

# A REIMAGINED FOREIGN CORRUPT PRACTICES ACT: FROM DETERRENCE TO RESTORATION AND BEYOND

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## I. INTRODUCTION

In order for the Foreign Corrupt Practices Act (FCPA), an American anti-bribery statute enacted in 1977, to deter companies from engaging in corrupt practices abroad<sup>1</sup> and to reach its maximum potential of creating an anti-corruption environment worldwide, it will need to do more than just facilitate disengagement from corrupt practices. Instead, the FCPA should be implemented as a restorative justice measure. This would require companies to engage in long-term relationships and rectify the harms to the citizens of countries where they committed corrupt practices, instead of simply making lucrative payments to the United States (U.S.) government and instituting internal compliance monitoring. This reimagined structure centered on empowering the victims of corruption would facilitate corporate social responsibility, as well as provide additional benefits to strengthen cross-cultural relationships, attract social investors, and sow seeds to create fertile business relationships in the future.

Part II of this comment will begin by discussing the costs and effects of corruption in order to lay the foundation for understanding the essence and magnitude of what the FCPA works to deter. Part III of this comment will discuss the FCPA: its background, its current enforcement mechanisms, and its recent trends, which include an uptick in enforcement actions resulting in lucrative resolutions for the federal government.<sup>2</sup> This analysis of the FCPA will demonstrate that while the government has managed to deter corrupt practices by U.S. companies in foreign countries, the existing FCPA does little to hold companies responsible to the victims of corruption and fails to address issues detrimental to the long-term agenda of creating an anti-corruption environment worldwide. Part IV will discuss the tenets of restorative justice theory, how it applies to corporate actors, and why restorative justice is well-suited for achieving greater anti-corruption goals. Part V will discuss the goals of corporate social

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\*J.D. Candidate, Temple University James E. Beasley School of Law, 2017. To the team who made this comment possible and the current events that fuels me to continue to think and write critically about justice in the world: To my advisor, Professor Harwell Wells, thank you for your guidance; to the journal staff who tirelessly edited this comment, you are well appreciated; and to the loved ones, here and gone, thank you for sharing in the struggle and the success.

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1-3 (2012); ELVIRA N. LOREDO ET AL., RAND CORP., ANTI-CORRUPTION REGULATIONS IN EMERGING AND EXPEDITIONARY MARKETS: NEW MARKETS, NEW CHALLENGES 2 (2012), [http://www.rand.org/content/dam/rand/pubs/conf\\_proceedings/2012/RAND\\_CF304.pdf](http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2012/RAND_CF304.pdf).

2. See, e.g., Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act*, 49 U.C. DAVIS L.J. 497, 515 (2015).

responsibility (CSR), how CSR is measured, and how companies will be enabled to progress in the stages of CSR if the FCPA becomes a restorative measure. Part VI will consider the additional benefits of adopting a restorative justice framework, which include strengthening cross-cultural relationships, attracting social investors, and setting the stage for future business relationships. Part VII suggests a structure to implement the reimagined FCPA enforcement by utilizing portions of the lucrative resolutions to empower the victims of corruption through access to information, partnerships with like-minded organizations, and citizen oversight and organization.

## II. COSTS AND EFFECTS OF CORRUPTION

In the 1990s, scholarly literature emerged to elucidate the economic, political, and cultural consequences of corruption.<sup>3</sup> From an economic standpoint, “corruption damages economic growth, reduces both domestic and foreign investment, slows business development and encourages the growth of an informal economy.”<sup>4</sup> The political and cultural consequences of corruption stem from the fact that corruption undermines both the predictability of the rule of law and the public’s confidence in governmental institutions.<sup>5</sup> Additionally, “[c]orruption siphons public expenditures away from important social services such as health and education, reduces the productivity of public expenditures, and impedes governmental tax and tariff revenues.”<sup>6</sup> This abridged overview provides a broad-stroke picture of the costs of corruption, but even more enlightening for the purposes of this comment, the overview explains how a foreign company that engages in corrupt practices affects the citizens of a corrupt country.

A 2001 United Nations (U.N.) report entitled *Empowering the Victims of Corruption through Social Control Mechanisms* tracks the process of how the corrupt actions of a foreign company subject to FCPA enforcement have a trickle-down effect of crippling the citizenry of a corrupt country.<sup>7</sup> One can extrapolate from the report that there are specific effects of corporate corruption and the general costs of supporting and perpetuating a corrupt environment abroad. When a foreign company bribes a public official in order to gain a business advantage in a country, these corrupt actions allow the company to circumvent the infrastructure

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3. See Dan Danielsen & David Kennedy, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOC’Y FOUND. 17 (2011), <https://www.opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf> (describing the growth in information pertaining to corruption risks and subsequent prioritization of the issue).

4. *Id.*

5. *Id.* at 18.

6. *Id.* at 18.

7. See Petter Langseth & Edgardo Buscaglia, U.N. Office for Drug Control & Crime Prevention, *Global Programme Against Corruption: Empowering the Victims of Corruption through Social Control Mechanisms* 3 (Oct. 2001) [hereinafter *Global Programme Against Corruption*] (indicating that corruption leads to public resources being allocated inefficiently, a distrust of public officials, lower productivity, poor infrastructure, poor education, poorer health and lower standards of living).

in place to create a fair and competitive business environment.<sup>8</sup> Not only does such circumvention devalue and delegitimize the infrastructure, but it also erodes both the citizenry's confidence that the government will engage in fair treatment when evaluating its choice of business investments and the confidence of a national corporation or compliant foreign company vying for the same opportunity.<sup>9</sup>

In a 2009 Frontline World documentary, a number of experts spoke about the costs of corporate corruption.<sup>10</sup> Alexandra Wrage, the president of an anti-bribery non-profit organization called Trace International, asserted “[i]f a company pays a bribe to jump to the front of queue, to get bid documents, or real estate or whatever it is . . . they are paying to jump in front of somebody and they are paying government officials not to do their jobs or . . . to do their jobs in an inappropriate manner.”<sup>11</sup> In the same documentary, Paul Volcker, the former Federal Reserve Chair and head of the U.N. Oil-for-Food investigation, added that when “hidden payments and under the table envelopes being passed inhibit[] competition, it’s unfair competition. . . . When one side is bribing it’s a great temptation for the other competitor to bribe and it can tend to escalate.”<sup>12</sup> Thus, when a company under FCPA jurisdiction engages in corrupt practices abroad, it perpetuates the culture of corruption in the country, particularly in the business context.

The magnitude of corrupt practices by companies is eye-opening. According to Daniel Kaufman, a former Director of Global Governance at the World Bank Institute, private sector bribery of public sector actors amounted to about \$1 trillion annually in corrupt payments.<sup>13</sup> A study by Transparency International found that bribes paid to politicians and officials, specifically in developing countries, cost \$20 billion to \$40 billion annually.<sup>14</sup> To put this into perspective, this amount is equivalent to 40% of funds that are allocated for official development assistance.<sup>15</sup>

Corrupt practices by companies on an international scale also have a role in enabling corrupt practices on a local scale by perpetuating a culture of corruption generally. According to the 2001 Global Programme Against Corruption report, in a country where a culture of corruption is prevalent, “[p]ublic resources are allocated inefficiently, competent and honest citizens feel frustrated and the general population’s level of distrust rises. As a consequence, productivity is lower, administrative efficiency is reduced and the legitimacy of political and

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8. *Id.* at 2.

9. *Id.*

10. See *Spotlight: The Victims of Corruption*, FRONTLINE WORLD (Feb. 24, 2009), <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/spotlight-the-victims-of-corruption.html> (describing the juxtaposition of wealthy corrupt governments and deeply impoverished citizens).

11. *Id.*

12. *Id.*

13. Danielsen & Kennedy, *supra* note 3, at 18.

14. See *id.* at 19 (citing *Global Corruption Barometer 2010*, TRANSPARENCY INT’L 13 (2010), [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2010](http://www.transparency.org/policy_research/surveys_indices/gcb/2010)) (detailing annual amount of money paid in bribes to public officials in developing countries).

15. *Id.*

economic order is undermined.”<sup>16</sup> This truncated productivity and lack of legitimacy creates an environment that is ripe for allowing “[f]unds intended for aid and investment [to] instead flow quickly back to the accounts of corrupt officials, which tend to be in banks in stable and developed countries, beyond the reach of official seizure and the random effects of the economic chaos generated by corruption at home.”<sup>17</sup> This system then creates “poor infrastructure, education, health and other services and a general tendency to create or perpetuate low standards of living.”<sup>18</sup> As an example, in the 2009 Frontline documentary, University of California, Berkley Professor Michael Watts, an expert on Nigeria, asserted that due to corruption within the country “all of [the] public sector infrastructure: roads, electrification, the provision of water, primary schools, is utterly bankrupt.”<sup>19</sup>

It is important to note that the citizens of corrupt countries feel the ultimate costs of living under corrupt governments reflected in their day-to-day existence, especially regarding access to public government services.<sup>20</sup> The 2001 Global Programme Against Corruption report states that “[f]or poor people at the village level, petty corruption involving a payment of as little as \$10 for a free medical service can have devastating effects on their lives.”<sup>21</sup> Other examples include the fact that “applicants for driver’s licenses, building permits and other routine documents have learned to expect a ‘surcharge’ from civil servants.”<sup>22</sup> Additionally, “bribes are paid to win public contracts, to purchase political influence, to side-step safety inspections, to bypass bureaucratic red tape and to ensure that criminal activities are protected from interference by police and other criminal justice officials.”<sup>23</sup> Understanding the magnitude and details of the costs and effects of corruption generally place into perspective the important role of the FCPA.

### III. THE FCPA: FROM THE BEGINNING TO DATE

#### A. Background

Congress passed the FCPA in 1977 in response to concerns that companies under its jurisdiction were bribing officials in foreign countries in order to secure business deals abroad.<sup>24</sup> These corrupt practices were revealed following investigations into illegal corporate contributions to the Nixon campaign in light of

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16. *Global Programme Against Corruption*, *supra* note 7, at 3.

17. *Id.*

18. *Id.*

19. *Spotlight: The Victims of Corruption*, *supra* note 10.

20. *See Global Programme Against Corruption*, *supra* note 7, at 1 (describing those that live under corrupt conditions lack access to public services).

21. *Id.*

22. *Id.* at 2.

23. *Id.*

24. LOREDO ET AL., *supra* note 1, at 2.

the Watergate scandal.<sup>25</sup> During these investigations, the Securities and Exchange Commission (SEC) also discovered corporate slush funds, which were used to make large-scale bribes to foreign officials.<sup>26</sup> To determine the extent of these corrupt practices, the SEC hinted that it would likely provide immunity to companies who came forward to disclose information about illegal payments, and over 300 companies took advantage of this opportunity.<sup>27</sup> Congress passed the FCPA because there was no legislation that specifically prosecuted bribery of foreign public officials.<sup>28</sup> In pertinent part, the FCPA states that it was enacted for:

the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.<sup>29</sup>

In 1988, Congress amended the FCPA to state that to face criminal liability, an individual or company must have bribed foreign officials “knowingly” and with “corrupt intent” to gain an unfair business advantage.<sup>30</sup> The FCPA contains both anti-bribery and accounting provisions that prohibit bribery of foreign officials and the failure to maintain internal accounting controls, which identify these illegal payments.<sup>31</sup> The reach of the FCPA extends “to all issuers listing with the SEC, to domestic concerns, regardless of where the violation takes place, and to foreign persons and companies whose activities have a link to or impact upon the American economy. . . .”<sup>32</sup> Specifically, this means that the FCPA can be enforced

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25. See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 187 (1994) (describing FCPA as ensuing from Watergate conspiracy and illegal use of corporate funds).

26. *Id.*

27. *Id.*; see also Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 934 (2012) (highlighting examples of companies and countries where corrupt practices took place including Gulf Oil in South Korea, Northop in Saudi Arabia, Exxon and Mobil Oil in Italy, and Lockheed in Japan).

28. Pines, *supra* note 25, at 187–88.

29. *Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (updated July 20, 2016).

30. *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78dd-1–3 (2016); H.R. REP. NO. 100-418, at 920 (1988) (Conf. Rep.), as reprinted in 1988 U.S.C.C.A.N. 1547, 1951.

31. CRIMINAL DIV., U.S. DEP’T JUSTICE & ENF’T DIV., U.S. SEC. EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

32. Daniels & Kennedy, *supra* note 3, at 23.

against all U.S. companies and their foreign subsidiaries anywhere in the world as well as against all foreign companies that have U.S. subsidiaries or do business in the U.S.<sup>33</sup> The FCPA can also be enforced against any company that transacts through the U.S. banking system.<sup>34</sup> Some of the biggest settlements under the FCPA include foreign companies such as “Siemens, the German engineering giant; Daimler, the maker of Mercedes-Benz vehicles; Alcatel-Lucent, the French Telecommunications company; and the JGC Corporation, a Japanese consulting company.”<sup>35</sup> See Figure A for a breakdown of the top ten corporate FCPA resolutions, including the home country of each company.<sup>36</sup>

**FIGURE A.**

**The new Corporate FCPA Top 10 Actions List now reads as follows:**

No.	Company	Total Resolution	Home Country	Year
1	Siemens AG	\$800,000,000	Germany	2008
2	Alstom S.A.	\$772,290,000	France	2014
3	KBR/Halliburton	\$579,000,000	U.S.	2009
4	Och-Ziff	\$412,000,000	U.S.	2016
5	Total S.A.	\$398,200,000	France	2013
6	VimpelCom	\$397,500,000	Netherlands	2016
7	Alcoa	\$384,000,000	US	2014
8	Snamprogetti/ENI	\$365,000,000	Britain	2010
9	Technip S.A.	\$338,000,000	France	2010
10	JGC Corp.	\$218,800,000	Japan	2011

The SEC and the Department for Justice (DOJ) have enforcement authority

33. THOMAS R. FOX, FCPA ENFORCEMENT: WHAT DOES IT MEAN FOR NON-US COMPANIES?, LEXISNEXIS 3 (2012, rev. 2014), <https://www.lexisnexis.com/risk/intl/en/resources/whitepaper/FCPA-Enforcement.pdf>.

34. *Id.*

35. *Id.* (citing Leslie Wayne, *Foreign Firms Most Affected by U.S. Law Barring Bribes*, N.Y. TIMES (Sept. 4, 2012), at B1).

36. This table has been modified from its original source and includes the home country of each company. See Mike Koehler, *FCPA 101*, FCPA PROFESSOR, <http://www.fcprofessor.com/fcpa-101> (follow Q. How are FCPA fines, penalties, and sentences calculated? dropdown) (last visited Oct. 7, 2016) (providing a table of the some of the top FCPA settlements); see also FOX, *supra* note 33, at 3 (providing a similar table of the highest FCPA settlements from 2008 to 2011).

under the FCPA.<sup>37</sup> Only the DOJ has the authority to pursue criminal actions, but both the DOJ and the SEC have civil enforcement authority.<sup>38</sup> The DOJ may pursue civil actions for anti-bribery violations, while the SEC may pursue civil actions for both anti-bribery and accounting violations.<sup>39</sup>

### ***B. Penalties and Resolutions under the FCPA***

The FCPA provides for different criminal and civil penalties against violating companies.<sup>40</sup> Regarding criminal penalties, companies are subject to up to a \$2 million fine for each anti-bribery violation<sup>41</sup> and up to a \$25 million fine for each accounting violation.<sup>42</sup> Under the Alternative Fines Act, U.S. federal courts may impose fines, which equal up to twice the benefit the defendant obtained by making corrupt payments.<sup>43</sup> Regarding civil penalties, companies also face fines based on the egregiousness of the conduct.<sup>44</sup> Criminal fines from the DOJ are calculated based on the U.S. Sentencing Guidelines<sup>45</sup> and take into consideration factors like “the number of employees in the organization; whether high-level personnel were involved in or condoned the conduct; prior criminal history; whether the organization had a pre-existing compliance and ethics program; voluntary disclosure; cooperation; and acceptance of responsibility.”<sup>46</sup> The SEC settlement amounts have little transparency and can include any combination of civil penalties, disgorgement, or prejudgment interest.<sup>47</sup>

Additionally, post-resolution oversight mechanisms may require companies to implement a compliance program and monitor their activities through self-assessment, an external compliance monitor, or a hybrid system implementing both systems of monitoring.<sup>48</sup> This oversight requirement adds an additional deterrent

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37. 15 U.S.C. § 78u (2012); *see* H.R. REP NO. 95-640, at 9 (1977) (describing congressional intent on the division of responsibility between the DOJ and SEC regarding FCPA investigations); *see also* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-47.110, 9-47.130 (2000), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/47m\\_crm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47m_crm.htm) (describing the procedures for investigation and prosecution under the FCPA by the DOJ).

38. FCPA RESOURCE GUIDE, *supra* note 31, at 69.

39. *Id.*

40. *Id.* at 68.

41. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A) (2012).

42. 15 U.S.C. § 78ff(a), 78m (2012).

43. 18 U.S.C. § 3571(d) (1987).

44. FCPA RESOURCE GUIDE, *supra* note 31, at 69.

45. *See generally* SENTENCING OF ORGANIZATIONS, *in* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2004), [http://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2015/CHAPTER\\_8.pdf](http://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2015/CHAPTER_8.pdf).

46. Koehler, *supra* note 36 (follow Q. How are FCPA fines, penalties, and sentences calculated? dropdown).

47. *See id.* (giving examples of how SEC settlements have little transparency).

48. *See id.* (follow Q. How are FCPA enforcement actions typically resolved? dropdown) (indicating that the DOJ may decide not to prosecute a company if the company agrees to adopt adequate compliance procedures); *see, e.g.*, Letter from Denis J. McInerney, Chief, Fraud

component, due to both its cost and its ability to force monitoring within companies.

The DOJ can charge companies through criminal complaints, criminal information, and indictments.<sup>49</sup> The DOJ may agree to resolve criminal FCPA matters through a negotiated resolution, resulting in a plea agreement, deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), which results in monetary penalties but no trial.<sup>50</sup> The SEC can also pursue resolution of civil complaints through DPAs and NPAs and can obtain disgorgement, pre-judgment interest, and civil money penalties in administrative proceedings under section 21B of the Exchange Act.<sup>51</sup> While DOJ calculations of resolution amounts are generally public when DPAs or pleas are used to resolve a FCPA enforcement action,<sup>52</sup> calculations of fines under NPAs are more discretionary and often not transparent.<sup>53</sup>

### ***C. Rationales for increase in FCPA enforcement actions since 2004***

Initially, enforcement under the FCPA was low.<sup>54</sup> From its passage in 1977 to 2000, there was an average of three FCPA prosecutions per year, with minimal penalties.<sup>55</sup> However, in recent times there have been more robust FCPA prosecutions, resulting in a large number of criminal cases and hefty penalties.<sup>56</sup> The statistics surrounding the FCPA enforcement activity show a “meteoric rise of FCPA enforcement in the late 2000s, followed by the leveling off of steady, robust enforcement over the past several years.”<sup>57</sup> Since 2004, the average value of FCPA

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Section, Criminal Div., U.S. Dep’t of Justice, to Robert J. Giuffra, Jr., Sullivan & Cromwell (Mar. 14, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/08/2011-03-14-tenaris.pdf>.

49. FCPA RESOURCE GUIDE, *supra* note 31, at 74.

50. *Id.*

51. *Id.* at 76–77.

52. *See, e.g.*, Letter from Paul Pelletier, Principal Deputy Chief, Fraud Section, Criminal Div., U.S. Dep’t of Justice, to Eric A. Dubelier, Reed Smith LLP (Jan. 14, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11deputy-dpa.pdf>.

53. *Compare* Letter from Denis J. McNerney to Robert J. Giuffra, Jr., *supra* note 48, at 2 (listing only the general factors considered in the penalty amount of a NPA) *with* Letter from Paul Pelletier to Eric A. Dubelier, *supra* note 52, at 4–6 (showing the precise calculations and mitigating factors considered according to the U.S. Sentencing Guidelines Manual in reaching the penalty amount of the DPA).

54. *See* Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007) (contrasting the rate of FCPA prosecutions before 2001 with the rate of prosecutions after that year).

55. *Id.*

56. *See id.* at 386–94 (detailing a series of recent FCPA prosecutions resulting in penalties in the tens of millions of dollars).

57. Memorandum from Gibson Dunn to Clients, 2014 Year-End FCPA Update (Jan. 5, 2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-FCPA-Update.pdf> [hereinafter 2014 Year-End FCPA Update]; *see* Memorandum from Gibson Dunn to Clients, 2015 Year-End FCPA Update (Jan. 4, 2016), <http://www.gibsondunn.com/publications/documents/2015-Year-End-FCPA-Update.pdf> [hereinafter 2015 Year-End FCPA Update] (showing that

enforcement resolutions has almost uniformly stayed above the \$20 million mark and has surpassed the \$100 million mark in fourteen resolutions.<sup>58</sup>

One of the main reasons there has been an uptick in FCPA actions since 2004 is the DOJ's adoption of alternative dispute resolutions, such as the NPAs and DPAs, as the dominant way to resolve FCPA actions.<sup>59</sup> For example, "since the DOJ first used an alternative resolution vehicle in an FCPA enforcement action in December 2004, there have been 84 criminal FCPA enforcement actions against business organizations, and 70 of these enforcement actions (approximately 85%) involved an alternative resolution vehicle."<sup>60</sup> Using NPAs and DPAs allows the DOJ to capitalize on companies in likely vulnerable positions, with some evidence of corrupt practices, that want to protect their reputations and avoid the scrutiny of a trial.<sup>61</sup>

Another related reason for increased FCPA actions is that it is a lucrative program for the government because the large resolutions flow directly to the government.<sup>62</sup> Professor Mike Koehler, who has written and worked extensively on FCPA investigations, asserts that this perspective is espoused by a number of former DOJ enforcement attorneys: "For instance, a former DOJ prosecutor stated: 'FCPA is a cash cow. Big companies, most of whom are quite vulnerable, will do anything to avoid a civil or criminal trial. FCPA becomes a cost of doing business. The money flows into the government.'"<sup>63</sup> Another comment from a former DOJ prosecutor, Michael J. Jacobs, reinforces this point:

The Department of Justice has figured out that conducting investigations of corporations is a lucrative business. This is the one area of government activity that actually brings money in rather than shoots money out. We're talking about literally billions of dollars that the government is able to collect . . . generating revenue is a factor in bringing these cases.<sup>64</sup>

Thus, the penalties derived from NPAs and DPAs allow for large cash flow into

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the number of FCPA prosecutions remained similar from 2014 to 2015).

58. 2015 Year-End FCPA Update, *supra* note 57, at 3.

59. See Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act*, 49 U.C. DAVIS LAW J. 497, 522 (2015) (indicating that prosecutors would bring fewer cases if DPAs and NPAs were not available).

60. *Id.* at 521.

61. See *id.* at 521–22 (discussing how DPAs and NPAs circumvent proper judicial resolutions).

62. See *id.* at 522 (discussing how the government is incentivized to enforce the FCPA due to lucrative settlements); see also 31 U.S.C. § 3302(b) (2012) (stating that government officials receiving funds must deposit those funds immediately into the Treasury).

63. Koehler, *supra* note 59, at 522; see Mike Koehler, *Totally Milking the FCPA Cash Cow?*, FCPA PROFESSOR (June 3, 2013), <http://www.fcpaprofessor.com/totally-milking-the-fcpa-cash-cow> (highlighting numerous statements that focus on government profits from FCPA prosecutions).

64. Brian Mahoney, *FCPA Enforcement Will Stay Robust Beyond Obama's Second Term*, LAW360 (Nov. 6, 2012), <http://www.law360.com/articles/392138/fcpa-enforcement-will-stay-robust-beyond-obama-s-2nd-term>.

the government's budget, without having to expend for the costs of a trial; this prospect is undoubtedly attractive to the government.<sup>65</sup> This is because, "[i]n reality, all of the fine money collected by the DOJ and the disgorgement and penalties assessed by the SEC go right to the U.S. Treasury."<sup>66</sup>

It is interesting to note that it is possible for the DOJ to send a portion of the money collected to "identifiable victims" of the corrupt practices through a restitution order.<sup>67</sup> However, the DOJ has not implemented a restitution order in a FCPA case since 1990, and only once before then.<sup>68</sup> Billy Johnson, a former attorney of the DOJ's Fraud section, writes that "the use of restitution in these cases may have fallen into disfavor due to a lack of trust in how such money might be used if returned to the victim which, in most cases, would be the same government which was corrupted in the first place."<sup>69</sup> Thus, even while the FCPA has had success in deterring corrupt practices, innovative solutions must be created in order to restore the victims of corrupt practices.

#### ***D. Successes of current FCPA implementation***

As companies seek to avoid hefty payouts, the FCPA has become an effective deterrent measure.<sup>70</sup> A number of surveys have demonstrated that there has been a decline in investment abroad in corrupt countries by companies that are subject to FCPA regulations.<sup>71</sup> In 2009, the Dow Jones Risk Compliance Survey revealed that 51% of businesses had delayed an initiative due to the FCPA and 14% had abandoned an initiative altogether.<sup>72</sup> In a 2011 survey, Klynveld Peat Main Goerdeler (KPMG), a global firm that provides audit, tax, and other advisory services, found that more than 70% of executives in the U.S. and the United Kingdom (UK) believed that there were places in the world where "business cannot be done without engaging in bribery and corruption."<sup>73</sup> Thirty-two percent

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65. *See id.* (quoting numerous sources within the DOJ who attest to the DOJ's interest in pursuing FCPA prosecutions for financial gain).

66. *FCPA Fines: Where Does All the Money Go?*, TRACE TRENDS: A COMPLIANCE CONVERSATION (Feb. 13, 2009), [https://www.traceinternational.org/blog/726/FCPA\\_Fines\\_Where\\_Does\\_All\\_the\\_Money\\_Go](https://www.traceinternational.org/blog/726/FCPA_Fines_Where_Does_All_the_Money_Go) (statement by Billy Jacobsen, veteran of the DOJ's Fraud Section).

67. *Id.*

68. *Id.*; *see U.S. v. F.G. Mason Eng'g and Francis G. Mason*, Case No. B-90-29 (D. Conn. 1990) (ordering defendant to make restitution to German government following a FCPA prosecution of a bribery scheme that involved kickbacks to an official of the West German Military Intelligence Service to secure a procurement contract); *U.S. v. Kenny Int'l Corp.*, Cr. No. 79-372 (D.D.C. 1979) (ordering restitution to the Cook Island government in the amount of payments to then-prime minister and his political party to secure renewal of a distribution agreement).

69. *FCPA Fines: Where Does All the Money Go?*, *supra* note 66.

70. *See* Press Release, Dow Jones Risk & Compliance, Dow Jones Survey: Amid confusing about Anti-corruption Laws, Companies Abandon Expansion Initiatives (Dec. 9, 2009), <http://fis.dowjones.com/risk/09survey.html> (surveying done by Dow Jones regarding anti-corruption compliance, recording responses from 182 executives).

71. *Id.*

72. *Id.*

73. Mike Koehler, *Survey Says...*, FCPA PROFESSOR (June 2, 2011, 5:25 AM),

of UK executives and twenty-five percent of U.S. executives asserted that one way to deal with this issue was to simply avoid doing business in countries perceived to be corrupt.<sup>74</sup>

The FCPA has motivated many companies to develop practices of internal monitoring and compliance, which often take the form of “zero tolerance” policies throughout an enterprise.<sup>75</sup> These policies are developed due to a number of factors, including risk aversion to FCPA compliance costs and reputational damage associated with a FCPA enforcement action.<sup>76</sup> Especially in the case of global businesses, “the corrosive effects on multinationals and small to medium-sized enterprises alike are multi-faceted and complex. In addition to the direct cost of bribe payments, companies suffer reputational risk, the threat of extortion, increased cost of capital, distorted prices, unfair competition and decreased staff morale.”<sup>77</sup> The increase of internal FCPA compliance programs, as well as the costs of an FCPA action, both financial and reputational, suggests that the FCPA has deterred bribery among companies subject to its jurisdiction.<sup>78</sup>

Another success that can be attributed to the FCPA is its role in establishing the first model for anti-bribery and corruption laws. In 1977, the FCPA was the only national law criminalizing bribery.<sup>79</sup> However, as noted by the Open Society Foundation, the situation is much different today: “Multilateral conventions committing countries to join the fight against corruption have been widely signed and ratified. More than one hundred countries, including many of our closest allies and most important commercial competitors, have signed the United Nations Convention Against Corruption, committing themselves to implementing legislation criminalizing bribery.”<sup>80</sup> The national anti-bribery statutes of other countries have been even more expansive than the FCPA, by prohibiting activities beyond those prohibited by the FCPA.<sup>81</sup> For example, in the UK, the anti-bribery statute prohibits receiving bribes and bribery directed at private parties as well as

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<http://fcpaprofessor.blogspot.com/2011/06/survey-says.html>.

74. *Id.*

75. See Danielsen & Kennedy, *supra* note 3, at 11 (due to increasing requirements by statutes such as the FCPA, many U.S. private sector companies have initiated their own internal monitoring methods encouraging an increased culture of compliance). Increased compliance has occurred through cooperation between the private sector and the government, increasing the general popularity of anti-corruption initiatives. *Id.*

76. See LOREDO ET AL., *supra* note 1, at viii (indicating that at a RAND Corporation roundtable on anti-corruption, participants described in detail how risks can undermine a company’s assessment of the true cost of entering an emerging market).

77. Danielsen & Kennedy, *supra* note 3, at 18.

78. See Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. L. REV. 1365, 1377–78 (2014) (noting that increased business costs related to FCPA has resulted in less business in corrupt countries).

79. See generally Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT’L L. 345, 358 (2000).

80. Danielsen & Kennedy, *supra* note 3, at 20.

81. See *id.* at 23 (indicating that the UK has a statute that also prohibits the receipt of bribes).

public officials, which is not covered by the FCPA.<sup>82</sup> Therefore, the FCPA was the pioneer in anti-bribery laws, which took root throughout the world.<sup>83</sup> See Figure B for a table of other national and international anti-bribery statutes.<sup>84</sup>

**FIGURE B.**

<b>The World Follows: Other Anti-Bribery Laws Passed after the FCPA</b>	
Inter-American Convention Against Corruption	1997
Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention	1999
Council of European Convention on Corruption (Criminal)	2002
Council of European Convention on Corruption (Civil)	2003
The UN Convention Against Corruption (UNCAC)	2005
African Union Convention on Preventing and Combating Corruption	2006
United Kingdom Bribery Act	2010
Russian Anti-Bribery Laws, amended 2011	2011
Chinese Anti-Bribery Laws, amended 2011	2011

### ***E. Failures of the FCPA***

The previous section tracked the progress that can be attributed to the FCPA in serving as a deterrent measure for those under FCPA jurisdiction from engaging in corrupt practices abroad. It also highlighted the large penalties that companies faced with FCPA actions are required to pay out to the SEC and DOJ. However, even though companies have been found liable, gained a business advantage by cutting in front of the line through engaging in corrupt practices, and at times been required to pay large penalties, the companies have not been called on to rectify the harms that have been instituted on the ground in the countries where corrupt practices take place.<sup>85</sup>

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82. *See id.* at 23–24 (“The FCPA excludes so-called “facilitation” payments (small payments for routine and non-discretionary government action) from scrutiny”). The UK statute does not make an exception for facilitation payments. *Id.*

83. *See id.* at 21 (explaining that following the passage of the U.S. FCPA there was a series of multilateral treaties in the 1990s and early 2000s targeting bribery and corruption).

84. *Id.*

85. *See id.* at 13 (indicating that in 1998, Congress amended the FCPA). After the amendment, criminal liability arises where actors “*knowingly* and *corruptly* make payments to

Under the amended FCPA, there is a *mens rea* element for criminal liability, which allows enforcement only if the company had the requisite intent to engage in corrupt practices.<sup>86</sup> This allows prosecutors to concentrate on companies that make bribes “*knowingly* and with *corrupt intent*.”<sup>87</sup> This *mens rea* element targets companies that are the “most culpable” by aiming to prevent knowing and intentional violations of the FCPA.<sup>88</sup> If specific knowledge and intent cannot be proven, then the FCPA provides no basis for criminal liability.<sup>89</sup>

This *mens rea* requirement narrows the FCPA more than other anti-bribery statutes such as the anti-bribery statutes in both the UK and Italy, which establish offenses that can be prosecuted without a knowledge requirement.<sup>90</sup> Thus, when a company “*knowingly*” and with “*corrupt intent*” engages in corrupt business practices, the company chooses to financially support and become a part of the culture of corruption in that country and can fairly be required to provide a remedy for resulting harms.

An interesting intersection to consider is how the *mens rea* of a company can be evaluated when the DOJ and SEC primarily use non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) to resolve FCPA actions. Mike Koehler elaborates on this issue:

Indeed, use of NPAs and DPAs to resolve alleged FCPA violations presents two distinct, yet equally problematic public policy issues. The first is that such vehicles, because they do not result in any actual charges filed against a company, and thus do not require the company to plead to any charges, allow egregious instances of corporate conduct to be resolved too lightly without adequate sanctions and without achieving maximum deterrence. The second is that such vehicles, because of the “*carrots*” and “*sticks*” relevant to resolving a DOJ enforcement action, often nudge companies to agree to these vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the law. Thus, use of NPAs or DPAs allow “*under-prosecution*” of egregious instance of corporate conduct while at the same time facilitate the “*over-prosecution*” of business conduct.<sup>91</sup>

This presents a difficult question when the *mens rea* requirement is part of the argument to hold a company liable to the victims as well as to the federal government. However, a company logically would not be targeted for FCPA

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foreign officials,” narrowing criminal liability to only those who know they are engaging in bribery or corruption. *Id.*

86. *See id.* at 38 (stating that the FCPA requires prosecutors to prove beyond a reasonable doubt that the corporate defendant’s actions were both “*knowingly*” and “*corruptly*” undertaken).

87. *Id.* at 13.

88. *Id.*

89. *Id.*

90. Bribery Act 2010 § 7, c.23; Decreto Legislativo 8 June 2001, n. 5/7, G.U. 19 June 2000, n.231 (It.); *see* Daniels & Kennedy, *supra* note 3, at 24 (indicating that the UK and Italy do not have the same *mens rea* standard that the U.S. implemented into the FCPA).

91. Koehler, *supra* note 36 (follow Q. How are FCPA enforcement actions typically resolved? dropdown); *see generally* Koehler, *supra* note 59.

enforcement action unless the government had specific impetus and reason.<sup>92</sup> A company facing completely baseless actions is not likely to settle due to the reputational and business reasons as highlighted above when there would be nothing to lose and a likely hefty amount to settle.<sup>93</sup>

Additionally, this comment advocates for implementing a restorative justice model, regardless of the egregiousness of the crime. As explained above, even the smallest amount of corrupt practices can compound to having detrimental effects on the community where it is based. The restorative justice model, which calls for a collaborative effort from offenders to take responsibility for responding to the effects of their crimes, should not be thought of as a punishment, though it factors into the penalties calculation following an enforcement action.<sup>94</sup> This comment seeks to demonstrate the beneficial aspects of the restorative justice model, which translates into corporate social responsibility (CSR) even for unoffending companies.<sup>95</sup>

It is important to note that regardless of whether a company resolves a FCPA action with a plea or an alternative resolution mechanism, the DOJ and SEC have not accepted the prospect that fines and penalties from FCPA resolutions should be used to benefit the victims of bribery and corruption.<sup>96</sup> This is unlike the way that anti-bribery laws have been implemented in the UK, where the idea of compensating victims has been accepted.<sup>97</sup> Professor Andrew Spalding, who has written extensively about the FCPA and who has pioneered the proposal to use the restorative justice model to compensate victims of corruption, points out two examples:

When the British defense contractor BAE entered into a £30 million settlement in connection with illicit payments in Tanzania . . . the SFO, the Department for International Development (DFID), the Government of Tanzania, and BAE eventually agreed that most of the settlement would be used to fund educational projects in Tanzania, including the purchase of desks, textbooks and teacher instruction manuals for elementary schools. . . . Similarly, when the British engineering firm of

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92. See Koehler, *supra* note 36 (follow Q. How are FCPA enforcement actions typically resolved? dropdown) (indicating that this is the case because of the high burden of proof required by the DOJ under the FCPA).

93. See *id.* (discussing how the NPAs and DPAs facilitation of the over-prosecution of business conduct could cause the acceptance of a high settlement amount even for parties facing baseless actions).

94. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 248890, NAT'L INST. OF JUSTICE: RESTORATIVE JUSTICE SYMPOSIA SUMMARY I (1998), <https://www.ncjrs.gov/pdffiles1/nij/248890.pdf> [hereinafter RESTORATIVE JUSTICE SYMPOSIA SUMMARY] (explaining that restorative justice reorients the goals of justice with a more collective focus).

95. See *infra* Part IV of this comment for more information about restorative justice.

96. See Spalding, *supra* note 78, at 1410 (indicating that the DOJ and SEC have turned down victim group attempts to gain access to funds gained from FCPA enforcement actions, in part due to discrepancies as to what the term “victim” means within the context of the FCPA).

97. See *id.* at 1409–10 (including an example of the BAE case, where a UK company settled for £30 million which was directed to fund education in Tanzania where the bribery occurred).

Mabey & Johnson paid £6.6 million in criminal fines for bribes allegedly paid in Jamaica and Ghana, the UK returned a portion of those funds to the people of those countries.<sup>98</sup>

A similar recognition of victims of corruption simply has not occurred in the U.S.<sup>99</sup> Citizens of corrupt countries do not have alternative means of any type of restitution, because existing victims' rights laws require identifying a close nexus between the crime and victim.<sup>100</sup> This is difficult in FCPA cases where the community feels a ripple effect of the crime instead of a direct effect.<sup>101</sup>

Non-compliant companies gained a benefit from engaging in corrupt practices that enabled them to further their business agenda.<sup>102</sup> A 2009 survey by Ernst & Young found that 18% of companies polled knew they had lost business to a competitor that had paid a bribe.<sup>103</sup> Twenty-three percent of these respondents knew someone in their company had been solicited in order to win or retain business.<sup>104</sup> Engaging in corrupt practices enables a company to expand, cut through red tape, and facilitate furthering its business agenda without being restricted by anti-corruption regulations that may lead to a loss of business, new or existing.<sup>105</sup> Interestingly, the rhetoric surrounding payments made to public officials is often termed as "costs,"<sup>106</sup> which is misleading. Though corrupt payments do indeed increase the ultimate costs of the project, they enable companies that make corrupt payments to garner a benefit that their compliant counterparts do not experience.<sup>107</sup>

When such a company faces FCPA enforcement action, it should be responsible for the comprehensive harm that has resulted from engaging in corrupt

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98. *Id.*

99. *Id.* at 1410.

100. *Id.* at 1412.

101. *See id.* (indicating that identifying government agencies as victims in developing countries under the FCPA is difficult). Even for non-governmental organizations, the U.S. has only found victims under the FCPA when there was a "direct and measurable harm" suffered. *Id.*

102. Danielsen & Kennedy, *supra* note 3, at 19 (citing ERNST & YOUNG, Corruption or Compliance—Weighing the Costs: 10th Global Fraud Survey, at 6 (2009)).

103. *Id.*

104. *Id.*

105. *See id.* at 17 ("In many parts of the world, bribery was thought to be a routine cost of doing business. One occasionally heard that it could even increase economic efficiency by providing a simple way around complex and rigid bureaucracies.").

106. *See id.* at 19 (citing *Global Corruption Report 2009*, TRANSPARENCY INTERNATIONAL, at xxv, [http://www.transparency.org/whatwedo/publication/global\\_corruption\\_report\\_2009](http://www.transparency.org/whatwedo/publication/global_corruption_report_2009)) ("In a survey of more than 2,700 business executives in twenty-six countries in 2008, Transparency International found that nearly forty percent of polled business executives had been asked to pay a bribe when working with public institutions, and fifty percent estimated that corruption increased their project costs by at least ten percent.").

107. *See id.* at 18 (citing PRICEWATERHOUSECOOPERS, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme 2* (Jan. 2008), [http://www.pwc.com/th/en/publications/assets/confronting\\_corruption\\_printers.pdf](http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf)) ("Corruption creates an uneven playing field for ethical actors.").

practices. This is due to the sheer influx of money that companies inject into corrupt countries,<sup>108</sup> as well as the competitive edge gained and the tough *mens rea* requirement in cases where companies are found criminally liable. The FCPA's role in simply forcing a disengagement from the corrupt practices through disgorgement of profits, penalties and lucrative resolutions to the SEC and DOJ, and a reformation of the company's business practices through monitoring oversight requirements, is an incomplete remedy. It does not address the harm that has been caused by the company participating and thus perpetuating the culture of corruption in a given country.

The incomplete approach in addressing corrupt practices limits the FCPA to serve only as a deterrent measure. In order to fully remedy the harm, the company must be responsible for not only disengaging in corrupt practices and reforming internally, but also for taking steps to rectify the harms. As participants and beneficiaries of any given corrupt system, companies prosecuted for actions that they took knowingly and with corrupt intent should also have to provide a remedy for specific consequences that result from that system of corruption. Not only does fairness support a restorative requirement, but also, pragmatically speaking, such a restorative requirement suggests a solution eradicating corruption in the long term by addressing the roots of corruption and providing tools for civil society to combat corruption. This in turn supports the wider U.S. anti-corruption agenda.<sup>109</sup>

The FCPA should also be placed in the greater context of the U.S. anti-corruption agenda. The Fact Sheet from the White House articulates that "President Obama and the U.S. Government continue to drive a robust agenda to stem corruption around the world and hold to account those who exploit the public's trust for private gain."<sup>110</sup> The greater anti-corruption agenda includes "supporting multilateral standard setting, harnessing the extraterritorial reach of the FCPA to hold foreign companies accountable, and cooperating with foreign enforcement agencies. . . ."<sup>111</sup> The U.S. utilizes the FCPA in order to further its agenda to support an anti-corrupt environment throughout the world. What the FCPA currently does is deter those under its jurisdiction from engaging in corrupt practices.<sup>112</sup> But it does little to no work in deterring corrupt practices by those not under its jurisdiction, and creates a fertile environment for corruption to flourish.

Spalding asserts that anti-corruption laws, such as the FCPA, have the effect of "sanctioning" non-compliant companies to engage in corrupt practices because

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108. *See supra* Part II of this comment (providing examples of the amount of money involved in corrupt practices abroad).

109. *See* Daniels & Kennedy, *supra* note 3, at 20 (indicating that the U.S. anti-corruption agenda began with the 1977 passage of the FCPA, the sole domestic law that criminalized corruption).

110. Press Release, Office of the Press Sec'y, White House Office, FACT SHEET: The U.S. Global Anticorruption Agenda (Sept. 24, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

111. Daniels & Kennedy, *supra* note 3, at 51.

112. *See id.* at 11 (explaining how the FCPA lowers corruption by leveling the playing field for competing private sector businesses but also by encouraging private U.S. companies to have their own internal anti-corruption compliance methods).

it creates a void of foreign development investment funds that countries may need.<sup>113</sup> He writes, “[w]hen companies subject to U.S. jurisdiction find the risk of a bribery violation too high, and they withdraw from a project, or a sector, or a country. . . .”<sup>114</sup> Since the country still needs foreign investment, other companies with capital that are not subject to bribery laws, which Spalding terms “black knights,” will come in and fill the capital void, all the while engaging in corrupt practices.<sup>115</sup> Ultimately this means that “the net result is that although U.S. corporations (or foreign corporations subject to U.S. jurisdiction) are committing bribery less often [due to the FCPA], the overall amount of bribery occurring in developing countries can actually increase.”<sup>116</sup> This trend is antithetical to the wider U.S. agenda of promoting anticorruption worldwide.<sup>117</sup>

An additional layer to the wider U.S. agenda was introduced in a 2010 White House policy entitled the National Security Strategy.<sup>118</sup> In a section entitled *Strengthening International Norms Against Corruption*, President Barack Obama called for “the recognition that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.”<sup>119</sup> The FCPA, however, does not advocate for the protection of the human rights of citizens in corrupt countries, even while prosecuting companies that served to perpetuate these human rights violations by participating in and benefiting from a corrupt system.

Companies found liable for FCPA violations should bear the burden for both the specific and general costs of corruption in a country where the company participated, benefitted, and by extension perpetuated a culture of corruption.<sup>120</sup> With regards to both fairness and pragmatism, if the U.S. wants to support its stance that corruption is a human rights violation, then these violations must be addressed and remedied by companies found liable of perpetuating them. The FCPA must be reimagined into a restorative justice measure.

#### IV. RESTORATIVE JUSTICE: GOALS AND APPLICABILITY TO THE FCPA

The FCPA fits into the general trend of framing corruption as a “crime

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113. Spalding, *supra* note 78, at 1379.

114. *Id.*

115. *Id.*

116. *Id.*

117. See Press Release, Office of the Press Sec’y, *supra* note 110 (stating that U.S. policy is to stem corruption around the world).

118. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) [hereinafter NATIONAL SECURITY STRATEGY].

119. *Id.*

120. See R. Christopher Cook & Stephanie Connor, Jones Day, *The Foreign Corrupt Practices Act: An Overview* 3 (2010), <http://www.jonesday.com/files/Publication/3325b9a8-b3b6-40ff-8bc8-0c10c119c649/Presentation/PublicationAttachment/d375c9ee-6a11-4d25-9c30-0d797661b5ff/FCPA%20Overview.pdf> (emphasizing penalties implemented for corporations violated FCPA).

problem” and supports the perspective that “criminal and penal measures remain central elements of anti-corruption strategies.”<sup>121</sup> But for the reasons discussed earlier, this comment calls for an evolution from serving as simply a specific and general deterrent measure to becoming a restorative justice measure.

Restorative justice can be defined as a “process involving the direct stakeholders in determining how best to repair the harm done by offending behaviour.”<sup>122</sup> Restorative justice is a theory of criminal justice that supports a more inclusive process that seeks the reintegration of the offender and direct responsibility for responding to the effects of their crimes.<sup>123</sup> Restorative justice has its roots in many historical criminal justice systems, including ancient Arab, Greek and Roman civilizations.<sup>124</sup> It resurfaced in Western culture in the 1970s following a victim-offender reconciliation program in Canada, which was replicated in North America and Europe in the following decades.<sup>125</sup> The guiding principles of restorative justice are:

1. Crime is an offense against human relationships.
2. Victims and the community are central to justice processes.
3. The first priority of justice processes is to assist victims.
4. The second priority is to restore the community, to the degree possible.
5. The offender has personal responsibility to victims and to the community for crimes committed.
6. Stakeholders share responsibilities for restorative justice through partnerships for action.
7. The offender will develop improved competency and understanding as a result of the restorative justice experience.<sup>126</sup>

While these are the core tenets of restorative justice,<sup>127</sup> there remains a question whether this model is appropriate for addressing white-collar crime, such as corporate corrupt practices.<sup>128</sup>

John Braithwaite, a prominent restorative justice advocate, asserts that while most restorative justice discussions concentrate on juvenile crimes, the restorative

121. U.N., Office on Drugs & Crime, UN Guide for Anti-Corruption Policies 17 (Nov. 2003), [https://www.unodc.org/pdf/crime/corruption/UN\\_Guide.pdf](https://www.unodc.org/pdf/crime/corruption/UN_Guide.pdf).

122. Paul McCold & Ted Wachtel, *Restorative justice theory validation*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 110, 111 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2002).

123. *See id.* (arguing that restorative justice requires the direct involvement of stakeholders to reach the goal of reparation of harm).

124. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 1–2 (1999).

125. *See id.* at 1–3 (1999) (explaining in detail the development of restorative justice and the influence of eastern ideologies on western nations).

126. RESTORATIVE JUSTICE SYMPOSIA SUMMARY, *supra* note 94, at 1.

127. *Id.*

128. *See* Braithwaite, *supra* note 124, at 8 (explaining there may exist better options to address white-collar crimes by evaluating different theories).

justice model is also relevant in regards to corporate or white-collar crime.<sup>129</sup> This is because:

if justice requires repairing harm and empowering stakeholders to participate in the justice process, then an appropriate and just public response to white-collar crime should include a restorative component. According to this approach to justice, the government should continue to do its best to preserve order and to ensure retribution, but at the same time it should enable processes that promote justice in a broader sense and should address the needs and expectations created in the aftermath of crime.<sup>130</sup>

In recognizing that there are goals beyond deterrence and retribution, including holding corporations responsible for their corrupt practices and creating an impetus to rectify the harms of these corrupt practices,<sup>131</sup> the restorative justice model suggests a framework to implement these further goals.

Currently, a violation of the FCPA is considered a crime against the State, which follows most retributive criminal justice models and relies on “a premise that largely ignores the victim and the community that is hurt most by the crime. Instead, it focuses on punishing offenders without forcing them to face the impact of their crimes.”<sup>132</sup> The shift to restorative justice is particularly suitable in the anti-corruption context. As Spalding asserts, on one hand the current anti-corruption enforcement strategy has the shortcomings of conventional punishment of deterrence as it leads to

[c]orporations withdraw[ing] from . . . developing countries without learning . . . how to conduct business there without bribery. Because of this withdrawal, black knights move in and the overall level of bribery is not reduced . . . the victims of bribery—the citizens of developing countries—often feel that they did not participate in, much less benefit from, the punishment process.<sup>133</sup>

On the other hand, adopting a restorative justice model would suggest that the focus shifts to making the community and victims of corruption the centerpiece of legislation such as the FCPA. Spalding envisions that this will facilitate “a process of dialogue and reform [that] can educate the public on the nature of corruption, induce the corporation to implement necessary reforms, penalize the corporation in ways that benefit the local community, and work toward creating a set of business practices that comply with anti-corruption norms.”<sup>134</sup> The incorporation of restorative justice will not only expand the impact of the FCPA, but it will also

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129. *Id.*

130. Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 441–42 (2007).

131. See Cook & Connor, *supra* note 120, at 3 (clarifying different methods and approaches for holding corporations accountable for harms conducted by their corrupt practices).

132. RESTORATIVE JUSTICE SYMPOSIA SUMMARY, *supra* note 94, at 1.

133. Andrew Spalding, *Four Uncharted Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, WIS. L. REV. 661, 679 (2012).

134. *Id.* at 680.

allow companies to further other goals, such as corporate social responsibility.

### V. CORPORATE SOCIAL RESPONSIBILITY: FCPA AS A VEHICLE TO ACHIEVE CSR GOALS

Corporate social responsibility (CSR) addresses a company's impact on the society around it.<sup>135</sup> CSR can be defined as “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the work force and their families as well as the local community and society at large.”<sup>136</sup> In order to understand how companies can pursue CSR specifically, the International Organization for Standardization (ISO) published the ISO 26000, which is a directive regarding standards relating to many aspects of business, including CSR, and serves as a useful reference.<sup>137</sup> The ISO 26000 highlighted the underlying principles of CSR including “accountability, transparency, ethical behavior, respect for stakeholder interests, respect for the rule of law, respect for international norms of behavior, and respecting human rights.”<sup>138</sup> These principles are meant to be applied to each of the core subjects of CSR, including fair operating practices.<sup>139</sup> The standards also demonstrate how to “integrate social responsibility throughout the organization, such as publicly reporting on the organization's performance on CSR-related matters, engaging with stakeholders, and integrating social responsibility into the organization's governance.”<sup>140</sup>

Professor David Hess, writing about CSR and the FCPA, asserts that CSR in action constitutes a circular process involving open disclosure, meaningful dialogue and development of improved practices by the company.<sup>141</sup> Furthermore, Hess references a framework developed by Simon Zadek, the founder and CEO of the Institute of Social and Ethical Accountability, which tracks the five steps a corporation moves through when becoming a socially responsible corporation: defensive, compliance, managerial, strategic, and civil.<sup>142</sup>

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135. See Robert L. Heath & Lan Ni, *Corporate Social Responsibility*, INST. FOR PUB. REL. (Sept. 25, 2008), <http://www.instituteforpr.org/corporate-social-responsibility> (reflecting on the role of CSR and its impact on society where it operates).

136. See Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. & ENV'T MGMT. 1, 7 (2008) (identifying the World Business Council for Sustainable Development definition of corporate social responsibility).

137. See David Hess, *Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility*, 73 OHIO ST. L.J. 1121, 1125 (2012) (citing INT'L ORG. FOR STANDARDIZATION, ISO 26000 PROJECT OVERVIEW (2010), [http://www.iso.org/iso/iso\\_26000\\_project\\_overview.pdf](http://www.iso.org/iso/iso_26000_project_overview.pdf)) (laying out the standards and subjects at the foundation of the ISO 26000 standard).

138. *Id.*

139. *Id.*

140. *Id.* at 1125–26.

141. See *id.* at 1132–33 (explaining the three processes the CSR community utilizes to make sure corporations are accountable for their actions).

142. See *id.* at 1333 (explaining the procedures implemented by Simon Zadek for each of the five stages); see also Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125, 127 (summarizing the five stages of organizational learning).

Zadek elaborates that in the compliance stage, a corporation may institute a compliance approach as a preemptive strategy to avoid potential economic costs, such as litigation risks or loss of business due to reputational harm.<sup>143</sup> In the managerial stage, compliant and responsible business practices are valued as ways to achieve long-term gains and address societal issues, rather than simply avoiding potential economic costs.<sup>144</sup> Finally, the strategic and civil stages recognize a need to address a societal issue as a part of the larger business strategy for long-term value, and to mobilize industry participation in CSR to address the societal issue through collective action.<sup>145</sup>

The restorative justice model encourages CSR by sharing the same values of encouraging dialogue, participation and development of initiatives to improve the societal conditions that result from a company's actions. In applying the restorative justice model suggested by this comment, companies would be able to move beyond the compliance stage. Instead of simply refraining from engaging in corrupt practices due to the deterrent effect of hefty resolutions, companies would be enabled to move toward the strategic and civil stages. These stages would allow for a company to create a long-term relationship with the country and citizenry where the corrupt practices took place because it would be part of their larger business strategy. Companies that value CSR would work to rectify the harm that has occurred because of the companies' corrupt practices and mobilize like-minded partners to address the societal issue of corruption as a collective. This in turn leads to additional benefits such as improving cross-cultural competence, attracting social investors and fostering future business relationships.

#### **VI. ADDITIONAL BENEFITS: IMPROVING CULTURAL COMPETENCE, ATTRACTING SOCIAL INVESTORS AND PLANNING FOR FUTURE BUSINESS RELATIONSHIPS**

An additional benefit of embracing the values of dialogue, participation and development of societal initiatives is an opportunity for companies to engage in cross-cultural relationships through the restorative process. Companies are called on to work in long-term relationships with the citizenry of many different countries. While a company may have forged relationships previously in a business capacity, most situations do not call for the company to engage with the country on a deeper cultural level. Having a deeper cultural understanding will provide benefits for companies who want to pursue relationships with the country in the future.

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143. *See* Zadek, *supra* note 142, at 127 (summarizing the compliance stage as a time to mitigate economic costs that non-compliant may face such as loss of economic value due to reputational harm and litigation risks).

144. *See id.* (summarizing integrating responsible business practices as a way to achieve long-term gains that address a given societal issue).

145. *See id.* (summarizing enhancing long-term economic value through an integration of societal issues into business strategies and promoting broad industry participation in CSR to address societal issues as a collective.).

A company's cultural competence facilitates the comfort, cooperation and contribution of a wide berth of future business clients, including international clients.<sup>146</sup> Clients feel that they can relate to the company on both an intellectual and instinctual level. Initially, clients are drawn in by shared commonalities and values and continue to foster that relationship due to recognition of the gains that ensue from a company's adaptation to the client's culture. The purpose of cultural competency is to ensure that a company can fully understand the needs of any partner, client, or consumer, as well as to build bridges for the business entity to then articulate those needs.

To ensure that these future entities are heard and zealously serviced, a deeper cultural understanding is increasingly imperative. With the burgeoning interconnectivity of today's business environment generally, companies that can be culturally competent in a variety of settings will have a competitive edge. Furthermore, building a positive reputation as a responsible and involved company abroad will allow for a widened network and may facilitate future business relationships in the long run. Of course, this is predicated on the optimistic hope that the recommended model will ultimately decrease corruption in a given country, which would make future business relationships both attractive and imperative to sustain a competitive edge.

Another benefit includes improvement of both the public and investor confidence in a company's practices and values.<sup>147</sup> In a study that tracked public reaction to restorative sentencing over a period of twenty years from 1982–2002, there was evidence that the public supported such measures:

The idea that the offender has made amends to the individual victim or the larger community clearly carries considerable popular appeal . . . [which] may reflect both a desire on the part of the public to assist victims of crime, as well as the belief that by making compensation, the offender is taking an important step toward his or her rehabilitation and restoration to the community.<sup>148</sup>

Professor Hess highlights a group of actors known as "social investors," especially concerned with CSR issues.<sup>149</sup> Social investors who influence CSR through investment decisions can coordinate their actions through international organizations such as the International Corporate Governance Network (ICGN).<sup>150</sup>

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146. See Section 7. *Building Culturally Competent Organizations*, COMMUNITY TOOL BOX, <http://ctb.ku.edu/en/table-of-contents/culture/cultural-competence/culturally-competent-organizations/main> (last visited Oct. 23, 2016) (listing participation, trust, and cooperation as benefits of an organization's cultural competence).

147. See Julian V. Roberts & Loretta J. Stalans, *Restorative Sentencing: Exploring the Views of the Public*, 17 SOC. JUST. RES. 237, 329 (2004) (arguing restorative justice's tendency to decrease crime rate gains public support for corporate practices).

148. *Id.*

149. See Hess, *supra* note 137, at 1127 (explaining social investors' strong interests in CSR issues and how they seek to incorporate those non-financial issues into their investment decisions).

150. See *id.* (listing different organizations for social investors to coordinate their activities, including ICGN).

The ICGN published a report in 2009 highlighting why anti-corruption issues were especially important to social investors, which included: efficiency concerns regarding distorted competition which skews the quality and price of products;<sup>151</sup> stability concerns that corruption threatens the political process and the commercial survival of offending and non-offending companies alike;<sup>152</sup> and precedent concerns, that a corporate environment that tolerates corrupt practices is just as likely to tolerate financial fraud-type crimes that harm shareholders.<sup>153</sup>

Even for investors who do not identify as social investors, these issues are problematic and companies that are on the forefront of addressing corruption issues through compliance and restoration will be attractive to current and potential investors.

## VII. SUGGESTED FRAMEWORK:

### DISSEMINATION OF INFORMATION, PARTNERSHIPS, AND REALLOCATION OF RESOLUTIONS VALUES

This section focuses on three specific ways in which the existing structure of the FCPA can be reimagined to become a restorative justice measure, all of which point to empowering civil society as the most effective way to attain greater anti-corruption goals. Note how these suggested methods may correspond with the steps needed to enhance a company's corporate social responsibility. These include the dissemination of information, the requirement of a partnership with organizations fighting for anti-corruption, and the reallocation of FCPA penalties to fund anti-corruption efforts in the country where the FCPA violation occurred.

Embracing the restorative justice model within the anti-corruption context requires addressing the associated harms of corrupt practices to the victims and community.<sup>154</sup> There must also be an impetus for the previously non-compliant companies to work to empower civil society.<sup>155</sup> One of the starting points is the

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151. *See id.* at 1128–29 (citations omitted) (“At a macroeconomic level, corruption greatly reduces efficiency by distorting competition and depriving buyers of economically superior products at the most competitive prices.”).

152. *See id.* (citations omitted) (“Corruption destabilises the political process and promotes conflict [which] raises the cost of doing business and deters investment...this directly reduces returns [to non-offending companies], even in some cases threatening commercial survival...For companies that pay bribes, they can suffer legal fines, damage to reputation, debarment, imprisonment for executives, and other penalties.”).

153. *See id.* (citations omitted) (“[A] corporate culture that tolerates corrupt payments is also one that is much more likely to tolerate, or fail to prevent, financial fraud, theft of company assets and other actions that will directly harm shareholders.”).

154. *See* Andrew Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 359 (2015) (arguing that restorative justice punishes white-collar crime while remedying its harm and preventing future crime).

155. *See id.* at 387, 391, 406 (demonstrating that the community is integral to designing a successful restorative justice remedy which will both expose patterns of corruption and amend the environment in which it operates); *see also* Mark Umbrett et. al., *Restorative Justice Impact on Multinational Corporations?: A Response to Andrew Brady Spalding’s Article*, 76 OHIO ST. L.J.

potential role that previously non-compliant companies can have in gathering and disseminating information about corrupt practices within the public sector of the country to create transparency. Regarding information, there are two factors that encourage corrupt practices—"the lack of free access by citizens to government-related public information" and "[t]he lack of systems to ensure relative transparency, monitoring and accountability in the planning and execution of public sector budgets."<sup>156</sup>

The ability of the citizenry of corrupt countries to recognize and have solid evidence of corrupt practices instituted in the public sector is an essential first step in eradicating the existing corruption.<sup>157</sup> However, according to a Carnegie Endowment for International Peace 2014 report entitled *Corruption: The Unrecognized Threat to International Security*, "[w]estern governments and key business actors are not well set up [to systematically gather] [i]nformation on the organization, manning, and practices of kleptocratic networks in key countries. . . . Corruption is not on the agenda for high-level bilateral exchanges."<sup>158</sup> While this may be the general infrastructure surrounding the gathering of information on public sector corruption, the FCPA is uniquely poised to fill that information gap, because of the robust investigation process that surrounds any potential FCPA violation by both the U.S. government and corporations subject to FCPA jurisdiction.<sup>159</sup>

There are a number of ways that potential FCPA violations are brought to the attention of the SEC and DOJ for investigations.<sup>160</sup> These include "tips from informants or whistleblowers; information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives."<sup>161</sup> In addition to these research techniques utilized by the SEC and the DOJ, individual corporations facing even low-level allegations of corruption also expend significant time and resources in order to conduct internal investigations.<sup>162</sup> One example is the \$344 million spent by New York-based cosmetics company Avon on internal investigation costs alone for payments by its Chinese subsidiary.<sup>163</sup> This investigation looked into \$8 million of payments made from 2004 to 2008 in cash

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41, 47–49 (2015) (arguing that dialogue between parties is key to the success of restorative justice).

156. *Global Programme Against Corruption*, *supra* note 7, at 13.

157. *See id.* at 10 ("Transparency in government is widely viewed as a necessary condition both for effective control of corruption and more generally for good governance.").

158. SARAH CHAYES, CARNEGIE ENDOWMENT FOR INT'L PEACE, *CORRUPTION: THE UNRECOGNIZED THREAT TO INTERNATIONAL SECURITY* 3–4 (2014), [http://carnegieendowment.org/files/corruption\\_and\\_security.pdf](http://carnegieendowment.org/files/corruption_and_security.pdf).

159. *See* 2014 Year-End FCPA Update, *supra* note 57, at 11 (indicating that both the DOJ and SEC conduct thorough FCPA investigations).

160. FCPA RESOURCE GUIDE, *supra* note 31, at 53.

161. *Id.*

162. LOREDO ET AL., *supra* note 1, at 16.

163. 2014 Year-End FCPA Update, *supra* note 57, at 9–10.

and gifts to secure benefits from Chinese officials.<sup>164</sup> In conducting these investigations, the U.S. government and the individual companies gain insight into the prevalence of corruption in the public sector of the country where the alleged corruption took place.<sup>165</sup> Non-compliant companies and governments should share this useful information gathered in connection to FCPA investigations to the citizens where the corruption is taking place to begin a good-faith collaborative effort to eradicate corruption in that country.

In addition to disseminating the information gathered when investigating allegations of FCPA violations, previously non-compliant companies can better understand the effects of their corrupt behavior by engaging with the community and gathering information that highlights the citizen perspective of corruption in their own countries.<sup>166</sup> This dialogue can be facilitated by “opinion surveys, interviews with relevant individuals such as officials or staff of companies that deal with the Government, focus group discussions about the problem of corruption and aspects of the problem or measures against it that may be unique to the country involved. . . .”<sup>167</sup> The companies would be responsible for allocating resources to these studies and sharing the information based on the country where the corrupt practices took place. Not only does this empower civil society by providing information, but it also allows for introspection within companies that would encourage eliminating corrupt practices. In this way, companies may be made aware of the effects of their corrupt business practices, as opposed to mere cognizance of their corrupt business practices. This is not a one-time event, but should be an ongoing and cyclical process of research, analysis and action plans that involve the company and civil society for a period of time necessary to see positive results.<sup>168</sup>

Another manner which the FCPA can be used to empower civil society is by placing the onus on previously non-compliant companies to identify and support international organizations that are committed to fighting corruption.<sup>169</sup> This process would build from the previous stage of aiding in researching and creating action plans to implement the research results.<sup>170</sup> A requirement of FCPA enforcement for previously non-compliant companies to pursue strategic partnerships would be valuable “both in bringing key stakeholders into the process and developing direct relationships where they will be the most effective against specific forms of corruption or in implementing specific strategy elements.”<sup>171</sup>

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164. *Id.*

165. *See id.* at 6 (providing insight on some of the countries most cited in FCPA resolutions).

166. *See Global Programme Against Corruption, supra* note 7, at 6, 11, 18 (examining the need for gathering data on public perceptions of corruption).

167. *Id.* at 11.

168. *See id.* at 11–12 (explaining the ongoing process of “action research”).

169. *See id.* at 9 (explaining the value of strategic partnerships with relevant organizations).

170. *Id.*

171. *Id.*

Strategic partnerships involve companies from multiple countries working together with each other and/or with nongovernmental organizations and international aid institutions, such as the World Bank and Transparency International.<sup>172</sup>

An example of a successful application of this step occurred in an FCPA case from Kazakhstan.<sup>173</sup> James Giffen, a U.S. attorney, had been appointed as Counselor to the President of Kazakhstan and was charged with accepting bribes from Western oil companies to influence Kazakhstani officials.<sup>174</sup> These oil companies wanted the right to purchase oil and gas rights to the reserves in a newly independent Kazakhstan.<sup>175</sup> In settling the case, the U.S., along with Kazakhstani and Swiss officials, arranged a release of \$80 million of alleged bribes from Swiss accounts that were subsequently used to establish a trust fund for poor children and improve transparency surrounding the Kazakhstani oil industry.<sup>176</sup> This trust fund was to be managed by a Kazakhstani NGO.<sup>177</sup> A required and vetted partnership component (i.e. with a nationally or internationally recognized NGO) to FCPA enforcement actions would benefit the citizens of corrupt nations and further enhance goals of empowering civil society by redistributing the way that FCPA penalties benefit solely the U.S. government and enforcement agencies.<sup>178</sup>

A final step to embrace a restorative justice perspective would include requiring previously non-compliant companies to identify civil society organizations fighting corruption within their own home countries,<sup>179</sup> and supporting the work of these organizations, both financially and through awareness. One such internal organization could be social control boards, which are committees with monitoring and dispute resolution mechanisms, comprised of locally elected civil society members, and in some cases, government representatives.<sup>180</sup> These members of civil society are “usually known for their integrity, social activism and experience in dealing with the areas to be monitored by the social control board (e.g., utilities). Civil society representatives, their roles, characteristics, responsibilities and attributes are frequently formally legalized.”<sup>181</sup> Such social control boards require resources, transparency, and tacit governmental recognition to continue to be effective and perceived as legitimate.<sup>182</sup> Other avenues available for previously non-compliant companies to directly empower

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172. *Global Programme Against Corruption*, *supra* note 7, at 9.

173. *See* Spalding, *supra* note 133, at 680 (explaining how the U.S. DOJ, Switzerland and Kazakhstan established an NGO trust fund dedicated to providing programs for impoverished children and to improving transparency of the oil industry in Kazakhstan).

174. *Id.* at 680–83.

175. *Id.*

176. *Id.* at 680.

177. *Id.*

178. *See id.* at 676–80 (proposing a future form of the FCPA, incorporating restorative justice theory).

179. *See* CHAYES, *supra* note 158, at 26 (encouraging citizens to support civil society in their home country, as an approach to curbing corruption).

180. *Global Programme Against Corruption*, *supra* note 7, at 14–15.

181. *Id.* at 15.

182. *Id.* at 17–18.

civil society are mounting public campaigns against enablers of corrupt practices, as well as exposing the manner in which corrupt governments promote global anti-competitive environments.<sup>183</sup> Outlets for creating such awareness are accessible through social media and company networks. The question of how resources are allocated would be fact-intensive. However, the value of the resources can be adjusted from the often discretionary penalties from the DOJ and SEC, especially when using NPAs and DPAs.<sup>184</sup>

Empowering civil society by embracing a restorative justice model becomes essential to enabling the FCPA to reach a new level of anticorruption enforcement. When FCPA enforcement requires non-compliant companies to take steps beyond the deterrence of penalties and internal monitoring to require involvement in rectifying harms in corrupt countries, it may be able to reach a new achievement in its global anticorruption agenda. Following the requirement suggestions above, the civil society of corrupt countries becomes informed and guided, has resourceful partners, and is publicly and financially supported. As the Carnegie report admonishes:

Implications for support to civil society organizations are similarly far-reaching. No corrupt regime can be reformed or revamped without significant demand and persistent struggle on the part of the local population. However, international government and business enablers of such regimes should not use this fact as an excuse to off-load their own responsibilities onto the shoulders of often inexperienced, vastly out-resourced, and vulnerable civil society organizations.<sup>185</sup>

### VIII. CONCLUSION

The FCPA, enacted to combat bribery of foreign officials by companies under its jurisdiction, has become a deterrent measure as companies seek to avoid hefty resolutions that often result from DOJ and SEC actions. However, these funds flow back to the federal government and do not address the harms to the citizens in corrupt countries.<sup>186</sup> This ignores the fact that companies that bribe are being looked into by the DOJ and SEC because of some evidence of bribery, even if the evidence may not rise to the tough *mens rea* standard of knowing and intentional violations of the FCPA. These companies that engage in corrupt practices abroad also contribute to the culture of corruption in these countries. Additionally, companies that engage in corrupt practices have benefitted from the bribery, and yet current resolutions fail to address the business advantages that companies enjoy from these corrupt practices. Thus, a fairness argument supports requiring companies to engage in restorative measures. In light of the larger anti-corruption

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183. See CHAYES, *supra* note 158, at 26 (encouraging citizens to take the actions presented in order to curb corruption).

184. See Spalding, *supra* note 154, at 357, 394–399 (explaining the scope of discretion based on scope of injury and the particular demands of proper restitution in each case).

185. CHAYES, *supra* note 158, at 19.

186. Spalding, *supra* note 154, at 358.

agenda, implementing a restorative measure would root out corruption and equip the civil society of corrupt countries to work to combat corruption.

Restorative justice would encourage CSR and additional benefits such as increasing cultural competence, attracting social investors, and laying the foundation for future business relationships. All of these goals rely on dialogue, transparency, and recognition of a long-term goal of creating an anti-corruption environment worldwide. Such a model would lead to a reimagined FCPA, with the potential of attaining goals beyond deterrence and restoration.