosure of FCPA violations and FCPA compliance. However, there had to be abiding enforcement, in other words, enforcement needs regular maintenance and incentives needed sanitization and augmentation for the general deterrence effect to endure. The DOJ did it in various ways. As set out in preceding paragraphs, in 2008, they addressed mistrust of agency discretion which could have become a major hurdle in the cooperative enforcement (Scholz, 1997). They did this through the issuance of the Filip and Morford Memorandums. Sanitization and augmentation of incentives was undertaken by the DOJ when in 2010 relevant considerations became essential part of the agreements and in 2016 when declinations and reduced fines were used to incentivise corporate voluntary disclosures of bribery.

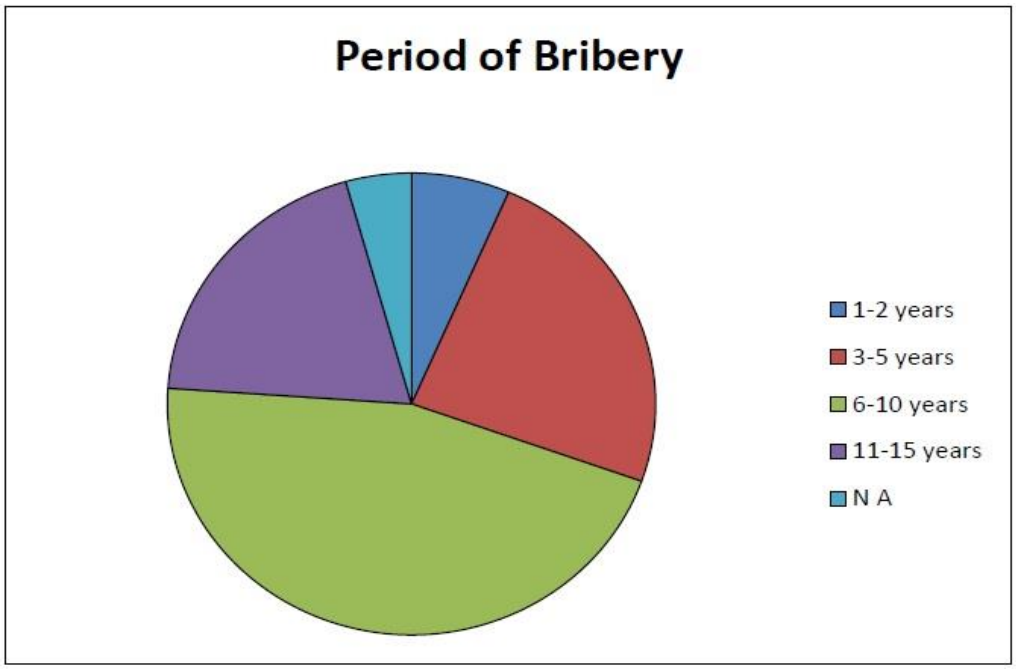
Parallel to incentive sanitization and augmentation, the DOJ undertook enforcement maintenance. Enforcement maintenance is not restricted to prosecutions and convictions but encompasses other methods of uncovering misconduct such as tips from foreign government investigation, from a competitor or business partner and whistle-blowers including industrywide investigation (sweeps). The year 2007 was remarkable when the DOJ launched such sweeps against rig exporters, medical devices manufacturer. Another technique was to work in tandem with each other and encompass FCPA aspects in whatever investigations were being done at the moment by either the SEC or the DOJ. In FCPA matters, enforcement was additionally aided by judicial pronouncements. On two occasions prosecutorial hand was vastly strengthened by the judiciary. The Frank Dodd Act and the Yates Memorandum are additional supplements for enforcement maintenance and it is expected that more and more voluntary disclosures of bribery will be forthcoming because of these. On December 20, 2017, FCPA prosecutors and regulators were handed still another tool in the fight against international corruption. An Executive Order titled, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," was passed under which the Treasury Department's Office of Foreign Assets Control ("OFAC") designated 52 persons and entities, thereby making it unlawful for U.S. persons to engage with them in business transactions of any kind. Notably, several of the listed individuals have been tied, directly or indirectly, to recent FCPA enforcement actions (Gibson Dunn, 2018b).

6. Partial Nullification of the Hypothesis:

Preponderance of the Deterrence Theory

Ex post, the hypothesis of the geneses of the corporations' voluntary disclosure of bribery being effectuated by the presence of a social license6 (Kagan, et al., 2011) and effective component/s in their compliance programmes has been partially nullified. On a simplistic level, the sustained lengths of time during which bribery went undetected, represented graphically below, undermines the hypothesis that altruistically motivated corporations voluntarily disclosed bribery.

[6] Social license denotes the extent to which corporations are expected to meet societal expectations by avoiding activities which societies deem unacceptable. Such activities may or may not be embodied in law. (Kagan et al., 2011)



The agreement-wise annual analysis in the preceding portion exposed the timing of the detection of bribery by the corporations to be attributable to either foreign investigations or investigations by the SEC and / or DOJ of some of the corporations and the general deterrence effect created by enforcement and enforcement maintenance by the DOJ. The incentive scheme of the agreements, which were sanitized and augmented dynamically, beckoned the corporations, as a safe harbour.

The alternate resolution vehicles/agreements of the FCPA involving voluntary disclosure validate the deterrence theory at the outset. The corporations which took the cost minimization vehicles of the agreements were those who were facing enforcement action in foreign territories. The probability of detection in the USA had gone high for them. Over time, however, corporations converted to adaptive contractarians of Scholz or the quasi-voluntary compliers of Margaret Levi. Both terminologies mean that corporations became FCPA compliant in return for certain assurances from the State. Both terminologies are premised on similar reasoning of the trust heuristic. The trust heuristic involves two levels. One is the corporations getting a fair deal or the lumpy goods. The other is a reassurance that other recalcitrant corporations will be caught and penalised. Both, therefore, envisage a changing and dynamic compliance environment. In the opinion of the author continued compliance would necessitate regular incentive sanitization and augmentation and enforcement maintenance. This is situated on the economic principle of more risk leading to more profits. More and more corporations getting

FCPA compliant would serve to increase the profits for the incorrigibly recalcitrant corporations. More effective FCPA enforcement would increase the profit taking for the noncompliant firms in another way. Many firms may find it unviable to continue business in highly corrupt countries. Although this was not the focus of the paper, in the study of financial documents the author found that three corporations had declared the closure of their operations in highly corrupt countries. These corporations were Biomet which shut its operations in Argentina and China, Louis Berger shut its Jakarta office and Universal stopped doing business in Thailand. A metric to study the continued violation of FCPA by the domestic corporations is the Transparency International's Bribe Payers Index. The index ranks the world's leading exporting countries according to the perceived propensity of their companies to bribe abroad. The 1999 index ranked the U.S. ninth out of nineteen countries (a lower ranking corresponds with higher levels of bribery). Three years later, the 2002 index put the U.S. thirteenth out of twenty-one countries. The 2006 index, which includes in its sample thirty countries, places the U.S. ninth, equal with Belgium (Krever, 2007). The 2008 index ranks USA ninth out of 22 countries and the latest 2011 index places USA on the tenth rank in 28 countries. The continued noncompliance necessitates enforcement maintenance alongside incentive sanitization and augmentation.

7. Partial Validation of Hypothesis

The primal hypothesis that effective compliance programme components enabled self-discovery and voluntary disclosure of FCPA wrongdoing by corporations, which in turn earned these self-disclosing corporations one of the agreements of the NPA/DPA, has been validated partially as indicated by certain facts mentioned below.

7.1 Comprehensibility and Accessibility of Compliance Programmes

FCPA compliance training should be in the local language and disseminated on the intranet is a lesson to be learnt from the cases of Ralph Lauren and Bio-Rad laboratories.

7.2 External Counsels

Another noteworthy feature common to almost all NPAs/DPAs studied is that 20 of the 44 NPAs and DPAs used external counsels for investigating the bribery schemes. Among these fourteen corporations got a NPA, regarded as a less harsh sanction than a DPA. This is endorsed in an October 2016 speech at Trace International's Global Anti-Bribery In-House Network conference in London by SEC FCPA

Chief Brockmeyer who stated that there are times when companies should not have management directing an internal investigation. She emphasised the importance of using external counsel, who report to outside directors and audit committees, when senior management is implicated. "The gold standard cooperation, the one that gets significant credit on our side, is where the counsel is not reporting to the company's management, but to outside directors" (Gibson Dunn, 2017).

7.3 Compliance Agility: Temporal

If there is one lesson that all the NPAs and DPAs studied here, teach is that corporations should act agilely. Corporations were regulatory laggards but at significant times they demonstrated compliance agility. The one corporation, SBM Offshore NV, that waited for one year to make a Self-Disclosure of FCPA violations, got no credit for it by the DOJ. DOJ's FCPA Unit Chief Daniel Kahn clarified this that timely disclosure does not require self reporting the moment wrongdoing is suspected–a company that self-reports within three months of discovering wrongdoing likely will obtain disclosure credit, while a company that waits a year likely will not qualify. Specifically, he explained, "to be timely, a company needs to bring things to our attention so we can do something about it. If they go around and interview everyone and alert wrongdoers that we're on to them," it is likely that the organization has missed the opportunity for the greatest cooperation credit" (Gibson Dunn, 2017). Deutsche Telekom, Magyar Telekom, Ralph Lauren and Avon Products, informed the DOJ immediately they commenced investigating and did not wait for the final investigation report to make voluntary disclosure. In the year 2005, when the Volcker Committee Report was released in the OFFP scam, four corporations acted with agility and used the Volcker Report as a basis and conducted investigations of FCPA violations in their global operations and self-disclosed their findings to the DOJ.

7.4 Compliance Agility: Spatial and Panopticonic

It is seen that agile compliers acted agilely in the temporal and also in the spatial and panopticonic dimensions. They self-disclosed with agility but equally they self-detected with agility. To borrow from the lyrics of Bob Dylan, these corporations did not, "… turn his head and pretend that he just doesn't see" but saw the "answer blowing in the wind." Among the forty corporations which made voluntary disclosure, from 2004 to 2014, five corporations reviewed their FCPA compliance when they were investigated by foreign authorities,

four when their names appeared for bribery in Iraq. Pfizer converted the Italian prosecutorial investigations into an internal FCPA review of its Croatian operations which were disclosed to the DOJ in October of 2004. Post disclosure Pfizer undertook a global investigation in 19 countries. At the time of disclosure to the SEC & DOJ, neither agency was aware of the allegations of improper payments or had any open investigation involving the overseas operations of Pfizer or any of its subsidiaries. Aon, Baker Hughes, Johnson & Johnson DePuy, Pride International, Bio-Rad Laboratories, Orthofix, Biomet and Smith & Nephew, took the SEC investigations into violations of the FCPA by them in one area of their global operations as a message to investigate violations in other countries of their operation. Louis Berger used the False Claims Act government investigation as a ground to conduct a review of its FCPA compliance. Diebold and General Cable Corporation were investigated by the SEC for wrong booking of revenue. They read the writing on the wall and did a full-fledged investigation into their FCPA compliance. The rest of the corporations which exhibited abrupt behavioural transitions demonstrated the same panopticonic agility. Few like Tidewater Marine, Noble learnt from examples of other corporations being convicted or setting their house in order. In others the behavioural transitions are apparently inexplicable. Despite that, the fact that these corporations did the changes enabled them to get the cost minimizing devices of the agreements. The biggest takeaway from the analysis of these agreements is that corporations have to be alert and agile to undertake all compliance reviews the minute they get a whiff of any enforcement either in their own or some else's backyard. In short corporations must exhibit agility in action by undertaking a panopticonic review of all compliances. The analogy to this will be when a spate of robberies in a neighbourhood prompts all households to undertake precautionary measures such as installation of security devices and holding neighbourhood vigils. Enforcement action in any aspect of operation, either in one's own or another's backyard should function as a consciousness-raiser for business managers to take a panopticonic review of all regulatory compliances.

7.5 Findings of Mendeloff and Gray Differentiated

Mendeloff and Gray (2005) in their study found that small and medium sized companies fined by the Occupational Safety and Health Administration (OSHA) responded by reducing workplace injury rates, as a pure legal deterrence model would predict - but that the greatest reductions entailed kinds of injuries that are not addressed by OSHA

regulations at all. They conclude that, although citing particular standards can reduce injury types specifically related to those hazards, inspections also affect a wider range of injuries, suggesting a broader impact on managerial attention to safety (Mendeloff & Gray, 2005, p. 219). This would suggest that heightened compliance is a natural corollary of any enforcement action. This does not appear valid in the FCPA cases. Tidewater Marine and Noble improved compliance by learning from the example of other corporations. Likewise, some other corporations also displayed abrupt behavioural transitions without themselves being subjected to enforcement action. In FCPA, the agile learners and actors were rewarded with the cost minimizing devices of the NPA/DPA. The other slow-acting, lethargic corporations had to deal with prosecutions and their numbers were large. During the period 2007 to 2017 the DOJ prosecuted 82 corporations under the FCPA.7

8. Unbounded Rationalists

The inference being that agile compliance practitioners are unbounded rationalists. Their rationality is not bounded by time, capacity, knowledge or information and this enables them to take decisions agilely in the corporation's best interests. The author distinguishes them from practitioners of bounded rationality. This bounded rationality perspective emphasises that busy managers do not have either the time, capability, knowledge, or information required to maximise corporate utility, but rather "satisfice" by choosing familiar alternatives that are good enough for the current situation. While managers cope with problems causing the most immediate concern, the level of risk in other areas can reach levels that a fully informed manager is able to avoid. This is the reason why safety increases after major accidents—because then management paid attention to problems which had been placed on the backburner due to paucity of time, knowledge or information (Scholz, 1997).

9. Agile Compliers

Practitioners of agile compliance made behavioural transitions in response to the changed enforcement behaviour. The agile corporate behavioural transitions were fashioned in tandem with the agile FCPA enforcement maintenance and the internationalization of the anticorruption environment. These practitioners had the necessary knowledge-generating systems or

[7] Figure is derived from the FCPA Clearinghouse by subtracting the total NPAs and DPAs involving voluntary disclosure from the total of 136 enforcement actions by the DOJ during the period.

learning mechanisms which alerted them to the increased likelihood of the government uncovering the FCPA misconduct through various means, such as a whistle-blower (especially after 2011), foreign government investigation, tip from a competitor or business partner, or industry-wide investigation (sweeps), and they took timely corrective steps. From the perspective of the discipline of economics, these practitioners of agile compliance did a cost benefit analysis in the changed enforcement environment and understood that compliance was the new calculus for corporate profit maximization. They understood that their probability of apprehension increased with each foreign investigation, segment sweep, and conviction of a corporate in the same business segment. In fact, the probability of detection rises after each apprehension because the enforcement agency is also learning the offender's habits (Stigler, 1974). For the practitioners of agile compliance, it therefore made sense to investigate FCPA compliance even when SEC initiated an informal investigation against them for financial misstatements.

10. Conclusion

The ostensibly altruistic agreements resulting from voluntary disclosures of bribery by the corporations were a function of stringent enforcement action. Particularistic deterrence predated general deterrence. Particularistic deterrence intimidated the pioneering ten corporations into the agreements. Over a two-year period, particularistic deterrence built up a general deterrence environment. This is seen through the abrupt and inexplicable corporate behavioural transitions. Periodically, waning compliance levels are recharged through enforcement maintenance implemented through various methods, like the Dodd-Frank Act, Yates Memo and judicial decisions clearly in favour of prosecution. The concomitant enforcement maintenance had a coercive and a reassuring function. The disclosing corporations knew that the enforcers had various methods of discerning noncompliance. Enforcement maintenance also reinforced the trust heuristic of the disclosing corporations that the other recalcitrant corporation would not be spared. The trust heuristic was strengthened by a dynamic system of incentive sanitization and augmentation. In summation, given the constant temptation of recidivism of non-compliant corporate behaviour and to crowd in FCPA compliance, both the enforcement and incentives had to be dynamically reinforced. From the perspective of corporates, only the agile corporate compliers would survive the agile FCPA enforcement and its maintenance. This applies generically to all compliance; per se. Compliance

officers should have the agility in their learning mechanism to comprehend the demise of a ritualistic adherence to the law by regulators and make the behavioural transitions resultantly.

Finally, the one question raised by the author is whether the agreements tend to favour the large corporations and are discriminatory towards the small and medium corporations. As agile compliance is undertaken in the temporal, spatial, and panopticonic arenas, it may favour geographically diffused corporations, given their very nature. It may be unattainable for small and medium sized enterprises. However, this can be an area of future study.

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