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Choosing Governance in the FCPA Reform Debate

Joseph W. Yockey*

The recent rise in enforcement under the U.S. Foreign Corrupt Practices Act (FCPA) has led to a vigorous debate about the need for reform. Critics say the statute is overenforced and harms shareholders. Regulators disagree and argue in favor of the status quo. This Article examines both sides of the FCPA reform debate and finds them wanting on several levels. First, a variety of factors suggest that critics' fears of overenforcement are often exaggerated. That said, proponents of existing enforcement efforts who believe that nothing needs to change are also mistaken. Instead of overenforcement, there is a risk that the FCPA is being underenforced. Instead of encouraging firms to develop anticipatory and sustainable compliance programs, current enforcement policy incentivizes a focus on static programs that are incapable of addressing the dynamic risk of corruption. Finally, the present regulatory model fails to adequately address how gaps in international anti-corruption enforcement pose unique compliance challenges on the domestic front.

This Article seeks win-win solutions to these problems by recommending a shift of focus toward regulatory strategies designed around principles of collaboration and experimentation that fall within the category of "new governance." Through a governance-based approach to regulation, firms are expected to better institutionalize context-specific compliance tools developed in consultation with the state and other actors. This approach—when ongoing and initiated outside the context of a specific enforcement action—ought to produce more effective and efficient self-regulation and fewer instances of bribery. The public−private learning process envisioned by new governance should also enhance the United States' efforts to promote international anti-corruption norms and help level the playing field for American firms.

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I. INTRODUCTION

Corruption is a disease that cannot be cured, only managed. While most agree on this basic point, there is considerable debate about the proper course of treatment. The United States' weapon of choice for combating transnational commercial bribery—the type of corruption under consideration here—is the Foreign Corrupt Practices Act (FCPA).[1] Mostly dormant for its first 25 years, the FCPA is now in the midst of an unprecedented surge in enforcement. More firms are coming under FCPA scrutiny, including several of the largest and most well-known companies in the world, and large criminal and civil sanctions are common.

The rise in enforcement places FCPA compliance at the forefront of any board's agenda. It has also led to an increasingly impassioned debate about the wisdom and viability of FCPA reform. On one side of the debate are critics who claim that ambiguity in the statute creates perpetual uncertainty about what constitutes an FCPA violation.[2]

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd (2012).

2. *See generally* Letter from U.S. Chamber of Commerce et al., to Honorable Lanny A Breuer, Assistant Attorney Gen. U.S. Dep't of Justice, and Robert Khuzami, Dir. of Enforcement, U.S. Sec. and Exch. Comm'n (Feb. 21, 2012), *available at* http://legaltimes.typepad.com/files/fcpa-guidance-letter-2-21-12_4_.pdf

Electronic copy available at: http://ssrn.com/abstract=2202277

They suggest this problem is compounded by fears of indictment that make it practically impossible for firms to challenge aggressive theories of FCPA liability in court. As a result, advocates for reform maintain that firms are forced to settle FCPA cases prematurely—often for sums that go beyond what is necessary for deterrence—and to overspend on internal compliance programs.[3]

On the other side of the debate are the many human rights groups and other organizations in favor of the status quo.[4] To these actors, the FCPA is doing exactly what it is supposed to: promoting economic growth by ensuring a fair and competitive business climate. The Justice Department agrees with this viewpoint. Assistant Attorney General Lanny Breuer recently invoked the image of Mohammed Bouazizi, the Tunisian fruit vendor whose self-immolation in protest of public corruption many see as the impetus for the Arab Spring, to push back against claims that FCPA enforcement should be "softened."[5] Breuer stated that "at this crucial moment in history . . . [we] have no greater mission than to work toward eradicating corruption across the globe."[6]

This Article examines the foregoing debate and describes what both sides get right, and, more importantly, what they get wrong about existing FCPA enforcement policy. From there, it recommends a shift in the direction of the reform conversation—one that incorporates over a decade of learning and progress in the application of "new governance" approaches to regulation.[7] New governance theory offers an alternative to traditional, top-down forms of regulation in favor of a more collaborative relationship between the state and private firms. Governance-based regulation holds particular promise in the anti-corruption context because it shows how the ambiguity associated with statutes like the FCPA can evolve from a compliance challenge to a key part of the compliance solution.[8] The way this transformation happens is through an ongoing dialogue among the state, firms, and other stakeholders that focuses on developing norms and standards necessary to give content to the law.[9] A crucial byproduct of this process is

(discussing concerns that the statute is unclear about what amounts to a violation); ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2010), *available at* http://www.instituteforlegal reform.com/sites/default/files/restoringbalance_fcpa.pdf (discussing the statute's ambiguities and how to make the statute clearer).

3. *See* WEISSMANN & SMITH, *supra* note 2, at 2–3 (discussing the large dollar amount of settlements and the rarity of which enforcement actions proceed to trial).

4. *Several Groups Urge Congress Not to Narrow Scope of FCPA*, 7 White Collar Crime Rep. (BNA) No. 2, at 70 (Jan. 27, 2012). These organizations include the International Corporate Accountability Roundtable, the Revenue Watch Institute, Public Citizen, Amnesty International, and Human Rights Watch.

5. Lanny A. Breuer, Assistant Attorney Gen., Address at the Am. Bar Ass'n 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* www.justice.gov/criminal/pr/speeches /2011/crm-speech-111108.html.

6. *Id.*

7. *See* Kenneth A. Bamberger & Deirdre K. Mulligan, *New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry*, 33 LAW & POL'Y 477, 480 (2011) (defining "new governance"). *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (describing "new governance" approaches to regulation).

8. *See* Bamberger & Mulligan, *supra* note 7, at 481 (discussing how "new governance" permits "evolution and dynamism").

9. *See id.* (discussing how "new governance" involves stakeholder participation).

that it provides firms with the information necessary to shape the ethical sensibilities of employees and better equip them to exercise judgment in the face of challenging new situations.[10] This, in turn, should lead to compliance that is anticipatory, adaptable, and sustainable. Enhanced self-regulation will also free up regulatory resources so that regulators can focus on bringing larger and more strategic enforcement actions designed to incentivize industry cooperation and bolster accountability.

This Article's analysis of the FCPA reform debate proceeds as follows. Part II sets forth the contours of the debate by documenting the rise in FCPA enforcement activity and its attendant criticisms. Part III discusses several quantitative and qualitative factors that cast doubt on the overenforcement narrative favored by the statute's critics—one of most significant being that limited regulatory resources and low detection rates force regulators to rely heavily on self-disclosure and negotiated settlements. Once settlement negotiations begin, firms often have more bargaining power than critics would like everyone to believe, suggesting that sanctions likely stay within manageable boundaries despite frequent protests to the contrary.

Part IV describes the reasons why, despite skepticism about overenforcement, proponents of existing FCPA enforcement policy are mistaken if they believe that nothing needs to change. Arguably the most useful aspect of the current debate is that it highlights the limitations of a regulatory model that relies primarily on the threat of sanctions to deter wrongdoing. For one, the same resource limitations and low detection rates that lead regulators to rely on negotiated settlements suggest that, instead of overdeterrence, the current model creates a risk of underdeterrence. This might explain why so many observers in the international community believe that transnational bribery remains a significant problem despite the greater emphasis on enforcement in recent years.[11]

A second problem is more nuanced. An increasing number of firms committed to ethical behavior are less interested in arguing about potential statutory changes and are more focused on making FCPA compliance part of their long-term strategies for risk management.[12] Yet, the current enforcement environment—where negotiated settlements are the norm—encourages these firms to lean primarily on compliance strategies that they can defend later should they happen to come under federal scrutiny. This is worrisome because regulators often lack the resources and expertise necessary to gain context-specific knowledge about how risk manifests itself in different firms. As a result, rather than working to craft innovative compliance solutions capable of responding to the dynamic nature of corruption, compliance efforts will likely devolve into static, one-size-fits-all programs designed to check the boxes that regulators look for.[13]

A final problem with the current FCPA reform debate is that it fails to adequately consider the effects of international enforcement activities on domestic compliance

10. *See id.* (discussing how "new governance" allows for firms to better interpret and apply legal mandates in varying contexts).

11. *See* David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 308–09 (2008).

12. DAVID KENNEDY & DAN DANIELSEN, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 17–18 (2011).

13. Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 29 (2008).

efforts. The United States has been quite successful in convincing other countries to adopt FCPA-like legislation, but enforcement has not always followed adoption. Thus, a lingering concern is that gaps in multilateral enforcement will divert business opportunities to firms from countries that are unreachable by the FCPA or its international counterparts. This raises the possibility that at least some American firms will feel compelled to resort to bribery if they fear that doing otherwise will allow foreign competitors to take their place.[14]

To address these problems, Part V argues that the time has come to take a step back in order to reorient the reform debate towards greater reliance on regulatory strategies that fall within the category of new governance. Among other things, the public–private collaboration that new governance envisions will facilitate the pooling of information necessary to provide firms with a more substantive understanding of anti-corruption norms and industry "best practices" for compliance. This is necessary to internalize good habits within the belly of a firm, which in turn plays a critical role in mitigating the resource and monitoring challenges faced by regulators.

But getting to this point will not be easy. The dialogic process at the heart of new governance must be ongoing and cannot wait until the onset of a specific enforcement action or investigation. It also requires both firms and regulators to buy-in to the advantages of a governance-based model of FCPA reform. For firms, one particularly useful strategy in this regard is the appointment of a "Chief FCPA Compliance Officer." Having a person in this position will make it easier for firms to communicate with outside actors and to integrate the lessons learned through external engagement into their general risk-management architecture. For regulators, making the shift to governance requires strong leadership and greater strategic integration among federal departments and agencies. Signs of progress are already beginning to show in this area, but regulators also need to place renewed emphasis on recruiting managers and employees who are able to bring in an outsider's perspective on the desired culture and regulatory framework. Finally, Part V concludes by showing how new governance approaches on the domestic front—including greater reliance on the market effects of reputation to spur compliance—provide a useful template for addressing problems with lax enforcement at the international level.

II. THE REFORM DEBATE

A. Rise in FCPA Enforcement Activity

Congress adopted the FCPA in 1977 as an amendment to the 1934 Securities Exchange Act.[15] It consists of two central parts. First, a series of anti-bribery provisions

14. *See* Hess & Ford, *supra* note 11 (illustrating the cumulative advantage that firms can gain from paying bribes).

15. The FCPA was amended in 1988 and 1998. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C.); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1–3, 78ff (2012)). The 1998 amendments were necessary to bring the FCPA into compliance with the Organization for Economic Cooperation and Development Anti-Bribery Convention and authorized extraterritorial jurisdiction over violations committed by U.S. nationals. *See* International Anti-Bribery and Fair Competition Act of 1998 § 2(c) (covering "[a]lternative jurisdiction over acts outside of the United States").

prohibit the act of "corruptly" making "an offer, payment, promise to pay, or authorization of the payment of any money" to "any foreign official for purposes of . . . obtaining or retaining business."[16] This prohibition applies to U.S. issuers, "domestic concerns," and "any person other than an issuer . . . or a domestic concern" who acts while in U.S. territory.[17] Second, it requires issuers to implement various accounting measures meant to assist with anti-bribery compliance efforts. They must "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[18] The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) both enforce the statute's anti-bribery provisions, whereas only the SEC enforces the accounting and internal control requirements.[19]

The reason FCPA reform is back on the map relates to a recent rise in enforcement activity. At first, enforcement was fairly lax. The statute's first 25 years saw just a handful of actions filed annually, often resulting in only modest sanctions. But if the FCPA was a proverbial "sleeping dog" then, today the dog is wide awake.[20] The DOJ now calls FCPA enforcement one of its highest priorities, second only to combating terrorism, and the past decade has given rise to a dramatic upsurge in enforcement activity.[21] Looking at just the number of individual companies charged with FCPA violations during the past ten years, the rate of enforcement increased slightly between 2002 and 2006 before nearly tripling between 2007 and 2011.[22] Sources estimate that the

16. 15 U.S.C. §§ 78dd-2(a)–2(a)(1)(B) (2012). The term "corruptly" is not defined in the FCPA. The statute's legislative history suggests that it means a payment made with the intent to induce the recipient to misuse her official position to wrongfully direct business to the payer. *See* United States v. Kay, 359 F.3d 738, 749 n.40 (5th Cir. 2004).

17. 15 U.S.C. § 78dd-2. The term "issuer" means any firm that has a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file periodic reports with the SEC (i.e., public companies). *Id.* § 78dd-1. "Domestic concerns" are U.S. citizens, nationals, or residents, as well as firms that have their principal place of business in the United States or that are organized under U.S. law. *Id.* § 78dd-2(h).

18. *Id.* § 78m(b)(2)(A).

19. The DOJ has jurisdiction over criminal and civil enforcement of the FCPA's anti-bribery provisions; the SEC has civil authority over the issuers as well as their officers, directors, and agents.

20. Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MARKETING 108, 108 (1998).

21. Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 782 (2011).

22. The number of firms prosecuted under the FCPA was 2.4 per year from 1998–2006; since then, the number has risen to 12.6 per year. Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 1 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-35, 2012), *available at* http://ssrn.com/abstract=2116487. The breakdown of SEC/DOJ matters initiated against individual firms over the past ten years is as follows: 6 in 2002; 6 in 2003; 2 in 2004; 8 in 2005; 9 in 2006; 17 in 2007; 16 in 2008; 42 in 2009; 18 in 2010; and 24 in 2011. SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 3 (2012), *available at* http://www.shearman.com/Shearman--Sterlings-Recent-Trends-and-Patterns-in-the-Enforcement-of-the-Foreign-Corrupt-Practices-Act-FCPA--FCPA-Digest-01-03-2012/. Notably, one initial challenge in discussing the rate of FCPA enforcement is characterizing the data. Many actions involve charges against multiple affiliated companies in a single action. In others, the SEC and DOJ charge the same company. When those matters were consolidated into single corporate cases, there were 11 FCPA actions in 2009, 20 in 2010, and 16 in 2011. *Id.* at 1. No matter how the data is characterized, however, most agree that there has been a dramatic increase in FCPA enforcement in recent years. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) ("FCPA enforcement

number of FCPA investigations currently pending is between 120 and 150.[23] Enforcement activity continues to target both domestic and foreign firms,[24] as well as individual agents retained by those firms.

Several reasons may explain the increase in enforcement activity. Part of the story concerns globalization. In the time since the FCPA's passage, State Department officials gradually began to place more emphasis on the need for vigorous anti-corruption enforcement to "nurture stability in democratic institutions and strengthen the rule of law in transitional economies."[25] This position emerged as more firms of all sizes began to seek business opportunities abroad, including in many promising new markets where bribery is endemic. Other possible explanations relate to greater international cooperation with anti-corruption enforcement, as well as regulatory developments like the enactment of the Sarbanes–Oxley Act in 2002[26] and the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act in 2010.[27]

There has also been a recent shift in investigatory resources and tactics. The Federal Bureau of Investigation (FBI) now maintains an FCPA-specific unit consisting of eight full-time FBI agents. A dedicated group of 20 Assistant U.S. Attorneys in Washington, D.C. handles nearly every FCPA prosecution brought by the DOJ.[28] The SEC, too, recently created its own specialized unit tasked with civil FCPA enforcement.[29] Among other strategies, enforcement personnel now focus their attention on specific industry segments, where the targeting of one firm in a particular industry (e.g., pharmaceutical or extraction) often leads to evidence that affiliated firms are involved in the same underlying bribery scheme.[30] In addition, prosecutors continue to bring tools to bear on

activity in 2009, the ultimate year in the decade of the FCPA's resurgence, suggests that CPA enforcement will remain a prominent feature on the legal landscape throughout this decade.").

23. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1832–33 (2011); Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html.

24. *See* 15 U.S.C. § 78dd-1(a) (2012) (explaining how foreign firms can be prosecuted by U.S. regulators under the FCPA).

25. U.S. DEP'T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 12 (2000).

26. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 724(a) (2012)). Sarbanes–Oxley (SOX) imposed new reporting and certification obligations that may arise when a firm learns of potential FCPA compliance problems.

27. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified at 15 U.S.C.A. § 78u-6 (West 2012)). Under Dodd–Frank, qualified whistleblowers who provide original information about potential FCPA violations may be awarded between 10% to 30% of any government-imposed sanctions in excess of $1 million. The whistleblower provisions remain in their infancy, but the SEC's Enforcement Division already reports seeing a sharp increase in the number and quality of FCPA tips received. *See 'Full Regime' of Cooperation Emerging in Anti-Corruption Arena, DOJ Official Says*, Sec. L. Daily (BNA) (Aug. 18, 2011) (discussing the increase in tips as a result of the whistleblower program).

28. Garrett, *supra* note 23, at 1785; Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. __ (forthcoming) (manuscript at 17)

29. Garrett, *supra* note 23. The SEC's FCPA Unit has 36 staff members. *An "Entrepreneurial" and Restructured SEC Pledges Proactive Enforcement*, HARVARD L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Apr. 5, 2012, 9:38 AM), http://blogs.law.harvard.edu/corpgov/2012/04/05/an-entrepreneurial-and-restructured-sec-pledges-proactive-enforcement/.

30. Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 693–94 (2012).

FCPA matters that were traditionally reserved for organized crime and drug cases.[31] For example, the first undercover "sting" in an FCPA case came in 2010 and led to the arrests of 22 executives in the arms industry.[32] The operation—which one commentator analogized to a Hollywood crime thriller—involved the use of a cooperating witness, the seizure of evidence in multiple states and two different countries, and widespread collaboration among several domestic and international law enforcement agencies.[33]

B. Criticisms and Calls for Reform

The rise in FCPA enforcement activity has had several effects. For one, it has moved FCPA compliance to the forefront of most boards' agendas and spawned an "industry" of specialized FCPA defense counsel, consultants, and forensic accountants.[34] It has also led many influential members of the business community to push for reform.

1. Enforcement Practices

The reform movement has less to do with the FCPA's purpose—deterring foreign corruption—and more to do with how the statute is enforced. Specifically, the FCPA's critics maintain a narrative of overenforcement. They argue that the law is vague, overbroad, and often leads to confusion about what is legal and what is illegal. To take one example, critics make much of the fact that the FCPA's definition of "foreign official" includes "any officer or employee of a foreign government or any . . . instrumentality thereof."[35] Concerns arise because the statute does not define the term "instrumentality," and some experienced attorneys and managers claim that they have a hard time figuring out who or what comes within its scope.[36] Critics suggest that problems with ambiguity in the statute are compounded by the fact that fears of the negative consequences of indictment or conviction make it practically impossible for firms to challenge aggressive theories of liability in court.

Unpacking these issues requires first taking a look at how a typical FCPA case is resolved. When regulators come into contact with a firm suspected of a possible FCPA violation—either after an independent investigation or through voluntary self-disclosure—they have considerable discretion on what to do next. Internal policy guidelines suggest that their ultimate enforcement decisions should follow from the balancing of several factors: (1) the target's cooperation in the investigation; (2) the existence and perceived adequacy of the target's internal compliance and ethics program; (3) the extent of the harm associated with the wrongdoing; and (4) the pervasiveness of

31. Garrett, *supra* note 23, at 1799.

32. Yockey, *supra* note 30, at 694.

33. Diana B. Henriques, *F.B.I. Snares Weapons Executives in Bribery Sting*, N.Y. TIMES, Jan. 21, 2010, at A3.

34. *See, e.g.*, *28th National Conference on the Foreign Corrupt Practices Act*, AM. CONFERENCE INST., http://www.fcpaconference.com/index.php (last visited Dec. 28, 2012) (announcing the FCPA conference).

35. 15 U.S.C. § 78dd-1 (2012).

36. *See* F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 44–45 (2010) (discussing the wide range of foreign officials frequently encountered in the context of international business transactions).

the wrongdoing within the organization.[37] Ostensibly, this means that enforcers could weigh these factors and elect to prosecute a firm or its agents. Practically speaking, though, settlement is the norm in FCPA cases.

A good example of how this plays out is the case of Siemens AG. In 2008, Siemens, a German conglomerate, and three of its subsidiaries pleaded guilty to FCPA-related charges and agreed to pay $1.6 billion in sanctions in what still sets the mark for the largest settlement in FCPA history.[38] According to prosecutors, starting in the mid-1990s, Siemens paid over $1.4 billion in bribes to officials in 65 countries across Europe, Asia, Africa, the Americas, and the Middle East—including $1.7 million in kickbacks to the Iraqi government as part of the United Nation's Oil-for-Food Program.[39]

The sequence of events leading to the discovery of Siemens's questionable payments involved actions by regulators in the United States, Germany, Switzerland, Austria, and Italy.[40] The DOJ and SEC worked especially closely with the Munich Public Prosecutor's office, sharing information and evidence in a cooperative process facilitated by provisions for mutual legal assistance contained in the 1997 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business.[41] For its part, Siemens spent over $950 million on an internal investigation into the allegations of wrongdoing, later sharing what it learned with the U.S. and German governments.[42] This cooperation, which also included taking disciplinary action against individual employees, helped persuade regulators to reduce the total sanction level under the company's plea deal.[43] By pleading guilty, Siemens paid approximately $800 million to U.S. authorities and $800 million to German authorities.[44] Had the matter resulted in a conviction at trial, the applicable U.S. Sentencing Guideline range placed Siemens's potential exposure between $1.35 and $2.7 billion.[45]

In another notable development, Siemens consented to several corporate governance reforms as part of its plea agreement. The company agreed to retain an independent compliance monitor for a four-year period to oversee the implementation of a new internal compliance and ethics program and to make continuous progress reports to the DOJ.[46] Siemens also agreed to continue its cooperation with additional ongoing

37. *See* David Hess, *Combating Corruption Through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure*, 21 MINN. J. INT'L L. 42, 62–63 (2012) (explaining the criteria that DOJ prosecutors use).

38. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008) [hereinafter Siemens AG Pleads Guilty], *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

39. *Id.*

40. *Id.*

41. *Id.*

42. These expenses included $850 million in attorneys' fees, $5.2 million for translation services, and $100 million for information technology services. *See* Vardi, *supra* note 23 (detailing the process and results of Siemens's internal investigation and suggesting that the only "winners" were the attorneys who conducted the investigation).

43. Siemens AG Pleads Guilty, *supra* note 38.

44. *Id.*

45. Plea Agreement, United States v. Siemens Aktiengesellschaft, No. CR-8-367, ¶ 4 (Dec. 15, 2008).

46. Siemens AG Pleads Guilty, *supra* note 38.

investigations into potentially illegal payments.[47] This cooperation played a crucial role in the DOJ's indictment of eight former Siemens executives and agents in December 2011 on charges of bribery and money laundering.[48]

The settlement structure described above is now common in FCPA cases. A clear majority of all FCPA investigations are resolved either through plea agreements or, even more frequently, through deferred prosecution or non-prosecution agreements (DPAs or NPAs). According to data collected by the OECD, the average annual number of DPAs and NPAs rose from fewer than five per year in 2004 to over 20 per year in 2010 (with a high of 38 in 2007).[49] With respect to FCPA matters specifically, the DOJ used DPAs and NPAs in resolving approximately 77% of all actions initiated between 2004–10.[50] This percentage rose to 82% in 2011, and so far in 2012 *every* corporate FCPA enforcement action has been resolved via DPA or NPA.[51]

Because the parties in the *Siemens* case reached a plea agreement, it led to an actual conviction in addition to the company's agreement to implement governance reforms and help with further investigations. DPAs usually require the same types of reforms but differ from pleas in that they resemble a form of probation. The government files charges but agrees to suspend them as long as a firm agrees to do the types of things that Siemens agreed to do (e.g., disgorge profits, retain an independent compliance monitor, and cooperate in the government's underlying investigation).[52] If the firm complies with its obligations under the agreement, the prosecution will eventually dismiss the charges, usually between two to three years later.[53] DPAs also typically require firms to fully admit facts that establish their wrongdoing, meaning that firms must carry out their part of the bargain or risk near-certain conviction at trial.[54] NPAs are similar to DPAs but do not involve a formal court filing. Instead, prosecutors reserve the right to file charges but refrain from doing so if the firm maintains compliance with the same requirements

47. *Id.*

48. Press Release, U.S. Dep't of Justice, Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1626.html.

49. *See* ORG. FOR ECON. COOPERATION & DEV., UNITED STATES: PHASE 3 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 32 (2010) [hereinafter OECD PHASE 3 REPORT], *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/46213841.pdf (discussing the change in the number of DPAs and NPAs).

50. *Id.* Both the DOJ and SEC are empowered to enter into DPAs, though the first time the SEC used a DPA was in May 2011. Rob Khuzami, the newly appointed director of the SEC's Division of Enforcement, referred to his agency's use of DPAs as a "potential game changer." SHEARMAN & STERLING LLP, A NEW TOOL AND A TWIST? THE SEC'S FIRST DEFERRED PROSECUTION AGREEMENT AND A NOVEL PUNITIVE MEASURE 2 (2011), *available at* http://www.shearman.com/files/Publication/20b76673-2736-4a55-840f-1f75d518ca93/Presentation/PublicationAttachment/71ecb942-9eab-4482-b786-41522a71af75/LT-052411-A-New-Tool-and-a-Twist.pdf.

51. Catherine Dunn, *The Wait Continues for FCPA Guidance from DOJ*, CORPORATE COUNSEL (Nov. 9, 2012), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202577792246&thepage=2.

52. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 322 (2007).

53. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 934 (2010).

54. Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM 87, 92 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

usually included in a plea agreement or DPA.[55]

2. Overenforcement?

The trend toward using DPAs or NPAs to resolve cases is not without controversy. In the FCPA context, these devices play a key role in the overenforcement narrative put forward by the statute's critics. Why? Because most firms appear reluctant to litigate claims under the FCPA. This is generally explained by the leverage that regulators hold to drive cases toward settlement.[56] Many firms claim that the negative collateral consequences of indictment or conviction would be disastrous. Firms can suffer tremendous harm to their reputation just from being thought of as "criminal"—even as early as the investigatory stage.[57] Firms in some regulated industries could also lose their licenses or permits to operate, and others could become ineligible to receive U.S. or foreign government contracts or funds from international finance sources.[58] Less visible harms include challenges with recruiting well-qualified employees and maintaining good relationships with existing suppliers or customers. The risk of separate civil shareholder class-action suits underscores all of these concerns.

The other primary driver of settlement is the broad standard of liability in cases of corporate crime. As long as an employee acts within the scope of employment and is motivated to serve the interests of her firm, the legal principle of respondeat superior mandates that a corporation is vicariously liable for the employee's wrongdoing.[59] This is true even where the employee violates express instructions or existing compliance requirements. Given that agency costs are never zero and no company can ensure a perfect compliance record, the specter of respondeat superior liability tends to provide enforcers with considerable bargaining power during settlement negotiations.

To advocates for FCPA reform, all of this adds up to a worrying state of affairs. A common criticism is that federal authorities serve as both "prosecutor and judge" and are effectively using firms' willingness to settle as a means to control the outcome of every FCPA case they initiate.[60] Even though most cooperating firms end up paying fines below those called for by the Federal Organizational Sentencing Guidelines,[61] critics argue that it is problematic for defendants to feel coerced to settle without challenging prosecutorial theories of liability in court.[62]

55. OECD PHASE 3 REPORT, *supra* note 49.

56. SHEARMAN & STERLING LLP, *supra* note 50, at 3.

57. Buell, *supra* note 54, at 90–91.

58. James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1237 (2007).

59. Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 INT'L LAW. 1259, 1275–76 (2008).

60. WEISSMANN & SMITH, *supra* note 2, at 2.

61. *See* SHEARMAN & STERLING LLP, *supra* note 22, at 5–6 (explaining that over the past five years, FCPA defendants that have voluntarily disclosed potential violations have received discounts from applicable Sentencing Guideline calculations in a range of 3% to 67%, with most falling within a range of 20% to 30%).

62. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1491–92 (2009). One FCPA compliance expert argues that "[t]he scope of things companies have to worry about is enlarging all the time as the government asserts violations in circumstances where it's unclear if they would prevail in court . . . [y]ou don't have the checks and balances you would normally have if you had more litigation." Vardi, *supra* note 23.

This concern is usually framed in terms of overenforcement. For example, one argument is that the benefits of cooperation often appear illusory, with the high costs of settling going beyond what is necessary for deterrence. There are several examples where firms paid jaw-dropping sums to settle FCPA-related charges despite providing extensive cooperation.[63] Total criminal and civil sanctions imposed on corporations in FCPA matters since 2008 amount to over $3.5 billion—a figure that does not include related expenditures on internal investigations or government-mandated corporate governance reforms.[64] And these latter amounts can be quite large. Anecdotes abound where firms pay millions to outside counsel as part of their cooperation with authorities, followed by millions more in fines and the expense of hiring a government-mandated compliance monitor as part of a settlement.[65] Thus, the $950 million that Siemens spent on its internal investigation[66] is cited alongside the $150 million Avon has currently spent investigating *possible* FCPA misconduct in China—a figure that may grow following the imposition of sanctions after the company shares the results of its investigation with authorities.[67] These examples lead some FCPA practitioners to wonder "how much

63. Examples include the $1.6 billion paid by Siemens AG in 2008, *see* Vardi, *supra* note 23; $579 million by KBR/Halliburton in 2009, Zachary A. Goldfarb, *Halliburton, KBR Settle Bribery Allegations*, WASH. POST, Feb. 12, 2009, at D1; $400 million by BAE in 2010, Daniel Michaels & Cassell Bryan-Low, *BAE to Settle Bribery Cases for More than $400 Million*, WALL ST. J., Feb. 6–7, 2010, at B1; $388 million by Technip S.A. in 2010, Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010); $356 million by Snamprogetti Netherlands in 2010, Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010); $218 million by JGC Corporation in 2011, Press Release, U.S. Dep't of Justice, JGC Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (April 6, 2011); and $185 million by Daimler AG in 2010, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010). These figures include the total amount of any civil and/or criminal fine, disgorgement, and interest imposed as part of settling FCPA charges.

64. *See* SHEARMAN & STERLING LLP, *supra* note 22, at 4 (noting specifically, over $508 million was paid in 2011; $1.78 billion in 2010; $579 million in 2009; and $803 million in 2008). Several points about these figures deserve mention. First, in 2008 and 2009, it is important to keep in mind that nearly 100% of the total fines came from just two settlements: Siemens AG in 2008 and KBR/Halliburton in 2009. *Id.* The trend of having a few outliers account for the bulk of total sanctions continues into 2010 and 2011. In 2010, nearly two-thirds ($1.1 billion) of the total penalties came from just three of the year's 20 consolidated matters (Technip, Snamprogetti, and BAE). *See id.* at 5 (listing the penalties for Snamprogetti and Technip as $365 million and $338 million, respectively); Michaels & Bryan-Low, *supra* note 63 (listing the penalties for BAE at $400 million). Adding the next three largest settlements from that year to the mix means that six cases accounted for 80% of all sanctions, with the remaining matters settling for an average of $20 million each. SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2–3 (2011). Results from 2011 are similar. *Id.* The average penalty paid in 2011 was $33.8 million. SHEARMAN & STERLING LLP, *supra* note 22, at 4. If the high and low outliers are removed, the average falls to $22 million. *Id.* Thus, while these numbers are certainly material, they do not appear as dramatic when compared only to annual totals.

65. *See* Vardi, *supra* note 23 (explaining that the independent monitor retained by Siemens as part of its settlement could reportedly cost the company up to $52 million in fees).

66. Siemens AG Pleads Guilty, *supra* note 38.

67. Peter J. Henning, *The High Price of Internal Inquiries*, N.Y. TIMES DEALBOOK, May 6, 2011, http://dealbook.nytimes.com/2011/05/06/the-high-price-of-internal-investigations/. As discussed in Part III.B, it is important to keep in mind that these figures mean relatively little in isolation. To be useful, these costs must be compared to the scope of the underlying problem, the benefits that a company stood to gain through the corrupt transactions at issue, and the probability of detection.

worse [firms] would be if they didn't self-report or cooperated only if they got caught."[68]

Efforts to avoid fines and other expenditures can lead to several related problems. If firms cannot realistically challenge prosecutors' interpretation of ambiguous provisions in the FCPA due to the fear of collateral consequences, then the resulting unpredictability in enforcement may cause their agents to become overly risk averse, or it could lead firms to avoid certain markets altogether. A recent Dow Jones survey found that 51% of companies have delayed, and 14% have cancelled, business ventures abroad due to uncertainty over FCPA enforcement.[69] Lack of predictable statutory interpretation can also raise the costs of developing and implementing internal compliance programs, and firms may end up devoting time and resources to monitoring efforts that exceed socially optimal levels. Arguably the most vocal FCPA reform advocate, the U.S. Chamber of Commerce (the Chamber), sums up this argument as follows:

> The result of [current FCPA enforcement policy] has been a chilling effect on legitimate business activity (as companies perceive a real risk of prosecution even in scenarios involving only the most remote and attenuated connection to foreign governments) and a costly misallocation of compliance resources (as companies dedicate resources to policing and investigating even such remote and attenuated situations).[70]

These concerns have not fallen on deaf ears. Vigorous lobbying efforts by prominent corporate advocacy groups continue to gain traction among congressional leaders.[71] In just a three-month period at the end of 2011, the Chamber reportedly spent $400,000 on external lobbyists and $5.6 million on an internal team as part of its push for reform.[72] Though no draft legislation has yet to emerge, there appears to be strong bipartisan support for some type of FCPA reform.[73] The DOJ and SEC recently provided 130 pages of new regulatory guidance, but critics want more.[74] Critics hope Congress will take steps

68. Vardi, *supra* note 23. The data on mitigating factors is mixed. Hinchey surveyed settled FCPA cases from 2002 to 2009 and found that the ratio of sanctions and the amount of bribes paid is greater for companies that voluntarily disclose FCPA violations. Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 404–06 (2011). Choi & Davis find that the correlation between mitigating factors (including voluntary disclosure and cooperation with authorities) and total monetary penalties paid is not significant. Choi & Davis, *supra* note 22, at 21. By contrast, Shearman & Sterling LLP find that the DOJ gave discounts ranging from 3% to 67% in FCPA cases involving voluntary disclosure and negotiated settlements. SHEARMAN & STERLING LLP, *supra* note 22, at 5.

69. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 498 (2011) (discussing confusion over anti-corruption laws).

70. Letter from U.S. Chamber of Commerce et al., *supra* note 2, at 2.

71. The Chamber hired former Attorney General Michael Mukasey to lobby on its behalf.

72. C.M. Matthews, *Clinton Defends FCPA, as U.S. Chamber Lobbys for Changes to Law*, WALL ST. J. BLOGS (Mar. 23, 2012, 1:51 PM), http://blogs.wsj.com/corruption-currents/2012/03/23/clinton-defends-fcpa-as-us-chamber-lobbys-for-changes-to-law.

73. Tina Chi, *While FCPA Reform Has Bipartisan Support, an Actual Proposal Has Not Yet Surfaced, Rep. Bobby Scott Says*, 10 Corp. Accountability Rep. 32 (BNA) (Jan. 13, 2012). U.S. Senators Amy Klobuchar (D. Minn.) and Chris Coons (D. Del.) say that they plan to introduce legislation to clarify parts of the FCPA. U.S. Representative Jim Sensenbrenner (R. Wis.) has also suggested that he will introduce a similar bill. C.M. Matthews, *Is Bobby Scott Getting Behind FCPA Legislation?*, WALL ST. J. BLOGS (Dec. 2, 2011 3:17 PM), http://blogs.wsj.com/corruption-currents/2011/12/02/is-bobby-scott-getting-behind-fcpa-legislation/.

74. CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., SEC. & EXCHANGE COMM'N , FCPA:

like amending the statute to clarify various provisions or to add a defense to liability based on the existence of an "effective" compliance program.

On the other side of the debate are groups arguing in favor of the status quo.[75] As soon as news started to leak that amending the statute might soon become reality, over 30 leading civil society organizations—including Amnesty International and Human Rights Watch—wrote to lawmakers urging them to decline any invitation to "weaken" the FCPA.[76] Other commentators argue that, if anything, FCPA enforcement has been too lenient on wrongdoers. Even some members of the business community have started to distance themselves from reform efforts being spearheaded by the Chamber.[77]

III. QUESTIONING THE CURRENT REFORM NARRATIVE

A. The Need for Ambiguity and Flexibility

The concerns raised by the FCPA's critics must be taken seriously given the recent prioritization of FCPA enforcement. However, there are several problems with the current reform narrative. The first relates to the claim that ambiguity in the FCPA is a primary cause of the perceived overenforcement problem. Admittedly, several parts of the FCPA appear vague or open to multiple interpretations. This problem includes the statute's required mental state, "corruptly," which remains undefined, as well as the term "foreign official" mentioned earlier. What critics often overlook, however, is that a certain degree of ambiguity is necessary to fulfill the FCPA's purpose of deterring corruption. To explain, we need first to look at the normative values that inspired its enactment. This Article then explains how those values are reflected in the FCPA's design.

1. Focus on Values

The FCPA's origins stem from a series of corruption scandals in the 1970s. First, in 1971, Congress gave the military aircraft company Lockheed a $250 million loan guarantee to stave off bankruptcy shortly before learning that the company obtained several foreign government contracts through the use of bribery.[78] This discovery

A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA: RESOURCE GUIDE], *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

75. Hess & Ford, *supra* note 11, at 307–11 (noting the view by some that DPAs result in "crime without conviction").

76. *Groups Urge Congress Not to Narrow Scope of FCPA*, Sec. L. Daily (BNA) (Jan. 18, 2012).

77. Charles Duross, the Deputy Chief of the DOJ's Fraud Section and head of the DOJ FCPA Unit, claims that several compliance officers have told him that the FCPA provides their companies with a competitive advantage because it allows employees in the field to cite the statute as the reason why they cannot give into bribe requests. *See* James McGrath, *DOJ FCPA Unit Chief Charles Duross at Ohio State's FCPA Symposium*, FCPA PROFESSOR BLOG (Mar. 19, 2012), http://www.fcpaprofessor.com/doj-fcpa-unit-chief-charles-duross-at-ohio-states-fcpa-symposium (discussing the evolution of the FCPA); s*ee also* Samuel Rubenfield, *GE's GC: SEC Is Fuzzy on FCPA Sentencing Guidelines*, WALL ST. J. CORRUPTION CURRENTS BLOG (Mar. 15, 2012, 11:31 PM), http://blogs.wsj.com/corruption-currents/2012/03/15/ges-gc-sec-is-fuzzy-on-fcpa-sentencing-guidelines/ (noting that GE's general counsel, Brackett Denniston, does not believe FCPA enforcement has gone "overboard").

78. *See* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism, China's New Laissez Faire, and Their Impact in the Developing World*, 59 UCLA L. REV. 354, 372 (2011) (discussing

embarrassed U.S. officials and created tension in the countries where the bribes were paid.[79] A few years later, SEC investigations into the Watergate scandal uncovered roughly $300 million in questionable payments made by American companies, often via offshore "slush funds," to support political campaigns in the United States and abroad.[80]

These scandals proved to be the tipping point for legislative action, but the FCPA was about more than just responding to a few isolated events. The statute's "fundamental motivation . . . was moral."[81] A leading sponsor of the bill proclaimed that "[t]here's just no disagreement on . . . the venal effect of bribery, that it is wrong."[82] The FCPA's principled approach to regulating corruption became explicit as the United States pushed for greater multilateral commitment to fighting bribery. Initial criticisms of the FCPA focused on how it might put American firms at a competitive disadvantage. The argument proceeded as follows: if only American firms are prohibited from bribery, then firms from other countries remain free to take their places in promising foreign markets where bribery is seen as a necessary cost of doing business.[83] Other early critics of the FCPA maintained that bribery could be pro-competitive, as when necessary to gain market entry, and an efficient way to counteract bureaucratic delays in overregulated or developing economies.[84]

Rather than weaken the FCPA in response to these concerns, Congress sought to protect the interests of American firms by leveling the global playing field. Considerable lobbying led to several multilateral anti-corruption instruments, the most visible of which remains the OECD Anti-Bribery Convention.[85] This Convention was almost entirely a product of pressure that U.S. officials exerted on OECD member states after American firms convinced Congress that they could not compete internationally so long as the FCPA remained an outlier.

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the Lockheed case and the FCPA in the 1970s).

79. Countries where Lockheed admitted paying bribes include Japan, Italy, and the Netherlands. *Id.*

80. *See* Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 961 (2009) (discussing the implications of the Watergate scandal).

81. Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, 161–62 (2002).

82. *Id.* (quoting *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing on S. 305 Before the Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. (Mar. 16, 1977)).

83. *See also* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 674 (2004) (describing international reluctance to adopt anti-bribery measures).

84. *See* David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1412 (2008) (citing studies that suggest bribery may have pro-competitive effects); John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, FOREIGN AFF., Sept.–Oct. 1998, at 17.

85. The official name of the OECD Anti-Bribery Convention is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Though the OECD Anti-Bribery Convention tends to gain the most attention in the anti-corruption literature, other similar international conventions include: United Nations Convention Against Corruption (UNCAC), Oct. 31, 2003, G.A. Res. 58/4, U.N. Doc. A/RES/58/422; African Union, Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (40 signatories); Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173 (Council of Europe) (48 signatories); Civil Law Convention on Corruption, Nov. 24, 1999, E.T.S. No. 174 (Council of Europe) (42 signatories); Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 4 (38 signatories).

It took nearly 20 years, but eventually the OECD Anti-Bribery Convention entered into force in 1999 and 39 states have ratified it.[86] The Convention closely tracks the FCPA and requires ratifying states to implement domestic legislation prohibiting the bribery of foreign public officials in international business transactions. In some ways the Convention goes beyond the FCPA's original requirements, and, once ratified in 1998, required Congress to amend the latter's jurisdictional reach to cover anyone, including foreign nationals or foreign companies who commit an act in furtherance of bribery while in U.S. territory.[87] The Convention also includes provisions designed to bolster its effectiveness, including measures on multilateral investigatory cooperation and extradition for bribery offenses, and is enforced through a system of peer review.[88]

The process of gathering multinational support for the anti-corruption effort was difficult. Most countries initially resisted the United States' lobbying because they believed that bribery provided their domestic firms with one of the only advantages they had over their American counterparts.[89] The message that ultimately resonated and convinced foreign governments to come on board came back down to values. With help from non-governmental organizations (NGOs) like Transparency International and a small group of influential U.S. corporate executives committed to seeing even transnational enforcement, a consensus began to emerge that the social benefits of combating corruption outweigh any economic disadvantages that might follow from extraterritorial anti-bribery laws.[90] The strength of the values-based rationale for combating corruption became so convincing that the final version of the Convention that OECD member states accepted opted for the most severe response—criminalization—rather than more moderate options like disclosure.[91]

2. Principle-Based Design

The normative values that inspired the FCPA's enactment (as well as similar international instruments) are reflected in its statutory design. Most statutes can be

86. The OECD's 34 member countries and 5 non-member countries—Argentina, Brazil, Bulgaria, Russia, and South Africa—have adopted the Anti-Bribery Convention. *See* OECD, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS: RATIFICATION STATUS AS OF APRIL 2012 (2012), *available at* http://www.oecd.org/daf/briberyininternational business/anti-briberyconvention/40272933.pdf (listing signatories to the Convention). Russia became the 39th state to join the OECD Convention in 2012. Of the other "BRIC" economies, Brazil joined in 2002. China is not yet a member of the OECD Convention, but in 2011 it enacted domestic legislation that prohibits bribery of foreign officials. As of the time of this writing, India remains the only major economic power to still allow transnational bribery. Elizabeth Spahn, *Multi-Jurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. (forthcoming 2012) (manuscript at 1).

87. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306–09 (codified as amended at 15 U.S.C. § 78dd-3) (codifying anti-bribery regulations). Prior to this amendment the FCPA applied only to U.S. domestic concerns and issuers subject to the SEC regulation. *See supra* text accompanying note 17 (defining "domestic concern" and "issuer").

88. Abbott & Snidal, *supra* note 81, at 173 ("Peer review was envisioned as a discursive procedure, akin to the 'managerial model' of implementation, in which the values inherent in the convention (or recommendation), in international law and in OECD membership could be brought to bear on recalcitrant governments.").

89. Tarullo, *supra* note 83, at 687.

90. Abbott & Snidal, *supra* note 81, at 162–63, 175–76.

91. *Id*. at 682–83.

roughly grouped along a line of rules or principles. Where a statute falls on either side of that line typically depends on its level of specificity.[92] Rule-based statutes tend to be narrowly tailored and specific about what they require or prohibit.[93] By contrast, principle-based statutes are broader and more open-ended.[94] The classic example of this distinction is the common speed limit. A rule-based speed limit might say that drivers are prohibited from exceeding 70 miles per hour, whereas one based on principles might simply require drivers to drive at a "reasonable" speed.[95]

While the FCPA does contain a few specific rules, it is primarily a principle-based statute. The prohibition against bribery is defined in broad terms and focuses on the payer's intent. A challenged payment must have been done "corruptly" and for the purpose of "obtaining or retaining business."[96] Whether someone acts "corruptly" requires making a value judgment of whether the bribe payer intended to induce the bribe recipient to misuse her official position to wrongfully direct business to the payer.[97]

Determining whether a statute is based on rules or principles sheds light on its enforcement dynamic. Because rules are narrow and more technical, they provide persons or firms subject to their enforcement with greater levels of notice and predictability.[98]

92. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 553 (2009) (arguing that constitutional drafters use rules because they want to limit discretion, but they use principles to channel politics and delegate decisions to future generations).

93. James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 130 (2012).

94. *Id.*

95. *Id.* Of course, the normative justification underlying a law is a separate issue from the semantic properties of the text of the law and does not determine categorically whether a statute will be principle-like rather than rule-like. Similarly, a distinction is often drawn between "principles" and "standards," though both are similar and remain offset from rules. *Id.* at 132. Standards are said to follow from policy considerations, such as cost-benefit analyses, while principles are thought to reflect fundamental values held by the public at large or smaller communities. *Id.* The focus in this Article is mainly on principles as so defined. This is because the FCPA, and securities regulation in general, is often discussed along the lines of competing values. Park, *supra* note 93, at 132. In addition, as discussed throughout, Congress was primarily motivated by values-based considerations when enacting the FCPA.

96. 15 U.S.C. §§ 78dd-1(a)(1)(B), 78dd-2(a)(1)(B), 78dd-3(a)(1)(B) (2012). The U.K. Bribery Act similarly prohibits bribes to foreign officials that are made "to obtain or retain business or an advantage in the conduct of business." MINISTRY OF JUSTICE, GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY 19 (2011), *available at* http://www.justice.gov.uk/downloads/consultations/bribery-response-consultation.pdf.

97. *See* United States v. Kay, 359 F.3d 738, 749 n.40 (5th Cir. 2004) (noting that in enacting the FCPA, Congress was principally concerned about payments that prompt an official to deviate from her official duty, not payments that cause officials to properly perform those usually ministrial duties that their office requires). The Eighth Circuit has applied a different definition of "corrupt" in the FCPA setting, saying that the term means conduct that is "voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991) (alteration in original) (quoting the trial court's jury instructions); *see* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1018 (2000), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm (explaining that under the FCPA, the person making the payment must have a corrupt intent—the payment must be intended to induce the recipient to misuse his position). The Criminal Resource Manual guides prosecutorial discretion and follows the same definition of "corruptly" referenced in *Kay*. *See id.* (defining corrupt payment as something intended to influence any act or decision of a foreign official in his or her official capacity).

98. Park, *supra* note 93.

Rules also make it harder for regulators to overreach.[99] Conversely, the more general nature of principles provides regulators with greater flexibility when interpreting them to address activities that might not have been anticipated when a statute first entered force.[100] How that flexibility is exercised will come down to a variety of factors—including moral values and public policy goals—and thus provides firms with less notice about how the statute will be applied.

Once the FCPA's principle-based approach is taken into account, some of the most frequent criticisms regarding FCPA enforcement take on a different gloss. For example, the notion that the anti-bribery provisions are open to expansive interpretation should not come as a surprise. This is simply a natural outgrowth of the values that Congress designed the FCPA to reflect. By way of illustration, consider the FCPA's requirement that a bribe must be made to obtain or retain business in order for liability to attach.[101] This requirement, dubbed the FCPA's "business nexus" requirement, is one area where the range of prohibited conduct becomes narrower because bribes made for non-business reasons are not proscribed. However, firms continue to argue that the contours of the necessary business nexus remain vague, with regulators often applying them too aggressively.

This issue came up in *United States v. Kay*.[102] In that case, two individual defendants alleged that payments made to foreign officials to avoid customs duties and to lower sales taxes did not satisfy the business nexus requirement because they were not tied to the award of a specific new government contract or the renewal of an existing contract.[103] The Fifth Circuit rejected the defendants' claim and held that the FCPA's business nexus requirement should be broadly construed to cover any payments that provide the payer with an unfair competitive advantage.[104] In reaching this conclusion, the court relied in large part on Congress's decision to ratify—without reservation—the OECD Convention in 1998 (which in turn required a few slight amendments to the FCPA).[105] Article One of the Convention prohibits payments to a foreign public official to induce her to "act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[106] Seizing on the language "or other improper advantage," the *Kay* court concluded that the types of payments that the defendants made would fall within the Convention's scope, and, by the same token, also fall within the FCPA's anti-bribery provisions.[107]

99. *Id.* at 131.

100. *Id.*

101. 15 U.S.C. § 78dd-1(c)(2) (2012).

102. *Kay*, 359 F.3d at 743.

103. *Id.*

104. *Id.* at 755.

105. *Id.* at 753–55.

106. OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1.1, Dec. 17, 1997, 37 I.L.M. 1.

107. *Kay*, 359 F.3d at 754. Much has been made over the *Kay* court's statement that not all payments to lower taxes or customs duties will violate the FCPA. According to the court, "if the government is correct that anytime operating costs are reduced the [defendant] is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach." *Id.* at 760. The court concluded

From an enforcement perspective, this conclusion rests on sound policy grounds. Bribery is a complex and clandestine endeavor. Regulators are rarely able to precisely link profits through bribery with the retention or capture of a particularized competitive advantage. Foreign officials often drop vague hints about what a bribe will accomplish without negotiating for a direct quid pro quo arrangement.[108] Forms of corrupt transactions also rarely remain static. As regulators learn of one type of scheme, wrongdoers shift to new ways of concealing illicit payments. Trying to anticipate every specific form of foreign corruption would be nearly impossible.

Similar reasoning bears on the FCPA's definition of "foreign official." As several Justice Department officials note, any narrowing of this term would be impracticable due to the many different forms of foreign governments.[109] This is one reason why the OECD Anti-Bribery Convention's equivalent of the FCPA's foreign official requirement is so broad.[110] The current international trend is clearly toward creating a more expansive scope of anti-corruption coverage, which has led some states to criminalize bribes paid to both public and *private* foreign actors.[111] Put simply, flexibility and breadth in anti-corruption legislation continues to be of paramount importance given the ever-changing issues and circumstances associated with corruption.

B. Settlement Dynamic

Of course, recognizing the need for flexibility in anti-corruption laws probably will not resolve critics' concerns about potential overenforcement. This brings us to the crux of the reform argument: that the leverage that prosecutors hold through corporations' fear of indictment means that there is nothing to stop prosecutors from applying the FCPA's expansive scope beyond what is necessary for deterrence. But again, this issue is not as clear-cut as reform advocates would like everyone to believe. Yes, regulators do have considerable leverage to drive cases toward settlement, but fears that they will use this

that the government must show how a bribe produces an effect, such as tax savings, "that would assist in obtaining or retaining business," as opposed to merely increasing "the profitability of an already profitable venture." *Id.* at 756, 760 (internal quotation omitted). Critics of current FCPA enforcement practices contend that regulators often ignore this part of the *Kay* analysis and continue to bring cases involving bribes to reduce taxes and duties without showing how those payments assist in getting or keeping business. This criticism seems off base. First, the language in *Kay* providing that payments that only increase profitability do not assist in obtaining or retaining business appears to be dicta. The court's reasoning on this point is also economically suspect. Avoiding taxes or customs duties in an amount of $250,000 is equivalent to gaining $250,000, as the SEC correctly noted in its amicus brief in *Kay*. *Id.* at 744 n.18.

108. *But cf.* Shawn Cole & Anh Tran, *Evidence from the Firm: A New Approach to Understanding Corruption*, *in* 2 INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 408, 410 (Susan Rose-Ackerman & Tina Soreide eds., 2011) (noting that in some Asian countries a kickback may be directly negotiated as part of the procurement process).

109. *Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 47 (June 14, 2011) (statement of Greg Andres, acting U.S. Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice).

110. The OECD Convention provides that "'foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization." OECD Convention, *supra* note 106, art. 1.4.

111. *See* KENNEDY & DANIELSEN, *supra* note 12, at 49 (discussing how the U.K.'s Bribery Act of 2010 provides one such example, as does the OAS Treaty, to which the United States is a signatory).

leverage too aggressively across the board seem overblown.

For one thing, *some* FCPA cases do go to court. Earlier this Article discussed the *Kay* court's decision that the FCPA's business nexus requirement should be construed broadly.[112] In addition, several defendants recently litigated the government's interpretation of the term "instrumentality" within the FCPA's definition of foreign official and received rulings that provide multi-factor tests for dealing with this issue.[113]

Even setting aside these actions as outliers, the fact that firms often elect to cooperate and might still pay large fines does not automatically mean that the regulators are overenforcing the FCPA. Not all sanctions in FCPA settlements are large, and some appear to be *de minimis*.[114] The traditional economic approach to evaluating the quality of enforcement posits that penalties should be sufficient to induce wrongdoers to fully internalize the social cost of their violations.[115] Overenforcement results if the total penalty imposed exceeds the amount optimal for deterrence.[116] Applying this definition in the FCPA setting requires analyzing the resources spent on enforcement and the sanctions imposed in each case.[117] It also requires looking at: (1) how much a firm stood to gain through the use of bribery; (2) the amount of all sanctions, including any non-legal sanctions (such as harm to reputation); and (3) the probability of detection and successful prosecution.[118] For example, if the odds of sanction via a successful FCPA enforcement action are considerably less than 100%, then paying a bribe would seem to be efficient *ex ante* as long as the expected sanction is less than the gain from the offense.[119]

112. For a more detailed discussion of *Kay*, see *supra* text accompanying notes 102–07.

113. One court ruled that a state-owned enterprise qualifies as an instrumentality of a foreign government based on the application of the following non-exclusive factors: (1) whether key officers and directors of the entity are, or are appointed by, the government; (2) whether the entity is financed by the government or through revenues obtained via government-imposed taxes or other fees; (3) whether the entity has exclusive power to exercise its designated functions; (4) whether the entity provides its services to citizens within the country; and (5) whether the entity is widely perceived and understood to be performing governmental functions. United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011). The court in *United States v. Control Components* applied a similar multifactor test but also included jury instructions requiring the DOJ to prove that the defendant executives knew that the bribe recipients were government officials. *See* SHEARMAN & STERLING LLP, *supra* note 22, at 12 (describing the jury instruction and its impact on control components and subsequent cases).

114. Garrett, *supra* note 23, at 1847.

115. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL'Y INT'L, Autumn 2010, at 3, 5 (setting forth the authors' opinion that the optimal sanction must be "great enough, but no greater than necessary to take the profit out of [the sanctioned act]"); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 190–93 (1968) (deriving equations expressing optimality in fine calculation in order to cause wrongdoers to internalize social costs).

116. Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1744 (2005).

117. Park, *supra* note 93, at 126–29 (discussing quantitative measures used to derive fair approximations of the "optimal" level of enforcement and noting the inherent lack of qualitative detail in analyzing a large sample of cases).

118. Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 224 (2010) ("To deter, officials' penalties should be an increasing function of the payoffs they receive and the probability of detection.").

119. Put differently, "the optimal total sanction must consist of a fine equal to the perpetrator's expected gain from the violation multiplied by the inverse of the probability of detection . . . the penalty must be sufficient to render the expected value of the illegal behavior equal to zero." Ginsburg & Wright, *supra* note

This framework can cast a different light on cases like *Siemens*, discussed above. On one hand, critics point to the high costs of the company's cooperation and the resulting $1.6 billion in fines as evidence of overenforcement. On the other, without knowing how much Siemens stood to profit from the bribes paid or how likely it was that the bribery would be discovered, the possibility remains that the company got off too easily.[120] Firms doing business in the developing world may rationally expect that they might have to pay a bribe or ransom, and will adjust their expected risk premium in accordance with the likelihood of detection.[121] Seen in this light, if companies are willing to enter a country with the knowledge that bribes are likely a cost of doing business there, FCPA enforcement simply becomes an additional cost to consider. Unfortunately, trying to assess FCPA enforcement quality along the lines of the traditional economic model proves difficult for several reasons.

1. Quantitative Issues

One limitation of the traditional model is that it often relies on inexact quantitative inputs. For example, the total amount of business sought through bribery frequently remains unknown, and, even if disclosed, would need to be adjusted for overhead costs in order to provide an accurate sense of potential profits. The DOJ and SEC begin to calculate profits from bribery by giving a "reasonable approximation" of the defendant's illicit gain, which the defendant then has a chance to rebut.[122] But some observers argue that the government's method for reaching its initial estimate is faulty,[123] and others believe that it likely produces overly conservative estimates of expected gain because regulators will want to avoid a protracted debate about the total fine amount.[124]

115, at 7.

120. Choi & Davis, *supra* note 22, at 2, 8, 21. Choi and Davis find evidence that the SEC and DOJ impose greater FCPA sanctions on firms in cases that involve greater amounts of bribe payments and greater profits from bribery, as well as more extensive misconduct as measured by illegal activities that span multiple country lines, involve both parent and subsidiary companies, and feature both entity and individual employee defendants. This may suggest that differences in the regulatory treatment of defendants depend on differences in each defendant's moral culpability or may reflect an attempt to impose greater sanctions on more egregious harms. However, Choi and Davis do not attempt to answer the question of whether the precise level of sanctions being imposed is optimal for deterrence.

121. Yockey, *supra* note 21, at 800.

122. Jonathan M. Karpoff et al., The Impact of Anti-Bribery Enforcement Actions on Targeted Firms 13 (Feb. 27, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1573222.

123. Turk, *supra* note 28, at 30–31. Speaking to the frequent use of a disgorgement penalty in FCPA settlements, Turk notes:

> [R]egardless of the unique factual difficulties raised in the FCPA context, the SEC is applying an incorrect analytical framework that ensures that disgorgement amounts are incorrect and overestimated. This is because the SEC typically makes a rough estimate of the "paper profits" from a particular project subject to bribery, while the proper methodology is to estimate the difference between what the defendant corporation actually earned to a "but-for" world in which no bribe was offered. Such an analysis requires considering the "incremental probability of winning generated by the bribe and the opportunity cost of the project won that will lead to a more realistic," both of which will tend to produce a lower disgorgement number.

Id. (citations omitted).

124. Karpoff et al., *supra* note 122, at 15.

Similarly, the costs of legal and non-legal sanctions are often difficult to judge because the consequences of a corporate indictment or conviction may not be as severe as critics suggest. A recent study finds that firms suffer little to no reputational harm based on bribery charges alone, as opposed to charges of both bribery and accounting violations.[125] This supports Brandon Garrett's observation that while "[t]he reputation of an accounting firm may be greatly affected by fraud allegations . . . customers who buy Siemens kitchen appliances may not be particularly troubled by the payment of bribes in a third world development project."[126] Reputational costs further need to be offset by other considerations, including any corresponding public relations benefits that follow from settlement.[127] For example, when ABB recently resolved FCPA charges, it quickly announced how the compliance program adopted as part of its settlement agreement set a new industry "benchmark."[128] Siemens took a similar approach and is now seen as a compliance leader.[129]

The costs imposed by structural reforms required as part of settlement can also be difficult to evaluate. Admittedly, once regulators target a firm for FCPA scrutiny, the legal and forensic expenses necessary to conduct an internal investigation can be considerable. This Article previously noted the amounts spent by Siemens and Avon. A recent study finds that firms spend, on average, approximately one percent of their market capitalization on internal investigations after the onset of a federal FCPA investigation.[130] But this figure comes with some caveats. First, the costs used to calculate this average were self-reported and firms may underreport the time value of money spent by management in dealing with the investigation. If so, the costs of investigations may actually be higher than reported. On the other hand, the figures offered by firms may reflect bias. Firms advocating for FCPA reform may err on the side

125. *Id.* at 3–4.

126. Garrett, *supra* note 23, at 1783–84, 1790.

127. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 102 (2002) ("A firm can always seek to introduce ambiguity. Settlements can be accompanied by denial of wrongdoing, perhaps bolstered—as has occurred in the securities arena—by a public relations campaign to promote the view that false claims are a systematic lawyer- (or greedy customer-) driven phenomenon. If believed, this lowers the reputational threat, especially if the firm has the benefit of a pre-existing positive 'halo.'").

128. Press Release, ABB, ABB Resolves Foreign Corrupt Practices Act Issues and Will Pay a Total of $58.3 Million (Sept. 30, 2010), *available at* http://www.abb.com/cawp/seitp202/b7aa479846d0fe19c12577ae0017bfa0.aspx. Companies in other industries have also used reform in response to scandal as an opportunity to wage public campaigns against competitors. *See* Will Oremus, *How Apple Turned the Foxconn Scandal into Another Way to Beat Its Competitors*, SLATE (Mar. 30, 2012), http://www.slate.com/articles/technology/technology/2012/03/apple_foxconn_how_the_world_s_most_valuable_company_turned_its_labor_crisis_into_a_way_to_beat_its_competitors_.html (explaining how Apple turned negative labor allegations into a positive by announcing a new deal with Foxconn to improve labor conditions).

129. After its FCPA settlement, Siemens touted the assembly of a 600-person compliance team. The company also announced plans to enter into "collective agreements" with competitors designed to ensure that members of a particular industry commit to competing for business in an open and clean manner. *See* David Hechler, *Comeback Company: Siemens Fights to Recover from Bribery Scandal*, CORP. COUNS. (Oct. 28, 2009), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202434970012&comeback_company_siemens_fights_to_recover_from_bribery_sc_andal_.html (explaining how Siemens assembled a 600-person compliance team and entered into "collective agreements" with competitors in the wake of a bribery scandal).

130. Karpoff et al., *supra* note 122, at 23 ("The mean expense is $71.05 million, with a median of $11.00 million.").

of reporting higher amounts of compliance to bolster their case for change. Even if they are not politically motivated, it is unclear whether the figures cited by firms separate the specific costs of FCPA investigations from other ongoing internal investigations.[131] It is also uncertain whether firms that claim excessive costs associated with FCPA-related compliance programs are factoring in the costs necessary to fulfill their general internal compliance obligations under state corporate law.[132]

Others note a related problem: the government's calculation of pecuniary gain does not take into account the likelihood of detection—and transnational bribery is exceedingly difficult to detect.[133] FCPA cases often depend on securing foreign evidence and foreign cooperation. Signs of progress are beginning to show in this area, but U.S. authorities still face significant obstacles depending on where the alleged bribery transpired. Obtaining investigatory assistance from key trade partners like the United Kingdom or Germany is one thing. Getting similar levels of help from countries in Eastern Europe, Asia, or Africa is quite another.[134] The recent use of industry sweeps can help counter some of these challenges, but a natural byproduct of this approach is that firms outside of a particular sweep enjoy a lower risk of detection. Investigators can respond by using more complex discovery methods (like wiretaps and stings), but they have limited budgets, and the expense associated with these tactics may require them to cut back on the total number of investigations.

A final issue concerns the way the DOJ and SEC openly discuss their focus on particular industries and their desire to raise FCPA enforcement in general. When firms and individual wrongdoers become aware of an increase in enforcement, they will remain on alert and take greater measures to avoid detection.[135] Bribe payers who are corporate agents have considerable institutional advantages in this regard. As Darryl Brown and William Stuntz point out, wealth buys privacy.[136] Large firms have so many levels of hierarchy that it can make tracking individual employee misconduct difficult.[137] Individual violators can take the additional step of falsifying or destroying relevant documentation. Illegal bribe payments can be disguised by complex accounting treatments, repeated wire transfers, and the reliance on foreign agents, consultants, or

131. *Id.*

132. Doty, *supra* note 58, at 1241–42.

133. Rose-Ackerman, *supra* note 118, at 224; Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 143 (2010).

134. Anna E. D'Souza & Daniel Kaufmann, Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms 13–14 (May 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1563538 (discussing how poor governmental effectiveness in developing countries hinders detection rate at home).

135. *See* Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 928–29 (2011) ("[F]or a certain class of wrongdoers, conspicuous enforcement does not deter. Instead, it perversely increases the wrongdoer's effectiveness.").

136. *See generally* Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521 (2004) (discussing the range of practical barriers that make white collar crimes harder to detect, investigate, and prosecute); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) (discussing the tension between privacy rights and the government intrusion into one's privacy for purposes of criminal procedure and ordinary regulation).

137. *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1625 (2007) (discussing how private organizations are relatively opaque and larger firms with hierarchical layers are even more challenging).

subsidiaries.[138] Different industries also present unique detection risks. For example, in the construction industry, projects are usually lengthy, complicated, and expensive. This makes it easier for bribe payers to inflate cost records to allow for illicit payments, and, because most construction contracts are different, investigators often have trouble comparing and benchmarking costs.[139]

2. Structural Issues

To overcome obstacles with detection, regulators must generally rely on a combination of self-disclosure and voluntary cooperation by individual firms, backed up with promises of leniency.[140] This means that the threat of independent discovery must be just credible enough to get firms to the bargaining table. Developments like the certification requirements in Sarbanes–Oxley and the enhanced whistleblowing incentives in Dodd–Frank[141] should help on this point and likely explain why many firms opt for self-disclosure. But this dynamic also means that firms play an active role in resolving enforcement actions. Accordingly, another challenge with assessing FCPA enforcement quality comes from the fact that most actions end in *negotiated* settlements. Critics advancing the overenforcement narrative often overstate the leverage that prosecutors hold at the settlement stage, and may also be overly discounting the structural advantages that corporate defendants enjoy in comparison to individual defendants. Put simply, once settlement discussions start, firms can play several cards to help drive settlement values downward.[142]

138. Spahn, *supra* note 86 (manuscript at 31). Bribes paid in cash are especially difficult to track.

139. *See* Cole & Tran, *supra* note 108 ("[C]onstruction projects require a range of permits, allowing officials at various levels to exact bribes . . . [and] a large portion of the project output is concealed, making it difficult to verify the quantity and quality of construction input.").

140. Rose-Ackerman, *supra* note 118, at 222. This Article notes:

> Successful detection of corruption depends upon insiders to report wrongdoing. Citizens and businesses victimized by extortion demands may report bribery attempts, but they may not be able to offer enough proof for prosecutors to act. Instead, effective law enforcement often requires officials to promise leniency to one of the participants. This leniency creates an important paradox for law enforcement efforts. High expected punishments ought to deter corruption, but a high probability of detection may only be possible if some are promised low penalties.

Id.

141. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C.A. § 78u-6 (West 2012)). Under Dodd–Frank, qualified whistleblowers who provide original information about potential violations of the securities laws—which includes the FCPA—will be awarded between 10% and 30% of any monetary sanction imposed on a firm in excess of $1 million by either the DOJ or SEC. *See id.* § 922(a) (codified at 15 U.S.C. § 78u-6) (describing new incentives and protections for whistleblowers). The exact amount of the reward is left to the SEC's discretion based on factors such as the significance of the information, the degree of assistance provided, and the programmatic interest of the government. The following individuals are not eligible for a monetary reward: (1) persons who are criminally convicted in a related action; (2) those who acquire the information they provided through financial statement audits; and (3) persons who fail to submit their information in a form required by the SEC, or who knowingly provide false, fictitious, or fraudulent information. *Id.* The statute attempts to protect whistleblowers by prohibiting employers from retaliating against them.

142. This fact is one reason why some anti-corruption groups have criticized promises of leniency in exchange for cooperation. *See* Rose-Ackerman, *supra* note 118, at 227–28 (describing worries that promises of leniency will weaken enforcement of the law).

While it is true that FCPA convictions could lead to disqualification or debarment, much depends on the type of firm under scrutiny.[143] Only a small subset of FCPA defendants operates in industries like accounting or asset management where an indictment or conviction could mean the death of the company. Even if they do, this severe punishment is a factor the government has to consider as well. Just as the Arthur Andersen prosecution and conviction served as a warning sign to firms, federal regulators also came to recognize the dangers that can follow from prosecutions against certain entities. Though the U.S. Supreme Court ultimately overturned Arthur Andersen's criminal conviction, the appeal came after the firm collapsed and was too late to prevent harm to the firm's employees, creditors, and other stakeholders.[144] Others note that this might be one reason why debarment in FCPA cases remains rare. Some firms may simply be "too big" for debarment, including members of the defense industry or companies that perform functions that cannot be easily replaced.[145]

DPAs and plea agreements thus allow regulators to avoid the negative ripple effects that an entity-level indictment or conviction could have on employees, creditors, and shareholders while still "sanctioning" a firm accused of criminal misconduct.[146] Prosecutors can also use these devices to cite an array of successful enforcement proceedings while at the same time avoiding the risk of adverse results in evidentiary hearings or a trial and preserving their "win-loss" records.[147] However, to maintain a favorable record, prosecutors must take care to avoid pushing firms too far so as to jeopardize the settlement. Most firms will have at least roughly gauged their potential FCPA exposure and set aside funds in reserve in accordance with that calculation. They will want to pay a fine within an acceptable range and then quickly get back to

143. Beale, *supra* note 62, at 1500–02.

144. Bill Mears et al., *Andersen Conviction Overturned*, CNNMONEY (May 31, 2005, 2:58 PM), http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/.

145. *See* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 809–10 (2011) (detailing various reasons for the DOJ choosing not to disbar certain contractors).

146. *See* Griffin, *supra* note 52, at 330 ("When DOJ announced the DPA with AOL, for example, it stated that the agreement was designed to 'achieve[ ] a result that minimizes the collateral damage to shareholders and employees while imposing an appropriate punishment and protecting the rights of victims.'" (quoting Press Release, U.S. Dep't of Justice, America Online Charged with Aiding and Abetting Securities Fraud; Prosecution Deferred for Two Years; Company Agrees to Cooperate with Investigation, Pay $210 Million; Four Individuals Agree to Plead Guilty (Dec. 15, 2004), *available at* http://www.justice.gov/opa/pr/2004/December/04_crm_790.htm)). Regulators also benefit from DPAs and NPAs by avoiding the expense and complexities that would be part and parcel with the full-on prosecution of an entity defendant. Private firms—especially large ones—often feature multiple divisions, varying levels of hierarchy, and sophisticated internal computing and communication systems. As Professor Buell notes, "[a]ll of this adds up to a more difficult project for the state than the 'ordinary' criminal case. The modern organizational case can easily involve hundreds of witnesses, millions of documents, and years of investigation requiring the labor of dozens of state actors." Buell, *supra* note 137. The settlement of an FCPA action through a DPA or NPA allows regulators to reach a resolution that avoids these complications and their attendant costs.

147. Others have documented how prosecutors tend to be risk averse to protect their record of "wins" and bolster their employment prospects and potential political ambitions. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009) [hereinafter Bibas, *Prosecutorial Regulation*] (describing the personal motivations that may affect prosecutors); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) [hereinafter Bibas, *Plea Bargaining*] ("They may further their careers by racking up good win–loss records, in which every plea bargain counts as a win but trials risk being losses.").

business.[148] Firms know, too, that in all but extraordinary cases, the government will be inclined to forgo pressing for sanctions that fall outside of that range. FCPA cases are expensive.[149] Gathering foreign evidence is not cheap. Questions like whether an agent acted with the necessary *mens rea* ("corruptly") or satisfied the FCPA's jurisdictional requirements are highly fact-specific, subject to heightened burdens of proof, and rarely have straightforward answers. These issues can be especially difficult to unpack and present to a jury in light of the complexity inherent in overseas transactions.[150] This puts a premium on investing substantial resources at the investigation stage of each case, which regulators with limited budgets may be unable to afford or unwilling to pay.[151]

Relatedly, firms accused of foreign bribery often possess the resources to match or exceed those of the government.[152] Total revenue figures from the companies charged with FCPA violations in 2011 ranged from $157 million to $106 billion, with total stockholders' equity in ranges from $103 million to over $20 billion.[153] With these resources, firms have access to high-powered and well-connected defense attorneys—many of whom entered private practice immediately after working in leadership positions for the DOJ or SEC. Indeed, a brief scan of all FCPA actions from the past two years reads like a "who's who" of former government attorneys.[154] One of the selling points

148. Mark Mendelsohn, former deputy chief of the Fraud Section of the DOJ's Criminal Division and current partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, recently remarked that "companies [facing FCPA scrutiny] would rather negotiate a 'speedy resolution' that will allow them to focus on their businesses rather than go to court." Yin Wilczek, *Proposed Reforms of FCPA Seek to Fix What Is Not Broken, Ex-DOJ Prosecutor Says*, 7 White Collar Crime Rep. 292 (BNA) (Mar. 29, 2012).

149. James B. Stewart, *Bribery, but Nobody Was Charged*, N.Y. TIMES, June 24, 2011, http://www.nytimes.com/2011/06/25/business/25stewart.html?pagewanted=all&_r=0 ("The decision not to pursue [FCPA] cases against individuals seems also to reflect budgetary constraints at both [the DOJ and SEC] (cases involving foreign witnesses can be especially costly) and, for the Justice Department, the burden in a criminal case of proving guilt beyond a reasonable doubt.").

150. *See* Park, *supra* note 93, at 133–34, 136 (discussing the difficulties presented by fraud prosecutions and principle-based enforcement cases); *see also supra* Part III.A.2 (noting the FCPA is a principle-based statute).

151. *See* Park, *supra* note 93, at 136 ("In order to succeed, enforcers will need to assemble evidence of culpable intent, which often requires costly and timely review of voluminous materials."); *see also* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 606–07 (2012) ("In corporate governance, many regulatory and law enforcement agencies claim that they are underfunded. The SEC has often claimed itself to be [underfunded], despite a growing regulatory and enforcement portfolio. The FBI too has claimed . . . a lack of funds, including in connection with the financial crisis.").

152. *See* Beale, *supra* note 62, at 1483–84 ("In 2008, annual revenues from the top ten revenue-producing corporations in the United States were more than $2.1 trillion. . . . Because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals.").

153. *See, e.g.*, International Business Machines Corp., Annual Report (Form 10-K) (Feb. 28, 2012) (showing total revenues of $106 billion and total stockholders' equity of $20.1 billion for year ending Dec. 31, 2011); Maxwell Technologies, Inc., Annual Report (Form 10-K) (Feb. 16, 2012) (showing total revenues of $157 million and total stockholders' equity of $103 million for year ending Dec. 31, 2012).

154. The list includes a former Acting Deputy Assistant Attorney General and Chief of the Justice Department's Fraud Section, Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 104 (2011); a former Chief of the SEC's FCPA Unit, *Scarboro to Simpson Thatcher*, FCPA PROFESSOR (June 3, 2011), http://www.fcpaprofessor.com/scarboro-to-simpson-thatcher; a former Assistant Special Prosecutor of the Watergate Special Prosecution Force, *Biographies: Roger W. Witten*, WILMERHALE, http://www.wilmerhale.com/roger_witten/ (last visited Dec. 28, 2012); and numerous former

that these lawyers use in seeking new clients is their network of connections and familiarity with high-level federal corporate criminal investigations and prosecutions.[155] Of course, it is difficult to quantify how much representation by a former federal prosecutor helps when it comes to litigating an FCPA enforcement action. However, it is clear that firms consider such representation a considerable asset at the settlement stage, and prosecutors may think twice about taking a hard-line stance when a member of "big law" is on the other side of the table—especially when that lawyer has the funds to mount a vigorous defense and is uniquely knowledgeable about the strategies employed by federal authorities.

Finally, the various social costs and political concerns that can arise in FCPA cases should not be overlooked. As Paul Carrington notes, some prosecutors might find it personally troubling to target U.S. firms for paying bribes to *foreign* officials with whom they have no connection, particularly if the bribes won deals that led to greater shareholder wealth or more jobs for American employees.[156] Because public enforcers do not profit directly from an individual enforcement action, they could be more inclined to accept a lower settlement if they find the social cost of higher sanctions unacceptable.[157]

All of these factors may explain, at least to some degree, why regulators have suffered several setbacks in recent FCPA actions. The most recent setback came as part of the most extensive FCPA investigation ever launched.[158] In January 2010, the DOJ indicted and arrested 22 executives in the arms industry as they were attending an international trade show in Las Vegas.[159] These arrests, often referred to as the "Catch-22" arrests, were part of the first undercover sting operation in FCPA history.[160] While three of the Catch-22 defendants pleaded guilty to conspiring to violate the FCPA, the rest went to trial divided into four groups. The first group went to trial in May 2011. The court eventually declared a mistrial after the jury deliberated for five days without reaching a verdict.[161] The second group went to trial in September of the same year, but the District Court eventually dismissed all charges based on lack of sufficient evidence to

Assistant U.S. attorneys who focused on white-collar crime prosecutions, *Scarboro to Simpson Thatcher*, *supra*.

155. Justice Department officials frequently emphasize the importance of hiring defense attorneys who are honest and credible. Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1283–84 (2011). Accordingly, firms may worry about hiring anyone who is not a member of the ex-Justice or ex-SEC communities. This concern shows up in statements made by corporate defense attorneys on their web biographies. For example, when advertising its group of white-collar specialists, one prominent firm stated that "[t]hese former government officials have extraordinary relationships, credibility and influence in business, legal and government circles nationwide." *Id.* at 1284.

156. Carrington, *supra* note 133, at 134, 139.

157. *See* Park, *supra* note 93, at 154.

158. Henriques, *supra* note 33. One defendant was not physically present during the trade show arrests but law enforcement arrested him at or about the same time in Florida.

159. *Id.*

160. *See* Steven Andersen, *Groundbreaking FCPA Case Ends with Dismissals*, INSIDE COUNS., Apr. 30, 2012, http://www.insidecounsel.com/2012/04/30/groundbreaking-fcpa-case-ends-with-dismissals; Robert C. Blume et al., *2010 Mid-Year FCPA Update*, GIBSON DUNN (June 8, 2010), http://www.gibsondunn.com/publications/pages/2010Mid-yearFCPAUpdate.aspx.

161. Blume et al., *supra* note 160.

send the matter to the jury.[162] The next two trials ended in full acquittals and another mistrial, respectively.[163] Though the Justice Department said it would pursue retrials where possible, eventually "the government moved to dismiss all charges against the nineteen remaining defendants."[164]

The government experienced another adverse outcome in the trial against Lindsey Manufacturing and several of its employees. At first, things went well for the prosecution. The jury issued guilty verdicts against each defendant, including the company itself in the first instance of an entity-level conviction for FCPA violations.[165] However, the judgment did not stand after the defendants moved to dismiss the indictment based on claims of prosecutorial misconduct. The court granted the motion with prejudice after finding that prosecutors allowed an FBI agent to make false statements to the grand jury, obtained evidence through warrants based on misrepresentations in supporting affidavits, failed to disclose exculpatory *Brady* material, and repeatedly disobeyed court instructions during witness examinations.[166]

Despite these outcomes, it is important to keep them in context. The courts did not base any of the pro-defendant results on legal theories associated with the FCPA, nor did they deal with the question of whether prosecutors interpreted the statute too expansively. Mainly a lack of evidence or idiosyncratic instances of prosecutorial abuse caused the acquittals and mistrials. Most of the government's defeats also came in criminal cases against individuals, who may have more tolerance for litigation risk because their personal liberty is at stake.

Still, Mark Mendelsohn—the former deputy chief of the fraud section in the DOJ's Criminal Division and current partner at the Paul, Weiss firm—believes these results suggest that the DOJ is likely attempting to do too much with its modest resources.[167] At the very least, these setbacks should encourage greater internal monitoring and evaluation within the Justice Department and the SEC as they seek to avoid similar losses in the

162. *Id.*

163. Robert Wilhelm, *Government Throws in the Towel in Massive FCPA Sting Investigation*, 7 White Collar Crime Rep. 143 (BNA) (Feb. 23, 2012).

164. *Id.*

165. C.M. Matthews, *Judge Dismisses Landmark Bribery Conviction, Rips DOJ*, WALL ST. J. BLOGS (Dec. 1, 2011), http://blogs.wsj.com/corruption-currents/2011/12/01/judge-dismisses-landmark-bribery-conviction-rips-doj/.

166. According to the District Judge's order:

> [I]t is with deep regret that this Court is compelled to find that the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.

Id. A final setback came when a court acquitted a former executive for the American subsidiary of ABB Ltd. was acquitted of FCPA charges on January 16 of 2011. The District Judge found that the prosecution failed to present sufficient evidence linking the defendant to the alleged corrupt payments. Robert Wilhelm, *Court Tosses FCPA Case Against Executive Accused in Scheme to Bribe Utility Officials*, 7 White Collar Crime Rep. 44 (BNA) (Jan. 27, 2012). The Government has dropped its appeal of the dismissals in *Lindsey*.

167. Wilczek, *supra* note 148.

future.[168] The setbacks also come at a time when anecdotal evidence suggests that DPAs are becoming less onerous, both in terms of their length and the content of mandated structural reforms.[169]

IV. NEXT STEPS IN THE REFORM DEBATE

The foregoing discussion does not mean that prosecutors do not hold substantial leverage in pushing FCPA resolutions toward settlement—they clearly do—only that such leverage must be assessed in light of the circumstances of each case. Prosecutors have limited budgets and political concerns of their own. Most firms facing FCPA scrutiny possess the resources to hire expert, well-connected defense counsel and do not operate in industries where an indictment would automatically be fatal. Their managers will want to settle investigations as quickly as possible and get back to business, and a combination of factors suggests that they should be able to drive a harder bargain during settlement negotiations than often portrayed by reformers.

Perhaps greater empirical analysis—already underway—will better inform our understanding of these issues, assuming that analysts can overcome uncertainties about detection and other inputs.[170] But for now, even assuming that claims of overenforcement deserve at least modest skepticism, proponents of the status quo should not take it for granted that FCPA enforcement quality is high. The most useful aspect of the current debate is that it provides an opportunity to reexamine the framework of FCPA enforcement and the policy goals it hopes to achieve. This examination reveals that the current model suffers from several problems.

A. Risk of Underdeterrence

The first issue that the current enforcement model raises is the risk that, if corruption is not being overly deterred, it is being underdeterred. As we have seen, the current sanction-based approach to FCPA enforcement requires the state to make significant investments in monitoring and detection in order to enforce compliance.[171] The strain that this places on regulatory capacity helps explain the reliance on firm self-disclosure and cooperation. But this dynamic also signals a potential paradox in present FCPA enforcement. As anti-corruption enforcement becomes a higher priority, there is a risk

168. Despite the setbacks described above, the DOJ has been successful in some FCPA trials. *See* SHEARMAN & STERLING LLP, *supra* note 22, at 12–14 (discussing successful prosecutions of defendants Frederic Bourke and Gerald and Patricia Green).

169. *Id*. Of particular note is the trend away from FCPA settlements that include the appointment of an independent compliance monitor and toward greater reliance on self-monitoring in DPAs and NPAs. Yin Wilczek, *SEC/DOJ Shift Towards Self-Monitorships Reflects Issuers' Improved FCPA Compliance*, Sec. L. Daily (BNA) (Oct. 23, 2012).

170. *See* Choi & Davis, *supra* note 22, at 2 (using data from 2004–2011 to explain FCPA sanctions). The empirical work on FCPA sanctions by Choi & Davis is useful because it shows that "the magnitude of sanctions imposed on defendant companies in FCPA actions depends not only on what they did but where they are from and where they committed their violations." *Id.* at 43. However, from a deterrence perspective, their study does not factor in the likelihood of detection, nor does it account for non-monetary sanctions. *Id.* at 17 n.16.

171. Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, *in* THE OXFORD HANDBOOK ON REGULATION 146 (Robert Baldwin et al. eds., 2010); *see supra* text accompanying notes 167–68 (noting the modest resources of the government and the need to efficiently monitor and evaluate violations).

that regulators will focus on bringing smaller, easier actions that they can be sure of settling in order to demonstrate a high enforcement volume—or that they will settle cases against larger firms capable of mounting a defense for only minimal amounts.[172]

To take the DOJ as an example, a staff of 20 prosecutors likely cannot afford the time and risk associated with prosecuting every large firm suspected of wrongdoing. Thus, for every case like *Siemens*, prosecutors may devote the bulk of their energy and resources to pursuing firms that self-report or are less able to mount a vigorous defense. This strategy would be rational for an enforcer that needs to point to a vigorous enforcement record to back up a strong public commitment to fighting corruption.[173] However, if the expense of pursuing firms is too great for regulators with limited resources, they could end up imposing sanctions through settlement that are too low to sufficiently deter wrongdoing. These circumstances likely explain why so many NGOs and other actors in the international community believe that transnational bribery remains a significant problem despite greater attention to enforcement compared to years past.[174] They also undercut the values at the heart of the FCPA and raise questions about the United States' reputation in the international community as a pioneer in spreading anti-corruption norms.

One way to bypass these issues might be to legislate for more severe sanctions in FCPA cases. However, as to enforcement, we are concerned with not only finding the correct level of deterrence, but also the costs to society of enforcing the rule designed to do the deterring. With many criminal statutes, the costs of enforcement consist mainly of the costs of paying for prosecutors, prisons, police, and courts. With respect to the FCPA, though, there is another set of significant costs: the costs incurred by companies to establish internal compliance systems. If sanctions are set too high, there could become a point where the total costs of enforcing the statute—including compliance costs—become

172. These actions also typically follow from self-disclosure. *See* Hess & Ford, *supra* note 11, at 314 (noting also that "many convictions relied on actions that the corporation could have easily disguised to avoid detection, suggesting that more careful firms are able to make similar payments without significant fear of prosecution").

173. Park, *supra* note 93, at 147–48. Because of its size and considerable funding,

> the SEC is expected to produce a certain amount of enforcement output. It is easier for the SEC to generate a high volume of cases by bringing rule-enforcement cases. While a significant principle-enforcement action might create a significant amount of deterrence, the effects of the action may be unclear. Given the risk and time involved in enforcing principles, it may be rational for the SEC to focus on rule-enforcement cases that are straightforward and likely to settle quickly.

Id.

174. *See Global Corruption Barometer 2010/11*, TRANSPARENCY INT'L (2010), http://gcb.transparency.org/gcb201011/results/ (averaging the results for question #1 worldwide shows that 56% of world citizens believe that overall levels of corruption have increased in the past three years); s*ee also* Carrington, *supra* note 133, at 142–43 (showing commitment to increase cracking down on corruption yet doubting the effort's effectiveness). Carrington notes:

> One may admire the sincere efforts of all those who have secured the promulgation and ratification of these international conventions and still question whether they are effective in deterring corruption of public officials, or perhaps merely express "a hollow commitment." A thorough empirical study revealing an effect on the realities of weak governments has not been conducted, but the available data points to a conclusion that "enforcement must be re-energized."

Id.

socially inefficient as they are passed on to consumers and other end-users of a firm's products or services.[175]

Still another option would be for regulators to devote more energy to prosecuting individual wrongdoers within a firm. At bottom, employees who commit FCPA violations typify the agency cost issue that affects all firms. But many FCPA settlements simply require firms to pay a fine and make various internal governance reforms. As long as bribery is profitable and sanctions are borne primarily at the entity level, managers have little incentive to try to stop it.[176] This is especially true if the results of bribery provide them with career advancement or other personal benefits.[177] Prosecuting the individuals responsible for committing bribery—or those who failed to make a good faith effort to monitor the bribe payers—is one way to counteract the principal-agent problem.[178] As Miriam Baer observes:

> Most corporate chieftains would prefer to avoid fines. But all are horrified by the thought of jail and the prospect of being publicly labeled a criminal. . . . [P]unishment [also] improves compliance . . . [because it] reassures the employees and officers who are inclined not to break rules that we will hold accountable those who do. Punishment signals to law-abiding employees that the trust they have placed in others is reasonable and likely to be reciprocated.[179]

The trouble here is in proportioning blame appropriately. It is extraordinarily difficult to structure sanctions in a way that accurately captures the culpability of responsible parties. This difficulty follows from the organizational complexities inherent in modern corporations that make it challenging to assess internal behavior.[180] Even if these obstacles could be overcome and the "right" people are held accountable, the question remains whether subsequent managers or agents will be sufficiently deterred.[181] This concern highlights the importance of corporate culture. While it is true that FCPA violations can be viewed as part of a corporate principal-agent problem, they are not

175. Ginsburg & Wright, *supra* note 115, at 8.

176. *Id.* at 14 ("Corporate fines are unlikely to efficiently deter conduct by an individual employee because he will internalize almost none of the fine imposed against his employer.").

177. Rose-Ackerman, *supra* note 118, at 234 ("If payoffs help a firm obtain business, managers and owners may hope to facilitate their subordinates' bribery while remaining ignorant of the details. If corporations are held criminally liable for the corrupt acts of their employees and agents, top management may not support an effective monitoring system." (citation omitted)); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994).

178. Rose-Ackerman, *supra* note 118, at 235.

> One possibility is a negligence rule under which firms are only liable if they have neglected their internal enforcement responsibilities. For such a rule to be workable, however, courts must be able to evaluate internal firm behavior, a difficult task. One solution may be quite precise directives stating what type of internal monitoring is required with checks to be sure it is carried out in good faith.

Id.

179. Baer, *supra* note 151, at 630–31.

180. Rose-Ackerman, *supra* note 118, at 234–35.

181. *See* Carrington, *supra* note 133, at 146 (contemplating whether deterred firms will be able to compete with less constrained firms operating in other countries).

always the product of rogue individual agents. Prosecuting individual wrongdoers can only go so far in producing sweeping reform in companies where violations stem from issues of organizational culture and practices.[182] Cristie Ford and David Hess cite empirical studies showing that a majority of employees believe that "organizational factors"—such as pressure to meet performance targets or the disregard of internal corporate codes—are more to blame for firm misconduct than employee self-interest.[183] For this reason, many scholars believe that "corporate criminal enforcement ought to focus above all on genuine *institutional* production of wrongdoing," where placing "blame at the institutional rather than individual level is most justified and most likely to send useful messages about how institutions ought to arrange themselves so as not to produce lawbreaking."[184]

B. Compliance Challenges

Something else that often gets overshadowed by the current reform debate is the fact that an increasing number of firms are less interested in debating potential structural reforms to the FCPA and more focused on making anti-corruption compliance part of long-term strategic planning and risk management.[185] Whether framed in terms of corporate social responsibility or not, these firms have come to realize that there is a business case to be made for avoiding bribery that goes beyond the risk of regulatory sanction. Bribery raises their marginal tax rate, increases the chance of continuous solicitation,[186] raises the cost of capital due to the time lost during haggling,[187] makes it harder to recruit and keep talent, and, for some companies, can have adverse branding and reputational effects.[188] Contracts obtained through bribery may also be legally unenforceable, and can undermine employee trust and confidence in management.[189]

For firms that strive to be law-abiding, the issue then becomes how to structure their compliance efforts to minimize the chance of wrongdoing. This is often easier said than done. Corruption comes in many forms and rarely remains static. Corrupt negotiations may occur between low-level government workers and low-level firm employees, or

182. Hess & Ford, *supra* note 11, at 311, 317.

183. Cristie Ford & David Hess, *Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context*, 33 LAW & POL'Y 509, 512 (2011).

184. Buell, *supra* note 54, at 105.

185. KENNEDY & DANIELSEN, *supra* note 12.

186. Daniel Kaufmann & Shang-Jin Wei, *Does "Grease Money" Speed up the Wheels of Commerce?* 5, 8 (Nat'l Bureau of Econ. Research, Working Paper No. 7093, 1999).

> [F]irms that pay more bribes not only face a higher nominal rate of harassment in equilibrium, but also have to deal with a higher effective rate of harassment . . . . [C]ountries that allow corruption and bribery to flourish are, on average, also those with firms that waste more, not less, time with government officials haggling over regulation.

Id.

187. *Id.* at 11. The desire to avoid paying bribes can also cause costs to increase in other ways, as when companies pay more to ship goods through countries that present a lower risk of corruption. *See* Susan Rose-Ackerman & Rory Truex, *Corruption and Policy Reform* 6 (Copenhagen Consensus Project, Working Paper No. 444, 2012), *available at* http://ssrn.com/abstract=2007152.

188. Kaufmann & Wei, *supra* note 186, at 11.

189. FCPA: A RESOURCE GUIDE, *supra* note 74, at 3.

between high-ranking government officials and members of a firm's executive suite. Different markets and industries also present different risks. While commercial participants in some countries see bribes as simply a cost of doing business, in others the request for payment often rises to the level of extortion.[190] Unique cultural norms and business practices can further blur the lines between innocuous gift giving and illegal kickbacks.[191]

Firms also are not immune to the monitoring difficulties that frequently bamboozle law enforcement. Transnational bribery often occurs in secret and remote locations. A company's ability to monitor is extremely limited in these circumstances. This concern is compounded by firms' frequent reliance on foreign agents and intermediaries (a legal requirement in some countries) because these actors operate at the periphery of regular corporate activities and have a variety of tools available for hiding illegal payments.[192] Some foreign officials have even gone so far as to help agents hide their tracks by channeling bribes disguised as fees or commissions through specially created shell entities.[193] Similarly, direct quid pro quo transactions often give way to indirect payments to foundations or educational institutions that mask the specific personal benefit enjoyed by a foreign public official or her relatives.[194] These issues affect firms of all sizes, but can be particularly difficult for small- and medium-sized entities to handle given their frequent lack of resources and expertise. Managers may respond by threatening heavier penalties on agents who participate in bribery, but that only raises the additional danger they will become overly risk averse or will demand too great a risk premium for their services.[195]

It follows, then, that one of the greatest barriers to implementing meaningful compliance measures is not cost or willingness; it is overcoming unique risk assessment and monitoring challenges that arise under the circumstances of each firm. However, one danger posed by the current enforcement climate is that it encourages firms to focus primarily on compliance strategies they can defend later should they happen to come under investigation. This has serious drawbacks. Regulators often lack the resources or expertise necessary to gain context-specific knowledge about how risk manifests itself in different firms.[196] Thus, when crafting structural reform aspects during negotiations over a DPA or NPA, this leads them to generate static, uniform rules that fail to account for

190. Yockey, *supra* note 21, at 783.

191. *See generally* Warin et al., *supra* note 36 (describing the unique cultural norms in China exposing individuals to the risk of anti-bribery laws).

192. Yockey, *supra* note 21, at 811. The FCPA expressly prohibits corrupt payments made through the use of third parties. 15 U.S.C. § 78dd-1(a)(3) (2012); *id.* §§ 78dd-2(a)(3), 78dd-3(a)(3) (prohibiting bribes paid "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).

193. *See* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 686 (2000).

194. *See* PRICEWATERHOUSECOOPERS, CONFRONTING CORRUPTION 19 (2008), *available at* http://www.pwc.com/gx/en/forensic-accounting-dispute-consulting-services/business-case-anti-corruption-programme.jhtml.

195. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2186 (2012).

196. Baer, *supra* note 151, at 638–39; Bamberger & Mulligan, *supra* note 7.

the myriad business and compliance variables that firms confront on a daily basis.[197] Firms, in turn, may respond by implementing rigid compliance programs designed to "check the boxes" required by regulators regardless of whether they actually work to deter wrongdoing.[198] Rules and commands are rarely as effective in preventing internal misconduct as a system that hires for and seeks to reward and perpetuate a culture of compliance.[199] Moreover, any lack of experimentation also hinders efforts at developing the type of robust compliance laboratory necessary to find new and innovative ways of mitigating the perpetual risk of corruption.[200]

These considerations call into question the wisdom of adding an express compliance defense to the FCPA—something that many FCPA reform advocates continue to request. Without more, a compliance defense, which would provide firms with a shield to liability if they can demonstrate the existence of an "effective" compliance program, is unlikely to produce meaningful organizational reform. First, employee wrongdoers faced with rigid internal monitoring programs may simply respond by investing more time and energy in detection avoidance.[201] Moreover, regulators or courts with incomplete knowledge and limited expertise would seemingly be charged with judging the effectiveness of each company's program. Thus, a worry is that the process necessary to administer a compliance defense would devolve into the same type of formalized programs outlined above that fail to mesh with the unique situations and risks faced by firms and their agents, while also overlooking the bigger picture of reforming corporate values and internal culture.[202]

C. Gaps in Multilateral Enforcement

A third concern about the current FCPA reform debate is that it fails to adequately consider the influence of international developments on issues of domestic compliance. On one hand, as discussed earlier, the United States has been extremely successful at convincing other countries to adopt anti-corruption legislation in accordance with the OECD Anti-Bribery Convention. The problem is that enforcement has not always followed adoption. Transparency International notes that the "[OECD] Convention has not yet reached the point at which the prohibition of foreign bribery is consistently enforced," due mainly to a "lack of political commitment by government leaders."[203] A 2009 survey by Transparency International found that 14 non-U.S. signatories to the OECD Convention have enforced their anti-corruption laws as evidenced by prosecutions or investigations, but only three from this group—Germany, Norway, and Switzerland—

197. Bamberger & Mulligan, *supra* note 7.

198. Ford, *supra* note 13.

199. Bibas, *Prosecutorial Regulation*, *supra* note 147, at 963.

200. Bamberger & Mulligan, *supra* note 7, at 481; Christie Ford, *Macro and Micro-Level Effects on Responsive Financial Regulation*, 44 U. BRIT. COLUM. L. REV. 589, 600 (2011).

201. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1057–58 (2008).

202. Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2160–61 (2003) (reviewing PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET (2001)).

203. FRITZ HEIMANN ET AL., TRANSPARENCY INT'L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION (2011), *available at* http://issuu.com/transparencyinternational/docs/oecd_report_2011?mode=window&backgroundColor=%23222222.

are described as having a track record of "active" enforcement.[204] Twenty-one ratifying states have made little or no effort at enforcement.[205]

Recent steps by federal authorities appear to confirm that they are cognizant of this situation. Over the past two years, the SEC and DOJ devoted roughly equal attention to U.S. and non-U.S. firms. For example, in 2010, 11 of the 20 consolidated corporate cases involved non-U.S. companies.[206] These 11 cases resulted in 94% of all monetary sanctions imposed in FCPA cases that year.[207] This is likely based, at least in part, on a desire to encourage foreign governments to apply their own anti-corruption laws. Several of the foreign firms charged in recent years come from countries that have been criticized for their failure to actively enforce domestic laws implementing the OECD Anti-Bribery Convention.[208] Scholars find empirical support for the notion that the DOJ and SEC disproportionately target countries with lower economic development and weaker domestic anti-bribery institutions.[209] This supports the hypothesis that the United States seeks, altruistically, to "impose the most severe sanctions on firms whose bribes cause harm to the inhabitants of foreign countries most in need of U.S. assistance."[210]

Officials from the most recent two administrations also routinely stress their desire to see that properly-behaving American firms are not subject to unfair competition from foreign firms.[211] For example, DOJ officials state that "[w]e will press for ever-increasing vigilance by our foreign counterparts to prosecute companies and executives in their own countries for bribery,"[212] and that "[b]y enforcing the FCPA, and by encouraging our counterparts around the world to enforce their own anti-corruption laws, we are making sure that your competitors do not gain an unfair advantage when competing for business."[213]

Unfortunately, it is far from certain that federal authorities will be able to rely on this approach as a long-term solution. Countries with comparable anti-bribery legislation on the books might opt simply to free-ride on the United States' efforts.[214] This is a particularly high risk in countries that lack the resources (or interest) to police corruption. Accordingly, the concern is that gaps in multilateral anti-corruption enforcement will divert business opportunities to firms from countries that are not reachable under the

204. FRITZ HEIMANN & GILLIAN DELL, PROGRESS REPORT 2009: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 8 (2009).

205. *Id.*

206. SHEARMAN & STERLING LLP, *supra* note 22, at 2.

207. *Id.* at 4.

208. This position is further reflected in individual FCPA prosecutions. In 2011, 12 of the 18 individuals charged with violating the statute were non-U.S. citizens, and three others were dual American/foreign citizens. *Id.* at 2.

209. Choi & Davis, *supra* note, 22, at 31.

210. *Id.* at 8.

211. Garrett, *supra* note 23, at 1813.

212. Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Address at the Forum on the Foreign Corrupt Practices Act 6 (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

213. Alice C. Fisher, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act 2 (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

214. Turk, *supra* note 28 (manuscript at 40–41).

FCPA or other anti-corruption instruments. As long as this problem exists, some American firms might feel compelled to resort to bribery if they fear that doing otherwise would invite competitors from China, Russia, or elsewhere to step in and take their place.[215] Again, this dynamic can be especially difficult for small and medium-sized firms to navigate because they are often placed under such considerable financial pressure that bribery may seem like the only way to stay viable.[216]

V. ADVANCING THE DEBATE THROUGH GOVERNANCE

The concerns about FCPA enforcement identified in this Article do not lend themselves to easy answers, but they do suggest that whatever the FCPA reform discussion is about, at some point it must address the inherent limitations of a traditional regulatory approach that focuses primarily on the risk of sanction to spur compliance. As matters stand, both sides of the FCPA reform debate are largely talking past one another. Some firms likely remain undeterred by the present FCPA enforcement climate, whereas the risk and expense associated with even modest FCPA scrutiny can cause socially responsible firms to seek check-list solutions to compliance challenges that they (and regulators) often do not fully understand. This dynamic does not help firms that seek to remain law-abiding, nor does it help regulators operating with limited capacities find ways to reduce overall levels of bribery.

Accordingly, rather than focusing on specific legislative reforms, it would be far better to take a step back and reexamine the general regulatory framework in place for FCPA enforcement in an effort to find win-win solutions to these lingering problems. Seen in this light, one emerging regulatory alternative that offers particular promise is often described as new governance. New governance is the name given to a variety of strategies aimed at de-centering the law. It looks to move away from top-down regulation to a model that harnesses the expertise of firms and other stakeholders, encourages experimentation, and relies on both legal and market forces to achieve policy goals.[217] The goals in a new governance system are typically framed in terms of broad standards and desired outcomes rather than detailed prescriptive rules.[218] This facilitates a regulatory process that is more responsive and adaptable to rapidly changing market conditions than one reliant solely on static, detailed rules.[219] More specifically, under a

215. Hess & Ford, *supra* note 11, at 314–15. Choi & Davis note that

> non-US FCPA defendant companies are incorporated in relatively developed countries, including in particular Switzerland and the United Kingdom. Most strikingly, companies from more developing countries, including China in particular, do not face any FCPA actions. While Chinese companies do business around the world including in many countries with low economic development and weak anti-bribery institutions, including in particular Nigeria and several other countries in Africa, US officials focus their enforcement efforts not on Chinese companies but instead on foreign issuers from more developed countries.

Choi & Davis, *supra* note 22, at 33.

216. Yockey, *supra* note 21, at 811 n.145.

217. Bamberger & Mulligan, *supra* note 7, at 481; Hess, *supra* note 37, at 66–68.

218. Bridget M. Hutter, *Understanding the New Regulatory Governance: Business Perspective*, 33 LAW & POL'Y 459, 461 (2011).

219. Julia Black, *The Rise, Fall and Fate of Principles-Based Regulation*, *in* LAW REFORM AND FINANCIAL MARKETS 3, 17 (Kern Alexander & Niamh Moloney eds., 2011).

governance-based approach to regulation, firms are expected to better institutionalize context-specific compliance tools developed in consultation with the state and other actors. The hope is that this approach will produce more effective self-regulation and fewer incidences of bribery.

One of new governance's key contributions in this regard is that it shows how the ambiguity and legal uncertainty associated with statutes like the FCPA can actually work to make regulation more effective and less burdensome.[220] This happens through an ongoing process of public–private collaboration that focuses on problem solving and the development of norms and standards necessary to give content to the law. By involving the state, private firms, and other stakeholders in the standards-setting discussion, this approach becomes preferable to traditional, centralized forms of regulation because it enlists the expertise of actors who are closest to the ground and thus best positioned to provide insight into relevant challenges and their potential solutions.[221] An additional benefit of the dialogic process envisioned by new governance is that it encourages firms to focus on the "spirit" of regulatory goals rather than the letter of the law, which in turn discourages efforts at cosmetic compliance or "the gaming of detailed rules" and emphasizes the importance of internalization as the way to long-term compliance.[222]

But just as principle-based statutes offer the flexibility necessary to adapt to changing circumstances, the standards set through a new governance style of collaboration must be capable of evolving to meet new demands and normative goals. The state thus has multiple roles to play in this model: not only must it initiate the standards discussion, but it must also facilitate the continual process of learning and experimentation on which it relies. The state further has the crucial back-end responsibility of providing a credible threat of escalating enforcement against defectors to incentivize productive cooperation. Firms are expected to develop internal risk management and compliance systems designed to meet the regulatory goals set forth by the state, but the state must oversee this process and impose penalties for backsliding in order to bolster accountability.[223]

A. Collaboration and Information Gathering

The first step toward implementing new-governance-style strategies in the FCPA context is the gathering of information. One way this occurs is through multi-stakeholder collaboration. As we have seen, the FCPA can pose challenges from a self-regulation standpoint because of its ambiguity and the practical difficulties of internal monitoring that come from doing business abroad. Both of these concerns can be mitigated if the state works to facilitate external collaboration among regulators, firms, and other stakeholders. The OECD Working Group provides a good model for how this might operate in practice. The Working Group—which focuses on developing and administering the OECD Anti-Bribery Convention—frequently schedules meetings to discuss its agenda among firms, representatives from the private bar, NGOs, and non-

220. Bamberger & Mulligan, *supra* note 7, at 481.
221. Ford, *supra* note 13, at 28–30; Hess, *supra* note 37, at 73–74.
222. Black, *supra* note 219, at 11.
223. Hutter, *supra* note 218, at 460–61.

profit organizations dedicated to assisting with corporate compliance.[224] Other options include one-on-one meetings between regulators and firm representatives, peer-to-peer networks, and in-house workshops featuring former regulators, academics, or NGO staff members.

Collaboration along these lines will produce considerable amounts of information from a variety of unique and diverse perspectives. Firms can share their experiences with new forms of corrupt demands and schemes and explain how specific regulatory activities make compliance either more or less difficult. Actors such as NGOs and trade associations can provide information gleaned through surveys and other aspects of their research and policy-making functions. The DOJ and SEC's involvement with foreign law enforcement agencies can facilitate the pooling of information about third party agents with a history of illegal activity and other risk factors. These efforts ought to lead to the creation and dissemination of industry-wide "best practices" and other guidelines that can reduce the costs of compliance research and development. They should also help keep parties up-to-date with rapidly changing conditions on the ground. The government, as a sole monitor of corruption, will always be a step behind the industry actors who confront it on a daily basis.[225] Enhanced public–private collaboration will help fill that temporal and informational gap.

To a large degree, these efforts can be seen as ways to supplement rather than displace the current regulatory model, and one positive in the FCPA context is that several seeds for public–private collaboration have already been planted. From the statute's very beginning, influential members of the business community realized that transnational anti-bribery protections would be necessary for them to thrive in a global economy and sought to shape measures aimed at achieving that goal. For instance, executives at General Electric were early proponents of moving the reform discussion away from repealing the FCPA and toward the enactment of the OECD Anti-Bribery Convention.[226] This led them to cooperate with groups like Transparency International on the development of values-based internal anti-bribery policies and other education initiatives intended to be shared with firms working to develop and implement their own compliance systems.[227]

In addition, since the enactment of an amendment to the FCPA in 1988, the statute provides firms with a process for obtaining a regulatory opinion about proposed transactions. The process works like this: firms can ask, in writing, whether a transaction they are considering would run afoul of the FCPA based on the particularities of the deal.[228] Upon receipt of the request, the DOJ has 30 days to issue an opinion on the

224. *Members and Partners*, OECD, http://www.oecd.org/about/membersandpartners (last visited Dec. 28, 2012). There are several non-profit organizations of compliance professionals, one of the most prominent being TRACE INT'L, http://www.traceinternational.org (last visited Dec. 28, 2012).

225. Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 431 (2011).

226. Abbott & Snidal, *supra* note 81, at 162–63.

227. *Id.* at 174–76. General Electric's general counsel became so devoted to the normative anti-corruption values reflected in the FCPA and OECD Anti-Bribery Convention that he eventually became a founding member of Transparency International's U.S. branch. Spahn, *supra* note 86 (manuscript at 16).

228. *See* Doty, *supra* note 58, at 1241–47 (outlining a process for a more efficient model for obtaining a DOJ opinion on FCPA compliance).

matter. The opinion is binding and, if it approves the transaction, creates a rebuttable presumption of lawfulness.[229] Historically, this procedure has not been very popular with firms, but recent years have seen a steady increase in usage. Reluctance to utilize the opinion process in the past may be explained by fears of later scrutiny. There is also the concern that any guidance given by the DOJ will be of little widespread use given prosecutors' general reluctance to render "advisory" opinions.[230] Former SEC General Counsel James Doty suggests that one way to improve upon the FCPA opinion procedure would be to move to a system that more closely resembles the SEC's "no action" letter process.[231] Doty's model would require firms to make a public filing regarding their FCPA compliance programs. Once the SEC determines that the programs are "effective," firms would receive a rebuttable presumption that they did not violate the FCPA if an individual agent later makes an illegal payment.[232] As previously discussed, such a safe harbor does little to address issues of institutional culture, but Doty's suggestion that this public-filing process be augmented with a "no action" letter system is a step in the right direction from the perspective of collaboration. Compared to the current opinion procedure, Doty's suggested process of review is more likely to lead to a broader sampling of transaction-specific advice and would be administered by an agency, the SEC, which has a long-established history of performing similar functions.[233]

Outside of the formal opinion procedure, the DOJ and SEC recently published a 130-page joint resource guide on the FCPA.[234] This decision came in response to several congressional hearings that raised questions about the potential ambiguity surrounding terms like "foreign official" and the statute's "business nexus" requirement.[235] The DOJ also continues to stress that it is receptive to feedback from industry. Indeed, the head of the DOJ's FCPA Unit recently made a point of commenting publicly about his office's willingness to keep informal lines of communication open.[236]

B. Internalization

Efforts to bolster collaboration will generate a wide range of information about the environment in which corruption occurs and the risks faced by firms. This is necessary, first, in order to ensure that both regulators and regulated entities keep pace with the dynamic nature of corruption. To take one example, this Article noted elsewhere how firms often struggle when responding to extortionate threats because of the different ways

229. *Id.* at 1245 n.41.

230. *Id.* at 1238.

231. *Id.* at 1234.

232. *Id.* at 1245 n.41.

233. Doty, *supra* note 58, at 1234.

234. Joe Palazzolo, *FCPA Guidance Is Here!*, WALL ST. J. BLOG (Nov. 14, 2012, 10:08 AM), http://blogs.wsj.com/law/2012/11/14/fcpa-guidance-is-here/.

235. Lanny Breuer, Acting Assistant U.S. Attorney Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) ("[I]n 2012, in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions."). No drafts of the forthcoming guidance have yet emerged.

236. Charles Duross, Deputy Chief, FCPA Unit, U.S. Dep't of Justice, Address at the Ohio State Law Journal Symposium (Mar. 19, 2012).

U.S. regulators have scrutinized similar threats in subsequent investigations.[237] Vigorous outside engagement on this subject can give both sides a more complete picture of extortion and lead to detailed discussions about ways to respond.

Even more importantly, a process of ongoing external engagement will help address ambiguity and legal uncertainty in the FCPA by fostering the development of a more substantive understanding of anti-corruption policy. For example, uncertainty about terms like "corruptly" or "foreign official" can be a positive aspect of the FCPA if the state facilitates a process whereby regulators, firms, and stakeholders work together to move beyond rules and focus "instead on understanding and respecting evolving and context-dependent norms."[238] This understanding is crucial from the perspective of corporate governance and compliance because it enables firms to develop compliance measures that are anticipatory (i.e., programs that look to where the law is headed and what it is meant to achieve) rather than just reactionary. To mitigate the classic corporate principal–agent problem, firms will be able to explain to their employees that the decisions they make with respect to bribery have significant societal repercussions. This will help employees look past rigid performance metrics or internal rules to focus on the likely legal and social consequences of their actions. Giving employees a catalogue of narrow rules will never be as effective as making compliance with the spirit of the rules part of their second-nature.

Admittedly, firms are not flying blind when it comes to risk and can draw on a variety of sources to anticipate anti-corruption challenges. For instance, companies should be building up considerable institutional knowledge about markets that feature a high percentage of state ownership or which have reputations for widespread corruption.[239] But the availability of these resources does not mean firms are ideally

237. Yockey, *supra* note 21, at 782.

238. Bamberger & Mulligan, *supra* note 7, at 485. Julia Black describes the goal of new-governance style "regulatory conversations" as follows:

> In these conversations, it is not the case that any interpretation that the parties can agree upon will suffice; the interpretation is always structured by the goal the principle is trying to achieve or the value that it is expressing: to act fairly, or with integrity, or with due care and diligence, for example.

Black, *supra* note 219, at 9.

239. Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 2004 (2012). In a Global Anti-Corruption Survey conducted by AlixPartners during the fourth quarter of 2011, respondents from 100 multinationals with over $250 million in annual revenue identified the following places as presenting the highest risk of corruption: Indonesia, the Philippines, Vietnam, Africa, China, Russia, and the Middle East. *See* Nick Elliot, *AlixPartners Survey Shows Multinationals Building Anti-Bribery Compliance, but Resource-Constrained*, WALL ST. J. CORRUPTION CURRENTS BLOG (Mar. 26, 2012, 12:13 PM), http://blogs.wsj.com/corruption-currents/2012/03/26/alixpartners-survey-shows-multinationals-building-anti-bribery-compliance-but-resource-constrained/ (showing survey results for countries in which bribery and corruption are a significant risk). A review of all FCPA enforcement proceedings from the past two years shows that companies are most at risk for scrutiny when doing business in places like Asia and Central or South America, where state-owned or state-controlled entities remain dominant players. SHEARMAN & STERLING LLP, *supra* note 22, at 6–7. Others note that payments leading to FCPA enforcement actions occur most often in countries with reputations for corruption as catalogued by various NGOs and other international bodies. Karpoff et al., *supra* note 122, at 12. Firms armed with this information ought to be able to obtain assistance from their local agents and intermediaries to discern levels of state involvement in specific entities. This is one reason why the first step that most firms take upon entering a new market is to hire a foreign agent or consultant to help

situated when it comes to challenges that have never been encountered before or situations where the FCPA's implications are unclear. By contrast, an ongoing dialogue with the state and other stakeholders about FCPA enforcement policy would help generate the deep-seated knowledge necessary to respond to changing circumstances.[240] Few firms argue that compliance should be free, only that they have the means to make it as effective and efficient as possible. The process of learning and adaptation envisioned by new governance will culminate in a greater internalization of anti-corruption norms that then shape corporate culture and the ethical sensibilities of managers and agents. Once agents have bought into anti-corruption as a core value, they will be poised to exercise judgment in the face of new situations rather than being left to fit unique facts into the confines of static, formalized compliance programs.[241] Agents should also feel less conflicted about what might appear to be facially competing policies or incentive structures as they develop a more complete understanding of entity-wide anti-corruption goals.

C. Implementation

Getting to a point where firms internalize anti-corruption norms is easier said than done. It does not happen naturally and firms must make a concrete effort to develop appropriate training methods and strategies for implementation. One strategy involves categorizing anti-corruption as part of general risk management as opposed to leaving it up to rule-based compliance programs. This ought to have several effects. First, it will bring all existing tools for managing risk to bear on the issue, which for large firms typically includes sophisticated audit and management processes.[242] The integration of anti-corruption policy with other areas of the firm should further reinforce the notion that clean business practices are a core business value. Such reinforcement will be especially pronounced if members of senior management stress that anti-corruption compliance is taken seriously within all facets of the organization.[243]

By the same token, it is important that anti-corruption expertise be decentralized within the firm so that agents closest to the ground are capable of responding to problems as they develop. One promising development in this regard is the emergence of a new category of corporate officer: the Chief FCPA Compliance Officer. The position of

them navigate an unfamiliar business climate. Of course, firms also have the ability to rely on traditional due diligence methods during the procurement process to mitigate uncertainties surrounding a particular foreign entity or agent. Additional concerns raised by FCPA reform advocates appear particularly well-suited for resolution through the DOJ's upcoming regulatory guidance. For instance, the guidance can address what percentages of ownership by a foreign government or sovereign wealth fund will qualify an entity as an instrumentality of a foreign government, or how regulators will treat individuals who work part-time for both foreign and private actors.

240. Bamberger & Mulligan, *supra* note 7, at 501.

241. Standards and norms formulated with firm involvement may also be perceived as more reasonable than those coming solely from outsiders, making compliance more likely to take root. *See* Coglianese & Mendelson, *supra* note 171, at 9–10 (explaining that compliance is more likely to take place if rules are imposed by the firm itself as opposed to outsiders).

242. Bamberger & Mulligan, *supra* note 7, at 479.

243. *Id.*; *see also* Langevoort, *supra* note 127, at 109 ("An agent who comes to believe that senior management is not sincere about the ethics policy—seeing it as window-dressing only—can far more easily reconcile the aggressiveness that [a] competitive reward structure demands with the existence of the policy.").

"Chief Compliance Officer" has been a mainstay in public corporations since the enactment of Sarbanes–Oxley, but a specialized FCPA compliance officer is a new phenomenon. Research suggests that Walmart became the first American company to create such a position when it elevated former U.S. Attorney Tom Gean to the job in April 2012 during a time when the company was navigating a widespread FCPA scandal related to operations in Mexico.[244]

At the outset, it is crucial that hiring an FCPA compliance officer not be seen as simply another "box to be checked" on the way toward a compliance program that regulators will view favorably at settlement without further scrutiny. Establishing this position within a firm is about finding ways to promote internalization—not creating cosmetic compliance tools. Ideally, an FCPA compliance officer will have a thorough understanding of a firm's existing organizational culture and a background that includes management experience, strategic planning, knowledge of corporate governance and controls, and clear communication skills.

While still in its infancy, one way to get a sense of what a Chief FCPA Compliance Officer brings to the table is to look at similar positions from other areas of corporate activity. Specifically, recent work by Kenneth Bamberger and Deirdre Mulligan on the roles and responsibilities of Chief Privacy Officers (CPOs) provides a promising template for application in the FCPA context.[245] Bamberger and Mulligan rely on data from qualitative interviews with leading privacy officers to describe how these officers add considerable value when it comes to integrating compliance with risk management functions in ways consistent with new governance theory.[246] They describe, first, how successful CPOs start with a view that compliance must move from a reliance on specific rules to a more robust substantive understanding of the norms underlying privacy law.[247] This mindset drives many CPOs to adopt a largely outward-facing and forward-looking view of their responsibilities, meaning that they spend approximately half of their time engaging with regulators, stakeholders, and peer companies on ways to alleviate the uncertainty that comes from shifting norms, changes in the business climate, and new legal mandates.[248]

From their position at the senior management level, CPOs can then share the lessons learned through outside engagement with the board and other senior managers as they develop and consider overarching business-planning decisions.[249] This position also gives them the resources and accountability necessary to orchestrate a process of training and education to spread privacy goals (or in our case, anti-corruption goals) throughout each level of an organization.[250] By bringing CPOs into frequent contact with other business units to discuss strategy and problem solving, this process affords an outlet for the employees in those units to provide an ongoing feedback loop about new issues they

244. Andria Cheng, *Wal-Mart Creates an FCPA Compliance Officer*, MARKETWATCH (Apr. 24, 2012), http://articles.marketwatch.com/2012-04-24/industries/31390906_1_wal-mart-stores-chie-executive-mike-duke-wal-mart-spokesman-david-tovar.

245. Bamberger & Mulligan, *supra* note 7, at 504.

246. *Id.* at 479.

247. *Id.* at 478.

248. *Id.* at 479.

249. *Id.*

250. Bamberger & Mulligan, *supra* note 7, at 479.

encounter. Obtaining information in this way facilitates the development of granular knowledge on which new-governance-style collaboration and internalization depends. An FCPA compliance officer operating in a similar capacity would also make it easier to centralize and access internal data on corruption risk. Centralization and the systematic sharing of information are crucial for organizations that feature multiple departments and a wide geographical spread of employees and agents.[251] Without it, maintaining company-wide values is nearly impossible, given how fast variations can pop up among individual corporate sub-units.

This brings us to the issue of timing. Cristie Ford and David Hess point to the use of DPAs in resolving FCPA cases as an example of new governance regulation, particularly when they impose structural requirements on firms meant to improve corporate governance and corporate cultures.[252] However, while settlement plays an important part in our story, the promise of new governance requires that its tools be introduced at an earlier stage—and then remain ongoing. By waiting until settlement, there is a risk that adversarialism will distract from a problem-solving approach and lead to solutions that are reactive and short-term rather than truly forward-looking in the sense of long-term strategic planning.[253] For example, the Federal Sentencing Guidelines and the charging policies of both the DOJ and SEC purport to reward internal compliance programs, disciplinary efforts, and efforts to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[254] Yet when it comes to cooperation with a governmental investigation, there is a risk that parties in managerial positions may use their dominant influence within the firm to deflect blame downward toward lower-level employees who may not be as culpable.[255] This can lead to a variety of governance and internal-relations problems. Seeds of distrust within a company might be sown if lower-level employees—mindful of possible future waivers of company attorney–client privilege during an investigation—feel that they cannot trust or

251. Hutter, *supra* note 218, at 466, 468.

252. Hess & Ford, *supra* note 11, at 310.

253. Baer, *supra* note 151, at 628 (stating that punishment "has the tendency to block regulatory innovation and creativity because it attracts talent away from the tasks of governing, managing, and improving institutions and corporate policy, and it instead places that talent squarely in costly, time-consuming adversarial tournaments"). *But see* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 914 (2007) (arguing that DPAs often contain forward-looking reforms). Despite the characterization of structural reforms as forward looking, they are inherently cast with an eye toward reacting to past misconduct. As Baer observes, "[t]hey promulgate reforms under an adjudicative umbrella, largely in response to . . . violations of the law." Baer, *supra* note 151, at 628 n.244.

254. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.3 (2009), *available at* http://www.ussc.gov/Guidelines/2009_guidelines/manual/GL2009.pdf.

255. *See* Susanne C. Monahan & Beth A. Quinn, *Beyond 'Bad Apples' and 'Weak Leaders': Toward a Neo-Institutional Explanation of Organizational Deviance*, 10 THEORETICAL CRIMINOLOGY 361, 379–80 (2006). This Article states:

> [O]rganizational decision makers can deflect attention from structure, practices, and even policies by focusing on the lower-level participants who personally engage in deviant behavior. . . . When deviance is detected, however, this . . . may be employed against these lower-level actors as it is now the organization and its leaders who are protected from blame . . . .

Id.

communicate openly with company counsel.[256] New governance strategies work best when firms are in frequent contact with regulators for extended periods of time outside of the context of a specific enforcement action.[257] As discussed further below, this contact is necessary to build up the mutual trust necessary for productive collaboration.

D. Enforcement, Reputation, and Market Effects

Even if a consensus is reached on the normative desirability of greater public–private collaboration and enhanced self-regulation, there will always be a fear that attempts to reach these goals will be hijacked by members of industry, seeking only self-serving standards.[258] Stated another way, while a new governance approach to combating corruption should encourage more dialogue and meetings, the question remains whether firms will actually commit to it in ways that lead to less bribery.

On this point, it is important to stress that new governance's focus on self-regulation should not be confused with deregulation. That said, enforcement mechanisms are more nuanced in new governance regulation when compared to a traditional command-and-control regime. The primary attribute of a governance model of enforcement is a reliance on both legal and other external forces to incentivize cooperation and compliance. This becomes manifest, first, when the state places greater trust in firms to implement the compliance tools that arise out of external engagement with other actors. To dissuade firms from abusing the power obtained through such delegation, new governance relies initially on the structural process of public–private collaboration set forth above. As Saule Omarova notes, "[t]he process of formulating and negotiating industry-wide normative standards and principles, in and of itself, is an important step toward creating a sense of common fate among previously disparate members."[259] Firms doing business abroad have a collective interest in establishing baseline norms for responsible behavior to minimize the chances that regulators will resort to increasingly severe, and perhaps draconian, measures to spur compliance.[260]

The pooling and dissemination of information about anti-corruption policy and practices from a variety of sources—when done in a largely transparent fashion—also enables external actors like the media, NGOs, shareholders, and other stakeholders to pressure firms into moving beyond their immediate economic self-interest and toward fulfilling their legal and social obligations.[261] A process of external monitoring by non-

256. *See generally* Yockey, *supra* note 30, at 691 (noting that "culture of compliance" depends on open communication between agents).

257. Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535, 554 (2010).

258. Omarova, *supra* note 225, at 442.

259. *Id.* at 446–47.

260. Coglianese & Mendelson, *supra* note 171, at 22.

261. Hess, *supra* note 37, at 44. One notable development in this regard is the Cardin–Lugar provision in the Dodd–Frank Act. This provision requires oil, gas, and mining companies listed in the United States to disclose their tax and revenue payments in each country where they operate. These disclosures are meant to help NGOs, civil society groups, and citizens in resource-rich but often poorer countries to monitor government accounting of oil, gas, and mining revenues that are often illegally redirected to corrupt private actors. *See* Press Release, Global Witness, Global Witness Welcomes Landmark U.S. Effort to Curb Corruption and Promote Transparency (Sept. 20, 2011), *available at* http://www.globalwitness.org/library/global-witness-welcomes-landmark-us-effort-curb-corruption-and-promote-transparency (phrasing the U.S. pledge to implement the

regulatory actors will further generate additional information about the effectiveness of various practices and strategies—thereby helping to refine the information already pooled during earlier phases of collaboration.[262] Some even argue that firms should be forced to disclose information about the implementation of anti-corruption compliance efforts to facilitate external monitoring, accountability, and the development of best practices.[263]

Leveraging external monitoring in this way is necessary to address a lingering collective action problem. Often characterized specifically as an "assurance problem," the concern is that an individual firm may fear the reputational or legal consequences that attend FCPA investigations, while at the same time also fearing that it will be disadvantaged commercially by staying on the sidelines as less conscientious competitors choose to pay bribes.[264] Any lack of assurance that other firms will comply with anti-corruption measures puts firms in the difficult spot of trying to decide whether to remain compliant or to defect in self-defense.[265] As Part IV described, raising sanctions for FCPA violations is not enough to solve this problem.[266] Widespread external engagement thus becomes necessary to enhance the ability of reputational and other consequences of bribery to level the domestic playing field much in the same way that the OECD Anti-Bribery Convention was designed to level the playing field in international commerce. Decentralized monitoring of this type provides a check against potential underenforcement in a manner that is similar to general regulatory competition among public and private enforcers.[267] NGO activism is particularly useful in this respect because it transcends firm-specific idiosyncrasies that may arise in shareholder monitoring activities. Others note the benefit of finding senior executives (described as "regulatory entrepreneurs") who will speak out about the importance of finding industry consensus on and acceptance of standards for compliance and self-regulation.[268] This Article previously described how important the early involvement of executives at General Electric was to the promulgation of the OECD Anti-Bribery Convention and the development of industry-wide compliance initiatives. Similar sustained involvement by executives committed to clean business practices ought to help legitimize the new governance approach and convince other market participants to join the effort toward better self-regulation.

A more credible regime of self-regulation will further lead to a productive shift in the enforcement capacity of traditional regulators like the DOJ and SEC. There will always be defectors and free-riders in any regulatory system, but if new governance lessens this risk through enhanced self-regulation, these actors can redirect resources away from high-volume, low-impact negotiated settlements.[269] Regulators can then

Extractive Industries Transparency Initiative).

262. Hess, *supra* note 37, at 67–78.

263. David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. BUS. ETHICS 781, 782 (2009).

264. Hess, *supra* note 37, at 47–48; John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators? The Equator Principles*, 33 J.L. & POL'Y 542, 550–51 (2011).

265. Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1310 (2004).

266. *See supra* text accompanying note 175.

267. Park, *supra* note 93, at 128.

268. Omarova, *supra* note 225, at 453.

269. Bamberger & Mulligan, *supra* note 7, at 493.

devote more time and energy to innovation on the enforcement side to improve rates of detection and build cases against the worst offenders.[270] This way, regulators will be poised to bring fewer but more strategic FCPA actions designed to send powerful signals about the need for compliance with relevant standards.[271] In a sense, this also means that elements of the command-and-control model must remain in a new governance system. The major difference, however, is in the way new governance serves to augment traditional top-down methods of enforcement through the information-gathering process. In addition to freeing up enforcement resources, the emphasis on public–private collaboration at the core of new governance will provide regulators with greater access to information about how firms incorporate the lessons learned through an expansive regulatory dialogue when designing tools for compliance. Whether through periodic audits or other means, this will enable regulators to better monitor efforts at industry self-regulation and intervene against firms that fail to honestly engage with the self-regulatory process.[272]

Of course, while the state must offer a credible threat of enforcement, it must abandon the impulse to punish every minor violation or to cite the FCPA's breadth as justification for arbitrarily condemning an individual firm's compliance efforts. Opting for the former approach could effectively transform the FCPA's principle-based design into a system of detailed rules, while the latter could make it more difficult for firms to trust that regulators are committed to cooperation and mutuality.[273] Either result would be unfortunate because a side-effect of collaboration among regulated entities may be to improve the quantity and quality of evidence about potential FCPA violations. Competitors have the best information about which firms bend the rules since they are closest to the ground and may even have lost out on specific deals because of their refusal to bribe. This gives them unique access to particular types of corrupt schemes and the identities of the corrupt officials involved. Care must be taken to separate legitimate tips from tips meant to create trouble for a rival operation, but this is a concern in any whistleblowing context and has led to a variety of safeguards designed to keep the risk of false positives to a minimum.[274]

270. *See* Simon Bowers, *David Green, New SFO Director, Plans to Focus on Key Cases in Strategy Switch*, THE GUARDIAN (May 1, 2012), http://www.guardian.co.uk/law/2012/may/01/david-green-sfo-director (describing the act of regulators devoting more to innovation to improve rates of detection and build cases against the worst offenders as a shift from "sprawling" to "surgical" enforcement).

271. This is consistent with the model of enforced self-regulation introduced by Ian Ayres and John Braithwaite that follows a pyramidal scheme of escalating levels of sanction. Lower sanctions are reserved for defectors at the bottom of the pyramid, whereas more powerful penalties are introduced for the most serious violations. *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 38–40 (Donald R. Harris et al. eds., 1992) (discussing the pyramidal scheme of escalating levels of sanction).

272. Omarova, *supra* note 225, at 486 (noting that self-regulation excels if "those responsible for it know not only that their actions will be visible to their peers and public officials, and not only that poor performance will trigger sanctions, but also that if business institutions systematically fail to achieve regulatory objectives, a more vigorous regulatory shotgun waits in the wings").

273. Black, *supra* note 219, at 9–11.

274. The Dodd–Frank Act authorizes individuals who "allege discharge or other discrimination" based on whistleblowing activities to bring a civil action in U.S. courts and to seek reinstatement, doubled back-pay, and attorney's fees. 15 U.S.C. § 78u-6(h)(1)(B)–(C) (2006). Two district courts to consider the issue are split on whether Dodd–Frank's anti-retaliation provisions apply to employees who report potential FCPA violations internally but not to the SEC. *Compare* Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–94

E. Remaining Domestic Challenges

Administering the FCPA in a way where governance helps mitigate the problem of corruption will take time and several challenges remain. Virtually every type of negotiation or collaboration strategy faces time and budgetary constraints, can suffer from problems with reaching a consensus on key issues, or may reflect an imbalance of power and capacity across stakeholder groups.[275] The experience of the recent financial crisis has led to fears of capture and doubts about the wisdom of a system that relies heavily on self-regulation—especially when the relevant standards of self-regulation are influenced by the regulated entities themselves.[276] Concerns also arise about the capacity or willingness of federal enforcers to adopt a collaborative mindset given traditional views about their levels of expertise and emphasis on litigation.

Taking capture first, this issue comes up most often when discussing the SEC. Proponents of public-choice theory argue that large firms are able to exert so much political pressure on the SEC that regulators may be inclined to give undue deference to the demands of industry when making enforcement decisions.[277] This risk is thought to be magnified by the "revolving door" between industry and government service, with the idea being that regulatory personnel will go easy on suspected violators because they hope to secure employment in the private sector for greater pay at a later date.[278] If true, the public loses out, as regulators who are more concerned about their own interests might fail to fulfill their agency's policy mandates.

The public-choice narrative of capture can be quite convincing, but there are several counterpoints. First, not all regulators are motivated primarily by future employment prospects. Many are devoted to serving the public interest and opt for government service because it gives them personal satisfaction or because they are highly interested in the specific subject area being regulated.[279] Several scholars note that the SEC has a strong history of fostering an internal culture of independence that provides some ability to push back from industry pressure.[280] Perceived deference to industry may be less a sign of capture and more the result of the SEC taking a cautious cost-benefit approach to weighing the effects of enforcement on overall market stability.[281] It can also be difficult for individuals within the agency to carve out the type of reputation necessary to get on the radar of the private sector if they are not involved in at least some large, aggressive investigations or enforcement actions.[282]

(M.D. Tenn. 2012) (finding that the Dodd–Frank Act conceivably could protect FCPA whistleblowers), *with* Asadi v. G.E. Energy (USA), LLC, Civil Action No. 4:12–345, 2012 WL 2522599, at *1, *5 (S.D. Tex. June 28, 2012) (reaching the opposite conclusion).

275. Rory Truex & Tina Soreide, *Why Multi-Stakeholder Groups Succeed and Fail* 3 (The World Bank, Working Paper No. WPS5495, 2010), *available at* http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-5495.

276. Omarova, *supra* note 225, at 415 ("In today's postcrisis environment, the idea of financial industry self-regulation is not politically popular.").

277. Park, *supra* note 93.

278. *Id.*; Baer, *supra* note 151, at 608.

279. David Zaring, *Regulating by Repute*, 110 MICH. L. REV. 1003, 1012 (2012).

280. Buell, *supra* note 54, at 97; Park, *supra* note 93, at 149–50.

281. Park, *supra* note 93, at 149–50.

282. *Id.* Several scholars recently found empirical evidence that the "revolving door" phenomenon at the SEC does not lead to significant differences in the enforcement outcomes for SEC lawyers who leave

Capture is thought to be less of an issue with respect to the DOJ. Federal prosecutors are more decentralized than employees of other agencies and are typically viewed as politically independent.[283] Their prospects in the public sector are clearly improved by bringing high-profile prosecutions against prominent firms or agents. However, even if concerns over capture are less apparent, the DOJ poses additional issues because of the fear that the current adversarial model of enforcement leads to intractable distrust between firms and prosecutors.[284] Prosecutors, like many litigators, often possess a "war-like temperament."[285] Their jobs inherently require them to make accusations of serious legal violations, issue burdensome discovery requests seeking sensitive materials, and try to impose financial sanctions (or jail time) against their targets. Defense and in-house counsel can naturally become antagonistic when on the receiving end of these activities. A sense of conflict can further spread to the internal operations of a targeted firm.[286] As noted earlier, compliance personnel may be pitted against individual employees as they seek to cooperate with prosecutors to avoid entity-level sanctions by waiving privilege or taking disciplinary action. The danger, then, is that employees will become distrustful of company counsel and hide information to prevent the risk of later scrutiny.[287] This can lead to unhealthy risk aversion or cause employees to refrain from seeking advice from the people best positioned to give it: compliance personnel or other firm attorneys.[288]

These are all important factors to consider. On the one hand, adversarialsm may not be all bad. It forces engagement, can bring important issues to the attention of policymakers, and counteracts stasis.[289] On the other hand, the downsides of adversarialism—lack of trust and open communication—could hinder the collaboration and experimentation necessary for successful problem solving under a new governance model.[290] Yet identifying these concerns also provides a guide for the way forward. To be successful, new governance clearly requires buy-in by both firms and regulators. The good news is that several positive signs have emerged in recent years. Two executive orders issued by the Obama administration emphasize the need for regulatory cooperation with industry and greater strategic integration among federal departments and agencies.[291] Individual federal agencies have also devoted greater attention to

government service for employment at private firms. These scholars find that, if anything, "future job prospects make SEC lawyers increase their enforcement efforts while they are at the SEC." Ed DeHaan et al., Does the Revolving Door Affect the SEC's Enforcement Outcomes? 26 (July 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2125560.

283. Park, *supra* note 93, at 154.

284. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 980 (2009).

285. *Id.*

286. *Id.*

287. Yockey, *supra* note 30, at 707.

288. *Id.*

289. My thanks to Professor Heather K. Gerken for making this observation in the context of horizontal federalism during a presentation to the faculty of the University of Iowa College of Law. Professor Heather K. Gerken, Yale Law School, Address to the University of Iowa College of Law Faculty: The Political Safeguards of Horizontal Federalism (Sept, 21, 2012).

290. Baer, *supra* note 135, at 929.

291. *See, e.g.*, Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012) (promoting internal regulatory cooperation); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) ("Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and

experimenting with new governance approaches. The Federal Trade Commission (FTC) has been particularly active in this regard, electing to rely heavily on ongoing external engagement with firms, academics, and industry groups in fulfilling its regulatory mission.[292] In addition, rather than provide undue deference to industry, the FTC has utilized its enforcement powers strategically to grab industry's attention about the importance of participating in the standard-setting discussion.[293]

Greater integration among different federal actors should further facilitate the spread of new governance ideas. Tools are in place for enhanced integration in the FCPA context, given how frequently the DOJ and SEC work together on investigations. Nearly every FCPA case is directed from the DOJ's centralized FCPA Unit. This creates an "institutional center" for consultation with both the SEC and State Department, as well as a base for cooperation with foreign prosecutors.[294] Indeed, the U.S. Attorney's Manual stresses the need for DOJ personnel to coordinate with the State Department because of the foreign policy issues frequently associated with FCPA actions,[295] and increasing interagency cooperation among the DOJ, SEC, FBI, State Department, Commerce Department, and the Department of Homeland Security is a key point of emphasis in the DOJ and SEC's new FCPA resource guide.[296]

These developments aside, shifting to a governance model also requires reevaluating traditional views on agency employment characteristics.[297] It seems reasonable to conclude that many federal prosecutors are predisposed toward assuming an adversarial posture, which probably led them to litigation in the first place. However, it seems overly broad to imply that prosecution cannot also attract individuals who are more inclined to favor regulation and collaboration where possible. Different attorneys possess different skills. Part of the job of any successful manager is to hire the right people and utilize talents in the most efficient way possible.[298] Organizational decision-making is about structure as much as it is about personalities. In the FCPA context, one option is to redirect line prosecutors away from interactions and negotiations with firms prior to the onset of an investigation and replace them with personnel hired for that express purpose.[299] If the SEC and DOJ hire people with a regulatory and collaborative

harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.").

292. Bamberger & Mulligan, *supra* note 7, at 485.

293. *Id.*

294. Garrett, *supra* note 23, at 1861–62.

295. McLean, *supra* note 239, at 1983.

296. FCPA: A RESOURCE GUIDE, *supra* note 74, at 4–6.

297. Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 529 (2008) ("Decentered, flexible, and responsive institutions are only as effective as the people comprising them.").

298. Bibas, *Prosecutorial Regulation*, *supra* note 147, at 1007 (citing JACK WELCH, JACK 383 (2001)) ("Getting the right people in the right jobs is a lot more important than developing a strategy.").

299. Garrett, *supra* note 23, at 1784.

> Nor are prosecutors long accustomed to engaging in a regulatory role, either domestically or when reforming the governance of foreign firms. Given the new importance of foreign corporate prosecutions, however, as part of a larger policy discussion, we should more carefully evaluate the preeminent role that federal prosecutors play as global corporate criminal law enforcers and multinational regulators of corporate governance.

mindset—and train them to make appropriate qualitative judgments—such an approach will steadily influence the overall organizational culture of both actors.[300]

Making this kind of internal shift depends on strong leadership and may require the DOJ to recruit managers and employees with an outsider's perspective on the desired culture.[301] Members of the DOJ's upper echelon must also redefine what it means to be "successful" within the Department. Stephanos Bibas describes this in part, as reinforcing at an early stage in a prosecutor's career that her job is "to do justice, not just convict."[302] Similarly, as personnel are given responsibilities outside of the traditional enforcement domain, metrics and goals other than settlement or conviction rates will be necessary to define positive outputs and the quality of enforcement. For public–private collaboration to work successfully there must be considerable trust between regulators and their industry contacts. Enforcement personnel who act arbitrarily or who exploit industry candor to do nothing other than drive up their number of prosecutions will not produce the track record of fair dealing that new governance's problem-solving orientation depends on. Firms must have faith in the dialogic process, and this in turn requires that regulators demonstrate a commitment to pursuing enforcement only when necessary to target significant ethical failures and advance anti-corruption norms.

If the DOJ's adversarial culture is deemed too difficult to overcome when trying to implement new governance approaches, then one option is to enhance the SEC's role in FCPA enforcement. As Samuel Buell observes, the SEC is more specialized, bureaucratized, and centralized than the DOJ.[303] These attributes could make it easier to establish the dialogic mechanisms necessary for shaping standards for anti-corruption policy and compliance. Moreover, the SEC is arguably more familiar with corporate behavior and processes given its primary responsibility of regulating disclosure in the federal securities laws.[304] The SEC has made a concerted effort within the past year to hire a wide range of experts. It now features quantitative analysts, Wall Street traders, economists, and accountants alongside attorneys in its enforcement division.[305] This suggests that the SEC's commissioners and professional staff may be "better equipped not only than DOJ lawyers but also than Delaware judges to determine how a firm might

Id.

300. Bibas, *Prosecutorial Regulation*, *supra* note 147, at 1007 ("If one hires tough, independent people, for example, a firm will develop a tough, independent culture."). Bibas also notes that "[e]mpirical management literature emphasizes the need to hire and train employees who will embody and embrace the desired culture." *Id.* at 1008.

301. *Id.* at 998 ("Leaders who have climbed the organizational ladder may be too steeped in an organization's existing culture to critique and improve it. Thus, leaders recruited from outside or who have outsiders' perspectives are better able to reform mature firms' cultures.").

302. *Id.* at 997, 1000. This Article explains that

> district attorneys who award high status and a big office to the office ethics maven and funnel queries to him underscore the importance of ethical conduct. District attorneys who teach, cheerlead, and regale underlings with war stories and mission statements inculcate their priorities. Young attorneys, impressionable and eager to emulate their superiors, take their cues from this rhetorical leadership. In short, rhetoric from the top matters.

Id.

303. Buell, *supra* note 54, at 104–06.

304. *Id.*

305. *An "Entrepreneurial" and Restructured SEC Pledges Proactive Enforcement*, *supra* note 29.

change its practices at acceptable cost to avoid future violations of the securities laws."[306] The new director of the SEC's Enforcement Division, Robert Khuzami, has also made a concerted effort to modify existing agency performance metrics in order to focus on "quality, timeliness and deterrence impact" above enforcement volume.[307] This is certainly healthy, assuming of course that enforcement quality is judged in the context of new governance's regulatory goals. It would be counterproductive, however, if "reform" in the Enforcement Division becomes synonymous with the type of adversarialism associated with the DOJ's current setup.

When it comes to potential governance challenges within firms, the hope is that these issues can be addressed through greater experimentation with mechanisms such as the appointment of an FCPA compliance officer. Creating a point-person in the C-suite provides an outlet for the robust ongoing external communications necessary to establish trust with regulators.[308] It enables firms to deal with internal communication problems by providing a central point of contact for each layer of hierarchy. It will also improve the compliance officer's ability to moderate discussions between regular company counsel, management, and regulators on issues such as disclosure and cooperation because she will be able to provide a better sense of the firm's internal dynamic as it relates to FCPA compliance and possible curative steps.

A final reason to remain optimistic that new governance strategies are poised to enter the current regulatory domain relates to recent developments in education and training. It is becoming increasingly common for leading universities to focus on sharing problem-solving concepts across multiple disciplines, including law and business. For example, Stanford University's Hasso Plattner Institute of Design now focuses on applying "design thinking" to address strategic business issues. This is described as a process of collaboration that relies on public–private partnerships and ethnographic observations to anticipate future problems and develop plans to address them.[309] Similar approaches are being encouraged in leading American law schools. As new governance ideas continue to take hold, lawyers are being forced to learn new skills and expertise. Christopher Edley, Jr., Dean of the University of California, Berkeley, School of Law writes of the need to offer a law curriculum designed around a problem-solving orientation that trains lawyers to work together with a wide range of actors and fosters a "culture of collaboration."[310] This is important because lawyers are moving beyond categorization as either litigators or transactional attorneys and toward positions where their core responsibilities are augmented by the ability to collaborate with professionals from other disciplines.[311] Accordingly, law students should be exposed to collaborative

306. Buell, *supra* note 54, at 104–06.

307. Jayne W. Barnard, *Evolutionary Enforcement at the Securities and Exchange Commission*, 71 U. PITT. L. REV. 403, 405 (2010).

308. Bamberger & Mulligan, *supra* note 7, at 489.

309. Melissa Korn & Rachel Emma Silverman, *Business Education: Forget B-School, D-School is Hot*, WALL ST. J., June 7, 2012, at B1.

310. Christopher J. Edley, Jr., *Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School*, 100 CALIF. L. REV. 313, 325–26 (2012).

311. *See* Lisa T. Alexander, *Part III: Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737, 741 n.14 (2010) (citing Grainne de Burca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 9 (Grainne de Burca & Joanne Scott eds., 2006)) ("The transformation thesis argues that new governance has

principles and interdisciplinary techniques so that they will be prepared to recognize and apply new governance tools upon entering practice.[312]

F. The International Element

Solving the problem of lax international anti-bribery enforcement arguably poses a more difficult challenge than using governance to administer the FCPA because domestic actors lack control over many of the relevant variables. As we have seen, federal regulators can only do so much to pick up the slack of other signatories to the OECD Anti-Bribery Convention. Still, the application of new governance principles on the domestic front helps to identify ways to address international concerns. Anne-Marie Slaughter stresses that "[s]tates can only govern effectively by actively cooperating with other states."[313] On this point, efforts to promote multilateral collaboration continue to bear fruit. Transnational anti-corruption investigations inherently require international coordination, and U.S. regulators generally operate in an increasingly collaborative and collegial fashion with their international counterparts.[314] The United States Attorneys' Manual makes a point of emphasizing that FCPA investigations require documents and testimony from foreign sources.[315] Without the cooperation of foreign enforcement agencies, obtaining this evidence is almost impossible.

The need to address this issue has led to the creation of a robust set of transnational cooperative networks. The DOJ boasts being a part of approximately 60 mutual legal assistance treaties (MLATs) with foreign governments.[316] These bilateral agreements obligate signatories to provide assistance with ongoing investigations where possible. The DOJ reportedly made at least 25 MLAT requests during 2009.[317] Some countries refused to comply, but the DOJ says that it received the information requested in a majority of cases.[318] For its part, the SEC has signed dozens of memoranda of understanding (MOUs) with foreign securities regulators.[319] MOUs set out "'the terms of

demanded, and will increasingly demand, a re-conceptualizing of our understanding of law and the role of lawyers.").

312. *See id.* at 746–48 (noting the implications of a new governance policy for law students and lawyers).

313. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 285 (2004).

314. Garrett, *supra* note 23, at 1861.

315. U.S. ATTORNEYS' MANUAL § 9-47.110 (2000), a*vailable at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47mcrm.htm.

316. F. Joseph Warin et al., *Nine Lessons from 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement*, 38 SEC. REG. L.J. 19, 45 (2010).

317. *Id.*

318. U.S. DEP'T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY § 3.1(g) (2010); Choi & Davis, *supra* note 22, at 38 (reporting that total FCPA sanctions are greatest in cases that involve home countries that have entered into cooperation and assistance agreements with the United States, which may reflect a greater ease of gathering evidence in such cases).

319. Choi & Davis, *supra* note 22, at 36.

> Since 2003, the SEC has participated with numerous other countries in the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation (Multilateral MOU) and the Exchange of Information sponsored by the International Organization of Securities Commissions. In addition to the U.S. SEC, signatories to the Multilateral MOU include over 85 financial and securities regulatory authorities including the regulatory authorities from Hungary,

information-sharing between and among MOU signatories and create a framework for regular and predictable cooperation in securities law enforcement.'"[320] They are particularly useful in tracing funds spread among hidden foreign bank accounts.[321]

Multilateral collaboration is further facilitated through the OECD Working Group. Representatives of member states who attend Working Group meetings can share success stories about experiments to combat corrupt practices. For example, several countries have experienced success using privatized pre-shipment inspections to deter bribery in customs, and others report positive results through the implementation of online procurement systems.[322] In addition, a large part of the Working Group's agenda is based on helping prosecutors from ratifying states to exchange information and build up feelings of trust.[323] This is an area where greater collaboration between U.S. regulators and firms can facilitate international enforcement. Bribery involves both supply and demand. The supply comes when firms pay bribes; the demand comes when foreign officials solicit and receive bribes. So far this Article has focused mainly on issues of compliance on the supply side. But as firms provide information to the DOJ or SEC about where and in what form bribe requests are made, federal authorities can share that information with their foreign counterparts to bolster domestic enforcement efforts on the demand side. This should ameliorate the resource limitations in some countries by lessening the burden of detection.

Of course, collaboration will prove to be of little use if it is not supported by efforts within each country to reduce corruption. This is where the Working Group's final key function comes into play: external monitoring. The Working Group relies on a process of peer review with multiple layers to encourage compliance.[324] First, experts from governments other than the one under review visit the subject country to meet with prosecutors, members of private industry and the private bar, and representatives from civil society groups.[325] Based on the information collected, the Working Group then compiles three "phased" reports. Phase I reviews the adequacy of the country's legislation implementing the OECD Anti-Bribery Convention.[326] Phase II looks at whether the country applies its implementing legislation effectively.[327] Phase III turns to

Pakistan, and Thailand.

Id.

320. McLean, *supra* note 239, at 1988 (quoting *International Enforcement Assistance*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/offices/oia/oia_crossborder.shtml (last visited Dec. 28, 2012)).

321. Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT'L L. & BUS. 303, 415 (1998).

322. Rose-Ackerman & Truex, *supra* note 187, at 36.

323. Spahn, *supra* note 86 (manuscript at 7).

324. OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 12, Dec. 18, 1977, 37 I.L.M. 1, *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf.

325. Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFF., May/June 2006, at 75, 80.

326. OECD, PHASE 1 COUNTRY MONITORING OF THE OECD ANTI-BRIBERY CONVENTION (1999), *available at* http://www.oecd.org.

327. OECD, PHASE 2 COUNTRY MONITORING OF THE OECD ANTI-BRIBERY CONVENTION (1999),

a review of enforcement practices.[328] The primary bite that comes with the Working Group's peer review process is publicity and the market effects of reputation. Though each state values it to a different degree, most are at least partially concerned about reputation.[329] A state with a reputation for enforcing its anti-corruption laws, particularly on the supply side, will be more likely to attract investment from companies committed to clean business practices.

And in fact, the Working Group's criticisms of implementation efforts in several countries—including the United States, the United Kingdom, France, Japan, and Italy—have already inspired various reforms. NGO activism by Transparency International and others with specialized expertise can fulfill a similar function. Indeed, Transparency International's public condemnation of the United Kingdom's virtually non-existent foreign bribery efforts was one of the key drivers leading to the enactment of the U.K. Bribery Act of 2010—an anti-corruption instrument that in time may prove more potent than the FCPA.[330] In light of the lack of formal, binding mechanisms to enforce international law, external review in the manner described above may be the best option left for incentivizing countries to commit to multilateral anti-corruption efforts.

Outside of the state-to-state context, the push for greater peer review and related monitoring efforts has also led to several industry-specific attempts at reform. One of the most visible examples is the Extractive Industries Transparency Initiative (EITI). Arising out of the "Publish What You Pay" initiative, EITI provides a list of recommended standards and procedures designed to improve transparency in the amount of money that multinational firms in the mining, oil, and gas industries pay to resource-rich countries. Greater transparency through the reporting and auditing of such payments is intended to facilitate monitoring by the citizens in those countries—often with the assistance of NGOs and other advocacy groups—so that they can track whether public revenues are being funneled into legitimate accounts rather than the pockets of corrupt officials. Though the EITI standards are a form of soft international law, their influence is reflected in hard law in the United States. The "Cardin–Lugar" provision of the Dodd–Frank Act directs the SEC to adopt rules requiring reporting companies in the extractive industries to disclose "(i) the type and total amount of . . . payments made for each project . . . relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government."[331] The SEC adopted rules pursuant to this provision on August 22, 2012.[332] The rules require covered companies to disclose payment information annually by filing a new form with the SEC (Form SD).[333]

available at http ://www.oecd.org.

328. OECD PHASE 3 REPORT, *supra* note 49.

329. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1168–69 (2011); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2010–11 (2002).

330. *See* Adrienne Margolis, *Bribery Bill Brings UK Closer to OECD Rules*, INT'L BAR ASS'N, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=dbfdf0e9-074c-4b79-a7f8-1aed7e44b3b8 (last visited Dec. 28, 2012) (discussing concern about adequate guidance for companies and the need to monitor companies' adherence to anti-corruption measures).

331. Dodd–Frank Wall Street Reform and Consumer Protection Act § 1504, 15 U.S.C. § 78(q)(2)(a) (2012).

332. *Id.*

333. The SEC rules apply to any "resource extraction issuer," defined as an issuer that is required to file an annual report with the SEC and who engages in the commercial development of oil, natural gas, or minerals, as

Congress expressly referenced the EITI in outlining the SEC's rule-making obligations, and, while it is too soon to tell, the provision's supporters described it as "fundamental to improving governance, curbing corruption, improving revenue management, and allowing greater accountability from governments for spending that serves the public interest."[334] The Cardin–Lugar provision further represents the first time a country has required reporting at the project-level by members of the extraction industry, as opposed to broader reporting at the country or continent level.[335]

This development leads to a final observation. There continues to be greater recognition that problems like corruption transcend national boundaries. However, a constant challenge arises because international efforts to find solutions must account for differences in domestic laws and the capacities of regulatory systems. New governance's reliance on finding common agreement on fundamental norms through ongoing public–private dialogue thus becomes crucial to ensuring that idiosyncrasies across different countries and cultures do not jeopardize the legitimacy of the anti-corruption movement. At the same time, country-specific issues highlight the need for continued experimentation and an ongoing assessment of what strategies succeed or fail across different environments. Promising signs of coordination and integration among actors like the OECD Working Group, Transparency International, and private firms striving to perfect compliance suggest that new governance theory is beginning to take root in key parts of the international legal infrastructure. The next step is to continue to bolster these efforts so that the necessary actors have the information and resources to shape the global response to corruption for the better.

VI. CONCLUSION

When it comes to anti-corruption policy, the regulatory challenge is to design a system flexible enough to address the complexities of foreign bribery while still providing firms with the information and resources necessary for efficient compliance. Though advocates on both sides of the FCPA reform debate are often mistaken about key issues, the conversation they started confirms that finding a solution to this challenge will be difficult under the current sanction-based approach to FCPA enforcement. Fortunately, there is another way. As both a theoretical and practical matter, the complexities inherent in regulating corruption suggest that firms and regulators will be better served by looking at FCPA reform through the lens of new governance. The process of public–private collaboration envisioned by new governance can turn the FCPA's ambiguity and

well as any subsidiaries and other entities controlled by the issuer. *Id.* § 78m(q). The payments that must be disclosed include taxes, royalties, fees (including licensing fees), production entitlements, bonuses, dividends, and infrastructure improvements. *Id.* § 78m(q)(1)(c)(ii). The information about these payments that must be disclosed includes the type and total amount of the payments made for each project; the type and total amount of the payments made to each government; the total amounts of the payments, by category; the currency used for the payments; the financial period in which the payments were made; the business segment of the issuer that made the payments; the government that received the payments; and the issuer's project to which the payments relate. The term "project" is undefined by the rules—an intentional omission designed to provide issuers with flexibility in applying the term across different contexts.

334. Letter from Barney Frank et al., Members of the U.S. House of Rep., to Mary L. Shapiro et al., Commissioners of the U.S. Sec. and Exch. Comm'n (Feb. 15, 2012) (on file with author).

335. Rose-Ackerman & Truex, *supra* note 187, at 30–31.

flexibility into a framework for the internalization of anti-corruption norms. This process, in turn, should lead to enhanced self-regulation and corporate compliance programs that are dynamic and sustainable. Furthermore, the lessons learned through the application of new governance tools in the domestic context provide useful guidance for the many ongoing international efforts aimed at deterring transnational bribery.