

## **The FCPA & Corporate Philanthropy: Rethinking the Regulations**

By: Francesca Pisano

*American companies bring US innovation and capital to all corners of the globe. The US corporate presence abroad is seen not only in oil rigs and factories, but also in corporate development projects and humanitarian relief efforts.*

*When the 2010 earthquake hit Port-au-Prince, Haiti, US companies donated over \$146.8 million to the relief effort. Despite this impressive display of global engagement, commentators suggested that the US anti-corruption laws had discouraged corporations from greater involvement. Even with the laws in force, however, reports of corruption in the relief effort soon surfaced, derailing Haiti's recovery. Foreign aid that feeds corruption will never achieve sustainable growth, but development efforts will similarly fail if US anti-corruption laws discourage corporate philanthropy.*

*This Comment analyzes the application of the Foreign Corrupt Practices Act ("FCPA") to international corporate charity. It shows how the FCPA's ambiguous nature has the unfortunate effect of being both over- and under-inclusive, discouraging bona fide charity while at the same time failing to capture corrupt donations.*

*This Comment proposes a modification to FCPA enforcement: creating a Safe Harbor Option. This will offer businesses the opportunity to "buy" a rebuttable presumption of legitimacy for their charitable donations by publically disclosing the payments, projects, and recipients of their philanthropy. Granting a presumption of legitimacy to disclosed donations will ameliorate many of the over-inclusive aspects of the FCPA. The increased disclosure will allow the public to monitor corporate charity and question suspicious gifts, ameliorating the under-inclusive aspects of FCPA enforcement.*

*A greater emphasis on disclosure-based anti-corruption law will encourage robust and honest corporate philanthropy that will support long-lasting and sustainable development around the world.*

## INTRODUCTION

In 2010, a catastrophic 7.0 magnitude earthquake hit Port-au-Prince, Haiti. The Haitian people suffered devastating losses: over 200,000 people were killed<sup>1</sup> and rebuilding costs were estimated at \$14 billion.<sup>2</sup> The corporate response was immediate,<sup>3</sup> mobilizing over \$100 million in donations in only ten days,<sup>4</sup> eventually totaling over \$146.8 million.<sup>5</sup> Beyond direct donations, corporate leaders and business experts strategized ways to encourage investment in the rebuilding effort and to engage Haiti in the global economy.<sup>6</sup>

The generosity of the corporate response to the earthquake illustrates the unique contributions that US businesses can offer to international development and disaster relief.<sup>7</sup>

American corporations donate an estimated \$9 to \$11 billion to charitable causes each year<sup>8</sup> and

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<sup>1</sup> CTR. FOR GLOBAL PROSPERITY, INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 9 tbl.1 (Patricia Miller ed., Hudson Inst. 2011) [Hereinafter INDEX OF GLOBAL PHILANTHROPY].

<sup>2</sup> Catherine Keller, Business Civil Leadership Center, *Funds for Haiti*, U.S. CHAMBER OF COMMERCE, <http://bclc.uschamber.com/blog/2010-03-16/funds-haiti>

<sup>3</sup> The term “corporation” will be used through this Comment to loosely signify all US business structures.

<sup>4</sup> Catherine Keller, Business Civil Leadership Center, *Friday Update: \$106 Million in Business Aid for Haiti*, U.S. CHAMBER OF COMMERCE, <http://bclc.uschamber.com/blog/2010-01-22/friday-update-106-million-business-aid-haiti-0>.

<sup>5</sup> Annalyn Censky, *Haiti's Top Corporate Donors*, CNN, [http://money.cnn.com/galleries/2010/news/1002/gallery.top\\_donors\\_to\\_haiti/index.html](http://money.cnn.com/galleries/2010/news/1002/gallery.top_donors_to_haiti/index.html). Stand-outs include Teva Pharmaceuticals, which donated \$7 million in medication and Jefferies & Co., which donated \$7.5 million. *Id.*

<sup>6</sup> PRIVATE SECTOR DEVELOPMENT IN HAITI: OPPORTUNITIES FOR INVESTMENT, JOB CREATION AND GROWTH, WORLD ECON. FORUM (2011), *available at* [http://www3.weforum.org/docs/WEF\\_Haiti\\_PrivateSectorDevelopment\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_Haiti_PrivateSectorDevelopment_Report_2011.pdf) (discussing the role of and further opportunities for business investment in Haiti's recovery) *See also* *Charity Fatigue has Haitian Officials Calling for More Investments*, MIAMI HERALD (Nov. 30, 2011); Juan Forero, *After Quake, Haiti Seeks Better Business Climate*, NPR (Jan. 14, 2012).

<sup>7</sup> INDEX OF GLOBAL PHILANTHROPY, *supra* note 1, at 9 tbl.1; *See generally* Heidi Metcalf Little, *The Role of Private Assistance in International Development*, 42 N.Y.U. J. INT'L L. & POL. 1091 (2010) (discussing the importance of private funding in international development).

<sup>8</sup> INDEX OF GLOBAL PHILANTHROPY, *supra* note 1, at 4 (\$8.9 billion); Margaret Coady, Committee Encouraging Corporate Philanthropy, *Giving In the Numbers* 4 (2009) (\$11.25 billion).

fund successful development projects around the world.<sup>9</sup> Corporations engage in philanthropy for a variety of reasons; some view it as part of their responsibility to be “a good global citizen,”<sup>10</sup> while others focus on improving the company’s image<sup>11</sup> or maintaining a stable working environment.<sup>12</sup> Other corporations use charitable activities to gain an edge over competitors,<sup>13</sup> but some of these targeted donations seem more like bribery than philanthropy.<sup>14</sup> For example, in 2002 Chevron timed the announcement of a \$50 million development project to coincide with negotiations over a major oil assets in Angola.<sup>15</sup> The company pledged another \$80 million when the contract was later extended<sup>16</sup> amid accusations that the donations were being funneled through the corrupt Angolan government’s network.<sup>17</sup>

A company funneling money to government leaders to win oil contracts is exactly the type of activity that the FCPA aims to eliminate. The purpose of the FCPA is to hold US companies accountable for any bribes paid to foreign government officials or for failing to keep

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<sup>9</sup> Geoffrey B. Sprinkle & Lauren Maines, *The Benefits and Costs of Corporate Social Responsibility*, 53 BUS. HORIZONS 445, 446 (citing examples such as Merck’s successful efforts to combat river blindness; INDEX OF GLOBAL PHILANTHROPY, *supra* note 1 at 6).

<sup>10</sup> Sprinkle, *supra* note 9, at 446.

<sup>11</sup> Faith Stevelman Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 584 (1997); Veronica Besmer, *The Legal Character of Private Codes of Conduct: More Than Just A Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HASTINGS BUS. L.J. 279, 304 (2006).

<sup>12</sup> Jędrzej George Frynas, *The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 INT’L AFF. 582, 584-85 (2005).

<sup>13</sup> *Id.* at 584.

<sup>14</sup> See, e.g., Matthew Futterman, *Qatar’s World Cup Spending Spree*, WALL STREET JOURNAL (Jan. 13, 2011) available at <http://online.wsj.com/article/SB10001424052970203513204576047681613086452.html>; Kahn, *supra* note 11 (for a discussion regarding similar problems on a domestic scale).

<sup>15</sup> Frynas, *supra*, note 12, at 584.

<sup>16</sup> *Id.*

<sup>17</sup> Jędrzej George Frynas & Geoffrey Wood, *Oil & War in Angola*, 28 REVIEW OF AFRICAN POLITICAL ECONOMY 587, 589 (2001).

financial records that would prevent such activity from occurring.<sup>18</sup> In the aftermath of the Haitian earthquake, however, some commentators argued that this law did more than just discourage bribery—it also discouraged corporate charity and investment in a disaster relief effort.<sup>19</sup>

“One of the best ways to help Haiti,” one commentator wrote, is to “[p]ass a law stating that the [FCPA] does not apply to dealings in Haiti.”<sup>20</sup> Another author reported that fear of FCPA prosecution “preclude[d] legitimate US entities” from engaging the Haitian reconstruction effort.<sup>21</sup> This was not the first time that fear of criminal prosecution delayed charitable relief. Concerns regarding criminal liability delayed funds for Indian Ocean Tsunami relief in 2004<sup>22</sup> and \$50 million of State Department aid to Somalia in 2009.<sup>23</sup> Looking at the FCPA specifically, other commentators argued that the law was functioning as a de facto sanction system; discouraging business engagement in high risk countries, such as Haiti, with the threat of criminal prosecution.<sup>24</sup> Despite the debate surrounding the possible unintended effects of the law, the FCPA remained in force against companies working on reconstruction and relief efforts in

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<sup>18</sup> See *infra*, note 57 and accompanying text.

<sup>19</sup> Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?* WALL ST. J. (March 16, 2010), <http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/>; Tyler Cowen, *One of the best ways to help Haiti: Modify FCPA*, MARGINAL REVOLUTION (March 15, 2010), <http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html>. But see Mike Koehler, *No We Don't Need to Suspend the FCPA In Haiti or Any Other Country*, FCPA PROFESSOR (March 18, 2010), <http://fcpprofessor.blogspot.com/2010/03/no-we-dont-need-to-suspend-fcpa-in.html>.

<sup>20</sup> Cowen, *supra* note 19.

<sup>21</sup> Jones, *supra* note 19.

<sup>22</sup> Fraterman, Justin A., *Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?* 2 (January 14, 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1750963](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750963) (discussing the criminalization of supplying international terrorist groups with material aid).

<sup>23</sup> *Id.* at 41.

<sup>24</sup> Cowen, *supra* note 19. See generally Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation As Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010).

Haiti. However, it was not long before rampant corruption and lack of donor transparency began to plague rebuilding efforts; the question then became whether the law was even having its *intended* anti-corruption effect.<sup>25</sup>

The deleterious effects of corruption on economic, social, and political systems have been well documented.<sup>26</sup> Even foreign corruption has effects on US security and political interests;<sup>27</sup> profits from corruption, bribery, and transnational crime fund criminal and terrorist organizations around the globe.<sup>28</sup> Recognizing this threat, US leaders have pledged their efforts to fight corruption both at home and abroad.<sup>29</sup> For some, however, arguments against corruption are less persuasive if the corruption is entwined with development aid or charity because the funds are dedicated to good works.<sup>30</sup>

However, a plethora of literature suggests that even if corrupt donations reach needy recipients, no amount of charity will have a positive effect in developing countries without accountability and transparency.<sup>31</sup> Empirical studies have found that large amounts of aid in

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<sup>25</sup> See, e.g., Daniel Kaufmann, *Transparent Aid for Haiti's Reconstruction: Capture Matters*, BROOKINGS INSTITUTE (Mar. 30, 2010), available at [http://www.brookings.edu/opinions/2010/0330\\_haiti\\_transparency\\_kaufmann.aspx](http://www.brookings.edu/opinions/2010/0330_haiti_transparency_kaufmann.aspx); Daniel Frankle, *Wyclef Jean Squandered Haitian Relief Funds*, REUTERS (Nov. 27, 2011), available at <http://www.reuters.com/article/2011/11/27/idUS146824993020111127>.

<sup>26</sup> Jeff Everett et al., *Accounting and the Global Fight Against Corruption*, 32 ACCT., ORG., AND SOC'Y 513, 513-14. *But see*, Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 807 (2006).

<sup>27</sup> See Spalding, *supra* note 24.

<sup>28</sup> See generally Louise Shelley, *The Unholy Trinity: Transnational Crime, Corruption, and Terrorism*, 11 BROWN J. WORLD AFF. 101 (2005).

<sup>29</sup> Press Release, The White House, G-20 Summit in Toronto: Global Leadership to Combat Corruption (June 27, 2010) (available at <http://www.whitehouse.gov/the-press-office/g-20-summit-toronto-global-leadership-combat-corruption>).

<sup>30</sup> Luke R. Entelis, *Defending the Charity "Loophole": How Criticism of Congressional Charities Falls Short*, 24 GEO. J. LEGAL ETHICS 535 (2011).

<sup>31</sup> See, e.g., Bruce Winfield Bean, *Hyperbole, Hypocrisy, and Hubris in the Aid-Corruption Dialogue*, 41 GEO.J. INT'L L. 781, 782-796 (2010). See also Matthew Genasci & Sarah Pray,

some recipient countries actually increase government corruption.<sup>32</sup> In the worst cases, unmonitored or misappropriated donations have strengthened abusive governments,<sup>33</sup> fueled conflict,<sup>34</sup> or provided funding to terrorist organizations.<sup>35</sup> On a more basic level, corruption eats away at the narrow budget of money dedicated to good works: for example, in 2011, almost \$53 million of the Global Fund to Fight AIDS, TB, and Malaria was lost through corruption.<sup>36</sup> Massive corruption in international aid and charity is one major reason why “more than \$2.5 trillion in total aid”<sup>37</sup> has not been more successful at reducing global poverty.<sup>38</sup>

In the immediate aftermath of the Haitian earthquake, commentators and development experts were anxious to turn the tragedy into an opportunity to rebuild a “stronger” Haiti, one no longer dependent on foreign aid.<sup>39</sup> In the relief effort, however, US anti-corruption law had the paradoxical effect of both discouraging much-needed corporate engagement as well as failing to capture corruption. The situation in Haiti illustrates the challenge facing the FCPA to adequately handle both anti-corruption goals as well as corporate charity.

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*Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37 (2008).

<sup>32</sup> Katherine Erbeznik, *Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18 IND. J. GLOBAL LEGAL STUD. 873, 884-85 (2011) (citing Stephen Knack, *Aid Dependence and the Quality of Governance: Cross-Country Empirical Tests*, 68 S. ECON. J. 310, 311 (2001));

<sup>33</sup> See Bean, *supra* note 31, at 792; Dambisa Moyo, *Why Foreign Aid is Hurting Africa*, Wall St. J. (Mar. 21, 2009) available at <http://online.wsj.com/article/SB123758895999200083.html>

<sup>34</sup> Bean, *supra* note 31, at 791 (noting that in Somalia, “a civil war was sparked by efforts of opposition groups to control the humanitarian food aid.”); Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539, 546 (2011) (“humanitarian aid is merely another resource, like so-called conflict diamonds, that triggers conflicts between contending factions”).

<sup>35</sup> DEP'T OF TREASURY, TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES, 14-16 (2010).

<sup>36</sup> Elena Helmer & Stuart H. Deming, *Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks*, 45 INT'L L. 597, 611 (2011).

<sup>37</sup> Bean, *supra* note 31, at 810.

<sup>38</sup> See generally, *id.*

<sup>39</sup> See *supra* note 6.

Ultimately, a new legal framework must be considered if the US wishes to combat corruption and encourage corporate philanthropy abroad. Current FCPA enforcement is both over-inclusive, discouraging bona fide charity, and under-inclusive, failing to criminalize or capture some corrupt activity. FCPA enforcement should be modified to create a “Safe Harbor Option,” giving corporations the option to earn a rebuttable presumption of legitimacy for their donations (ameliorating the over-inclusive nature of the FCPA) by publically disclosing their payments (ameliorating the under-inclusive nature of the FCPA).

Part I of this Comment introduces the FCPA a law focused on preventing corruption abroad. Part II shows how this law fails to accommodate corporate charity. Part III suggests modifications to the FCPA to create the Safe Harbor Option for disclosed corporate charity. Finally, Part IV lends support for the Safe Harbor Option by discussing the benefit of regulating by disclosure rather than prohibition. It extends this argument to conclude that regulatory systems based on disclosure rather than prohibition will be most successful at encouraging both anti-corruption efforts as well as philanthropic goals.

## I. THE FCPA AND CORPORATE CHARITY

The FCPA is the major law aimed at combating international bribery and corruption. Part A introduces the FCPA and details the law’s major provisions. Part B discusses the FCPA’s application to corporate charity, and details how the law is both under- and over-inclusive.

### A. THE LAW

The creation of the FCPA in the 1970s began the global movement against corruption.<sup>40</sup> When US company Lockheed Martin revealed it had paid millions in bribes around the world,<sup>41</sup>

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<sup>40</sup> See DAVID KENNEDY AND DAN DANIELSON, *BUSTING BRIBERY: SUSTAINING GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 21* (Open Soc’y Found., 2011) (noting

it became clear corporate bribery was much more than a foreign ethics problem: rather, it was a major policy issue that strained US alliances and threatened political interests around the world.

<sup>42</sup> In Italy, the “sight of corrupt capitalism” strengthened the communist movement.<sup>43</sup> Japanese and US relations also suffered, as the scandal “dr[o]ve a wedge between two close allies.”<sup>44</sup> The fallout from the Lockheed Martin scandal provided impetus for the creation of the FCPA.<sup>45</sup>

The FCPA consists of two main provisions. The first is an accounting requirement to help prevent corruption and the second is an enforcement mechanism to punish companies that have already engaged in bribery.<sup>46</sup> The accounting requirement, known as the books-and-records provision, requires corporations to maintain sufficient internal controls and accounting standards to prevent violations of the FCPA enforcement mechanism.<sup>47</sup> The enforcement mechanism, in turn, criminalizes “corruptly giving anything of value to a foreign official for the purpose of obtaining or retaining business.”<sup>48</sup> The elements of “corruptly giving anything of value to a foreign official for the purpose of obtaining or retaining business” have been interpreted expansively by prosecutors and courts and are set out briefly below.

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the effect that the FCPA had on the global anti-corruption movement, creating momentum for agreements such as the OECD Anti-Bribery Convention, the Council of Europe Convention on Corruption, and the UN Convention against Corruption) [hereinafter BUSTING BRIBERY].

<sup>41</sup> Spalding, *supra* note 24, at 360

<sup>42</sup> *Id.*

<sup>43</sup> Spalding, *supra* note 24, at 385.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 359-60

<sup>46</sup> 15 U.S.C. §§ 78dd-1

<sup>47</sup> 15 U.S.C. §§ 78m(b)(2)(A).

<sup>48</sup> 15 U.S.C. § 78dd-1. An affirmative defense to an FCPA charge is available if the payment is: 1) explicitly legal under the host country’s laws, or 2) a reasonable business expenditure made without corrupt intent. 15 U.S.C. § 78dd-1(c)(1)-(2) (2000)). There is also an exception for “grease payments” to speed up routine, clerical government actions. 15 U.S.C. § 78dd-1(b).

- “*Corruptly Giving.*” The FCPA is aimed at payments that are made corruptly, with “evil motive or purpose.”<sup>49</sup>
- “*Anything of value.*” In other criminal statutes, this phrase has been interpreted broadly by courts; the FCPA is no exception.<sup>50</sup> It can be extended to gifts, travel expenses, scholarship, and even a charitable donations made in the name of an individual or to a cause that an individual values.<sup>51</sup>
- “*To a Foreign Official*”: A foreign official is defined in the FCPA as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”<sup>52</sup> The term “instrumentality” was the source of a great deal of confusion,<sup>53</sup> but several recent court decisions offered multi-factor definitions for the term.<sup>54</sup> The factors include considerations such as: the foreign state’s characterization of the entity; the

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<sup>49</sup> Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber, 327 F.3d 173, 182 (2d Cir. 2003). *See also* United States v. Kay, 513 F.3d 432, 432 (5th Cir. 2007) (noting that “corruptly” was a fact based question and that a jury did not need to find specific intent to find that a defendant acted corruptly).

<sup>50</sup> H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT’L TAX & BUS. LAW. 260, 273-75 (1994).

<sup>51</sup> William Allen Nelson, *No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act*, FORDHAM J. CORP. & FIN. L. (forthcoming 2011) (manuscript at 10-11)

([http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=william\\_nelson&sei-redir=1#search=%22FCPA%20no%20good%20deed%22](http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=william_nelson&sei-redir=1#search=%22FCPA%20no%20good%20deed%22)) at 10-11. *See also* NFTC Criticizes Broadening FCPA Enforcement, Lawyers Disagree, 26 INSIDE U.S. TRADE 42, Oct. 24, 2008, available at

[http://www.millerchevalier.com/portalresource/Moyer\\_2008\\_10\\_24\\_Inside\\_US\\_Trade](http://www.millerchevalier.com/portalresource/Moyer_2008_10_24_Inside_US_Trade) (“the company’s contribution to the charity bestowed a benefit to the official because it enhanced his reputation”).

<sup>52</sup> 15 U.S.C.A. § 78dd-1

<sup>53</sup> *See generally* Joel M. Cohen et.al, *Under the FCPA, Who Is A Foreign Official Anyway?*, 63 BUS. LAW 1243 (2008).

<sup>54</sup> Thomas R. Fox, *Reading a Crystal Ball? Guidance on Instrumentality Under the FCPA – Part I*, FCPA COMPLIANCE AND ETHICS, (Aug. 17, 2011 7:14 AM), <http://tfoxlaw.wordpress.com/2011/08/17/reading-a-crystal-ball-guidance-on-instrumentality-under-the-fcpa-part-i/>.

purpose of the entity’s activities; and whether the entity derives support from grants or a special tax status.<sup>55</sup>

- “*For the Purpose of Obtaining or Retaining Business*”: This term has also been interpreted expansively and covers any activities that assist a company in obtaining businesses directly (such as winning contracts) or indirectly (such as gaining lower taxes or import duties).<sup>56</sup>

Two agencies are responsible for the enforcement of the FCPA. The books-and-records provision is enforced against securities issuers by the Securities & Exchange Commission (“SEC”), while the Department of Justice (“DOJ”) enforces both the books-and-records and the specific enforcement mechanism against all “domestic concerns,” including citizens, residents, and corporations that have their principle places of business in the US.<sup>57</sup>

#### B. APPLICATION TO CORPORATE PHILANTHROPY: DESIRABLE AMBIGUITIES?

This Section discusses the shortcomings of US anti-corruption laws with regards to charitable giving and demonstrates that the FCPA is both over- and under-inclusive in the realm of corporate charity.

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<sup>55</sup> *Id.* Other factors cited include: the extent of the foreign state’s ownership or control over the entity or its officers; the entity’s financing structure and whether support is derived from government appropriations or fees; the circumstances surrounding the entity’s creation; and if the entity is widely perceived to be performing government functions. *Id.*

<sup>56</sup> *Lamb v. Phillip Morris*, 915 F.2d 1024 (6th Circuit 1990); *United States v. Kay*, 359 F.3d 738, 755 (5th Cir. 2004).

<sup>57</sup> 15 U.S.C.A. § 78dd-2, 3. This expansive definition allows the FCPA to capture a significant amount of activity, even if the corporation is considered a “foreign firm.” *See generally* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011); BUSTING BRIBERY, *supra* note 40, at 25 (“Of the twenty corporate matters brought in 2010, more than half involved non-U.S. companies, accounting for 94% of the penalties imposed in 2010.”).

The FCPA has often been criticized for a lack of clarity,<sup>58</sup> but the DOJ and SEC have declined to issue formal rules or guidelines.<sup>59</sup> This lack of guidance is suggested to stem from an unwillingness to provide a “blueprint” for companies to circumvent the law.<sup>60</sup> Many support this reasoning and believe that the inherent ambiguities in the FCPA make it an effective law.<sup>61</sup>

While formal rules are lacking, the DOJ does have an “Opinion Release” procedure to provide guidance.<sup>62</sup> Through this process, companies submit details of their business situations or contracts—hypotheticals are not permitted—and the DOJ will publish its opinion regarding

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<sup>58</sup> See, e.g., Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV., 492, 497 (2011).

<sup>59</sup> The DOJ has announced that it will remedy this situation by releasing rules in October of 2012. Matthews, *FCPA Guidance to Be Released By October*, Wall Street Journal Blogs (Aug. 29, 2012), available at <http://blogs.wsj.com/corruption-currents/2012/08/29/fcpa-guidance-to-be-released-by-october/>.

<sup>60</sup> Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 461-62 (1987). See also Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. Int'l L. & Pol. 645, 654 & n.67 (1981) (discussing how at the FCPA's inception, the SEC asked why they should “issue[] guidelines on how to violate the law,” and DOJ officials likewise refused to tell businesses “who they can bribe and who they can't.”). But see Rebecca Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379, 400-01 (2005) (arguing that the DOJ did not issue guidelines because the nature of the FCPA made it impossible to write effective guidance).

<sup>61</sup> See Letter from Civil Society Groups to Members of the House of Representatives (Jan. 12, 2012), available at <http://www.scribd.com/doc/78041628/Defending-the-FCPA-CSO-Letter-to-U-S-House-Jan-12-2012> (“We believe that any amendments to more narrowly define key terms of the FCPA would . . . significantly undermine the statute as a tool to curb corruption.”). But see Westbrook, *supra* note 58, at 498 (arguing that the FCPA's ambiguities frustrate its purpose). There has been a recent push, spearheaded by the Chamber of Commerce, to amend the FCPA in a variety of ways. See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, 6 (2010) [hereinafter RESTORING BALANCE]. These efforts have largely been suspended, following a well-publicized bribery scandal of one of the Chamber's major donors, Wal-Mart. Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, The New York Times (April 30, 2012), available at <http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act/>.

<sup>62</sup> For a detailed discussion of the Opinion Release procedure, see Longobardi, *supra* note 60, at 461-62.

any possible FCPA issues.<sup>63</sup> If the company follows the DOJ's advice, the activity will be presumed to be FCPA-compliant.<sup>64</sup> This Opinion Release procedure, however, has been used only a few times each year since its inception.<sup>65</sup>

Five of the last thirty FCPA Opinion Releases focus on charitable activity, demonstrating the industry's concerns about how the FCPA applies to philanthropy.<sup>66</sup> Although the DOJ may believe that ambiguity is a desirable trait in the FCPA, there is evidence that it is willing to offer extra guidance for philanthropic activities. In an effort to provide clarity to the area, the DOJ summarized its opinions into a "Best Practices" guide for international charity in a 2002 Opinion.<sup>67</sup> This guide instructs donors to:

- 1) Obtain certification from the recipient regarding an understanding of the FCPA;
- 2) Perform due diligence to confirm that none of the recipient's officers are affiliated with the foreign government;
- 3) Obtain audited financial statements from the recipient;
- 4) Ensure the funds are transferred to a valid bank account;
- 5) Confirm that the activities planned occur prior to disbursement of funds; and
- 6) Continue to monitor the program.<sup>68</sup>

Despite the DOJ publications, confusion remains regarding the scope of the FCPA and charitable giving.<sup>69</sup>

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<sup>63</sup> *Id.* In the publications, all identifiers or specific details about the company, contract, or operating country are removed. *Id.*

<sup>64</sup> 28 C.F.R. § 80.10.

<sup>65</sup> Longobardi, *supra* note 60, at 461-62. *See generally* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, OPINION RELEASES, <http://www.justice.gov/criminal/fraud/fcpa/opinion/>.

<sup>66</sup> *See* U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OP. RELEASE PROCEDURE, No. 95-01, (1995); U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OP. RELEASE PROCEDURE, No. 97-02 (2002); U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OP. RELEASE PROCEDURE, No. 06-01 (2006); U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OP. RELEASE PROCEDURE, No. 09-01 (2009), U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OP. RELEASE PROCEDURE, No. 10-02, (2010). For an in-depth analysis of these Opinions, see Nelson, *supra* note 51, at 22-32.

<sup>67</sup> U.S. DEP'T OF JUSTICE, OP. RELEASE PROCEDURE, No. 10-02 *supra*, note 66.

<sup>68</sup> *Id.*

<sup>69</sup> Westbrook, *supra* note 58, at 539.

Compounding this confusion is a lack of relevant case law.<sup>70</sup> There has only been one instance of a successful FCPA investigation and settlement regarding illicit charitable donations.<sup>71</sup> In 2004, the SEC settled with US-based pharmaceutical company, Schering-Plough (“SP”) for violations of the books-and-records provision.<sup>72</sup> SP paid \$500,000 in fines for the improper recording of about \$75,000 in donations made by SP’s Polish subsidiary to a Polish non-profit.<sup>73</sup>

In the complaint, the SEC enumerated several factors that should have alerted SP that their accounting records were insufficient to protect against “FCPA issues,” including the facts that:

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<sup>70</sup> *Id.* at 497, 593. This complaint regarding the FCPA is not unique to the area of corporate charity. The wide majority of FCPA cases settle without going to trial, and the resulting deferred- or non-prosecution agreements are not subject to judicial scrutiny and are not considered binding precedent. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 998-1001 (discussing “the absurdity of FCPA ‘case law’”). Despite the paucity of FCPA actions actually brought, potential penalty costs are dwarfed by the amounts that a company must expend to investigate possible abuses. Russell G. Ryan & Laura K. Bennett, *Seven False Comforts and Misconceptions About FCPA Risk*, BNA INSIGHTS, Dec. 21, 2011, at 2 (noting that a company that ultimately paid a \$300,000 FCPA penalty also expended \$2.5 million to investigate the violations). *See also* Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES (May 24, 2010), available at [http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket\\_print.html](http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket_print.html) (Siemens, for example, is reported to have spent nearly \$1 billion on legal and accounting analysis to review its transactions before and during the major FCPA prosecution).

<sup>71</sup> *In re Schering-Plough Corp.*, SEC Rel. Nos 34-49838, AE-2032 (June 9, 2004), available at 2004 WL 1267922. *See also* John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 147-54 (2005). One FCPA case focused on charitable giving did reach the court system, but it was dismissed because the court found that the FCPA did not allow for a private right of action. *Lamb v. Phillip Morris*, 915 F.2d 1024 (6th Circuit 1990). In this case, a US tobacco company’s foreign subsidiary entered a contract with the Children’s Foundation of Caracas. *Id.* at 1025. This agreement, signed on behalf of the Foundation by the wife of the President of Venezuela, set forth that in exchange for a \$12.5 million donation, the company would gain prince controls and tax assurances in Venezuela’s tobacco market. *Id.*

<sup>72</sup> *In re Schering Plough*, *supra*, note 71.

<sup>73</sup> *Id.*

- 1) SP's corporate charity focus was on healthcare issues, but the Polish non-profit was dedicated to the restoration of castles;
- 2) the donations to the charity represented an unusually high of total charitable gifts made by SP Poland during the time period;
- 3) most of the payments were carefully structured so the dollar amount did not exceed the local manager's authorization level and;
- 4) the Director and Founder of the charity was also a Polish government official responsible for purchasing healthcare products for his region of Poland.<sup>74</sup>

The SEC also highlighted the fact that the SP manager reported viewing the payments as "dues" required for the government official's cooperation.<sup>75</sup>

Ultimately, SP only faced fines for violations of the books-and-records requirement, not for violations of the substantive anti-bribery enforcement mechanism. This is possibly because the "willfulness" elements required for a criminal conviction failed to transfer from the Polish SP subsidiary to US-based SP.<sup>76</sup>

The SP investigation and settlement came as a surprise to many<sup>77</sup> despite the historical precedent of considering charitable contributions to be "something of value."<sup>78</sup> The settlement created confusion in companies' compliance programs, because SP's donations were made to a

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* This is similar to the recent expose regarding Wal-Mart's Mexican subsidiary's FCPA violations. In that case, Wal-Mart de Mexico was revealed to have paid almost \$16 million directly to local governments in Mexico to obtain licenses or building permits – many of these payments were labeled as "donations" in the company records. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle* (April 21, 2012), NY Times, available at <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

<sup>76</sup> Giraud, *supra* note 71, at 150-51. Currently, the SEC is investigating donations made by Wynn Resorts Ltd, which may implicate FCPA issues. Michael Koehler, *Wynn Resorts \$135 Million University of Macau Donation the Subject of SEC Scrutiny*, FCPA PROFESSOR (Feb 14, 2012), <http://www.fcprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny>.

<sup>77</sup> Giraud, *supra* note 71; Martin J. Weinstein & Robert J. Meyer, Practising Law Institute, *SEC Finds Donations to Bona Fide Charity To Be In Violation of the FCPA*, CORPORATE AND SECURITIES LAW UPDATE, 579, 580 (2004).

<sup>78</sup> See, e.g., *Lamb v. Phillip Morris*, 915 F.2d 1024 (6th Circuit 1990); Brown, *supra* note 50, at 273-75.

recognized Polish charity and the Polish foreign official enjoyed no personal financial gain.<sup>79</sup>

This seemed to contradict a 2009 DOJ Opinion Release stating that a corporation was allowed to donate medical devices to foreign state-run hospitals because the gifts were not directed to foreign officials, but rather to foreign instrumentalities, the hospitals.<sup>80</sup> Despite the confusion, commentators did agree that the SEC investigation indicated that that corporate charity was “fair game” for FCPA investigations<sup>81</sup> - some commentators have even predicted that the DOJ and SEC might affirmatively target charity programs for potential FCPA abuses.<sup>82</sup>

These ambiguities in the law are particularly troublesome for corporations that hope to make charitable contributions in their host communities abroad, and have resulted in both over- and under-inclusive results when the FCPA is applied to corporate charity.

### 1. *Over-Inclusivity*

Compliance advice—released by the DOJ or designed by commentators—tends to envision a much broader interpretation of the FCPA than the language of the statute suggests.<sup>83</sup> These opinions recommend a total prohibition against any charitable gifts to any organization

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<sup>79</sup> Giraud, *supra* note 71, at 136. *See also* Weinstein, *supra* note 77, at 581 (noting that the “expansive” new enforcement actions of the SEC could “render promotional charitable donations a criminal violation of the FCPA, even though such payments traditionally have withstood scrutiny”).

<sup>80</sup> U.S. DEP’T OF JUSTICE, OP. RELEASE PROCEDURE, No. 09-01, *supra* note 66. *See also* U.S. DEP’T OF JUSTICE, OP. RELEASE PROCEDURE, No. 97-02, *supra* note 66 (declining to prosecute a company that was planning donations to a local school, because the donations were going to a government entity (the school) rather than foreign officials); Nelson, *supra* note 51, at 35-36.

<sup>81</sup> Giraud, *supra* note 71, at 152; Weinstein, *supra* note 77, at 581.

<sup>82</sup> Helmer, *supra* note 36, at 623-34 (predicting that internationally-focused NGOs and aid organizations, especially “NGOs that are not fundamentally of a charitable nature, and that compete with more traditional business organizations,” might become the focus of FCPA scrutiny).

<sup>83</sup> *See generally* note 66. *See also* Nelson, *supra* note 51, at 48-57. *See also* Koehler, *The Façade*, *supra*, note 70, at 1001 (“businesses . . . model FCPA compliance policies . . . not on what the law actually says, but rather on what the enforcement agencies say the law says.”).

with connections to foreign officials or their families.<sup>84</sup> The FCPA, however, does not criminalize giving *anything* to foreign officials, but rather giving gifts to foreign officials *corruptly* (with the ill-intent expectation of quid pro quo.)<sup>85</sup> This guidance suggests that corporations may be exposing themselves to liability if they make donations to organizations connected to foreign officials. For a prudent, philanthropic company which followed these guidelines, the pool of possible charity recipients would seem to be limited to organizations that are 1) private, and 2) lacking in any connection to a government official.<sup>86</sup> Furthermore, even identifying “foreign officials” is considerably more difficult in the charitable realm than traditional business decisions. Many factors used in recent judicial decisions to define “government entities” might apply de facto to non-profit organizations, such as ‘the purpose of the entity’s activities,’ or ‘if the entity is granted special tax or loan opportunities.’<sup>87</sup> Such an expansive, ambiguous application of the FCPA runs a serious risk of chilling even honest corporate charity programs.<sup>88</sup>

Commentators have long argued that the FCPA has a negative impact on US business abroad, although empirical evidence of such claims is inconclusive.<sup>89</sup> However it is possible that

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<sup>84</sup> See, e.g., U.S. DEP’T OF JUSTICE, OP. RELEASE PROCEDURE, No. 10-02.

<sup>85</sup> 15 U.S.C. §§ 78dd-1.

<sup>86</sup> Nelson, *supra* note 51, at 40 (“many foreign aid organizations have ties to foreign governments.”).

<sup>87</sup> See *supra*, note 54.

<sup>88</sup> INSIDE U.S. TRADE, *supra*, note 51. See generally Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035-72 (2008) (arguing that the enforcement of many corporate criminal statutes causes companies to “overpay” for compliance programs and avoid otherwise lucrative investments or other opportunities.)

<sup>89</sup> See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 90-91 (2007) (for the contradictory reports on the effect that the FCPA has on US business). Compare RESTORING BALANCE, *supra* note 61 (arguing that the FCPA has had a negative effect on US business interests) with Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption*

any “chilling” impact the FCPA might have on business may be exacerbated in the realm of corporate charity: in for-profit business arrangements, the corporation might count on its profit to offset FCPA risks.<sup>90</sup> Such a profit offset is unlikely to exist in a charity project, at least to the extent necessary to offset the potential costs of an FCPA investigation. Corporations may try to minimize their risk by directing corporate aid away from “high risk,” corrupt countries.<sup>91</sup> This could cause unintended collateral damage by creating de facto sanctions that isolate the least developed, neediest communities from corporate charity.<sup>92</sup> By discouraging corporate aid, the US risks not only exacerbating poverty, but also squandering the opportunity for global leadership.<sup>93</sup>

### B. *Under-Inclusivity*

FCPA enforcement also fails to criminalize and punish some forms of charitable donations that could be considered corrupt.

For example, some corporate donations appear to be attempts to “buy off” host communities to create a favorable working environment.<sup>94</sup> Consider Shell in Nigeria, which has been criticized for creating development projects only in communities adjacent to pipeline construction, then abandoning the half-finished projects immediately after the pipelines are

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*Policies on the United States National Interest*, 67 N.Y.U. Ann. Surv. Am. L. 433 (2012) (arguing that the negative impact of the FCPA and other anti-corruption laws has been overstated  
<sup>90</sup>Brandon L. Garrett, *Don't Believe the Hype on Corporate Bribery* (May 2, 2012), Huffington Post, available at [www.huffingtonpost.com/brandon-l-garrett/dont-believe-the-hype-on-\\_b\\_1470363.html](http://www.huffingtonpost.com/brandon-l-garrett/dont-believe-the-hype-on-_b_1470363.html) (suggesting that FCPA fines and costs “may be fairly trivial in comparison to the corporate profits.”).

<sup>91</sup> Nelson, *supra* note 51, at 39 (“[t]he amount of corruption in a country can affect a company’s willingness to make charitable contributions in that country.”).

<sup>92</sup> Spalding, *supra* note 24, at 398.

<sup>93</sup> Margulies, *supra* note 34, at 543 (discussing counterterrorism policy and its chilling effect on US donations abroad).

<sup>94</sup> Frynas, *supra* note 12, at 584-85; Sprinkle, *supra* note 9, at 446-48.

complete and the villagers' goodwill was no longer needed.<sup>95</sup> As another example, Shell "built three town halls in one Niger Delta community as three community chiefs wanted to benefit personally from contracts for their construction."<sup>96</sup> From the facts available, it appears Shell's actions would not implicate any FCPA issues: no government official benefited from the donations even though such activities seem unfair.

Furthermore, it may be possible for unscrupulous corporations to escape FCPA liability if they funnel donations through charities that are independent of foreign officials. It is easy to imagine a scenario in which a corporation seeks business opportunities from a foreign official in exchange for development projects that increase the official's popularity in a key electoral area.<sup>97</sup> Even though such an exchange "undermine[s] . . . inherent fairness"<sup>98</sup> and provides a foreign official with "something of value" (here, increased prestige in an electoral district), because the funds are dedicated to a town or area rather than a government official, it is possible no FCPA violations would occur.<sup>99</sup>

## II. FCPA SAFE HARBOR OPTION: A REBUTTABLE PRESUMPTION OF LEGITIMACY FOR PROPERLY DISCLOSED CHARITY

This Part explores solutions that will allow anti-corruption laws to operate more effectively in the realm of corporate philanthropy. It introduces the Safe Harbor Option, a

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<sup>95</sup> Frynas, *supra* note 12, at 584-85.

<sup>96</sup> *Id.* at 585.

<sup>97</sup> Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 26-29 (2006).

<sup>98</sup> *Id.* at 29.

<sup>99</sup> *Id.* at 26-29; Nelson, *supra* note 51, at 34-36 (discussing the DOJ Opinion Releases, and noting that the opinions "are troublesome in that they seem to give companies room to circumvent the FCPA" through scenarios such as the one discussed here). Rose-Ackerman & Hunt, *supra* note 89, 444, n.64.

modification to the FCPA that gives corporations the option of “buying” a rebuttable presumption of legitimacy for their donations in return for full disclosure of these payments.

To ameliorate the over- and under-inclusive nature of the FCPA’s treatment of corporate charity, an optional disclosure-based program should to be enacted. The ‘Safe Harbor Option’ proposed by this Comment will incentivize transparency and decrease corruption by allowing for public “shaming” of companies engaging in corrupt philanthropy. The rebuttable presumption of legitimacy, awarded to corporations participating in the Safe Harbor Option, will ease some of the concerns corporations may have regarding the scope of the FCPA and potential liability stemming from charitable donations.<sup>100</sup>

Although the SEC and DOJ view self-disclosure of FCPA violations favorably in the process of investigation and potential prosecution,<sup>101</sup> such disclosures provide little assurance to companies because any prosecutorial mercy is purely discretionary.<sup>102</sup> The Safe Harbor Option will function very differently; as an optional program that requires disclosure of all corporate charity, not merely donations a company later discovers to be FCPA violations.

If a company participates in the Safe Harbor Option, they will be required to file annual reports disclosing charitable donations. These disclosures should be made to a neutral

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<sup>100</sup> For a similar recommendation regarding the application of the laws against providing funding to a terrorist organization to charitable and non-profit organizations, see Margulies, *supra* note 34, at 545 (recommending a solution that combines a “safe harbor” and a “expanded waiver” that produces a “dual approach that encourages due diligence on the part of aid groups, while avoiding an undue burden on humanitarian efforts.”).

<sup>101</sup> BUSTING BRIBERY, *supra* note 40, at 29.

<sup>102</sup> Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 650 (2012) (discussing the “opaque, inconsistent, and unpredictable world of DOJ decision making”). This is further complicated by the fact that disclosure of some FCPA violations to the SEC may open the company up to prosecution by other government agencies, such as the DOJ or the IRS. George Clarke & Lina Braude, *More Sticky Strands in the FCPA Web: Tax Rules and Financial Reporting May Drive Disclosure*, 42 INT’L LAW. 1095, 1095-96 (2008).

organization or government agency.<sup>103</sup> A new commission or board within the agency should be created to monitor the corporate philanthropy disclosures.<sup>104</sup> The amount of the donation, the project, purpose, beneficiaries, and any affiliated organizations will be disclosed.<sup>105</sup> Such a disclosure and tracking system should not be too difficult or expensive to provide.<sup>106</sup> The system should be internet-based, fully searchable,<sup>107</sup> and most importantly, easy to use and accessible to readers.<sup>108</sup> The disclosure system should make information easily and readily available to NGOs, watchdog groups, and interested citizens.<sup>109</sup>

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<sup>103</sup> Possible organizations include the Export-Import Bank or Overseas Private Investment Corporation. Cf. Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1043, 1093 (2010).

<sup>104</sup> Other authors have suggested similar commissions or federal agencies to monitor charitable activity within the United States. See Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 498-501 (2010) (citing a variety of proposals recommending the creation of a federal level commission to monitor domestic non-profits); Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through A Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 1-2 (2009) (advocating “the creation of a new, federal, quasi-public agency that would be the principal regulator of the charitable sector.”)

<sup>105</sup> For an example of a possible disclosure form for corporate social responsibility, see Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1299-300, 130511 app. A (1999).

<sup>106</sup> Michael Wiehen, *Needs Assessment, Contracting, and Execution*, in CURBING CORRUPTION IN TSUNAMI RELIEF OPERATIONS, PROCEEDINGS OF THE JAKARTA EXPERT MEETING 49 (Asian Development Bank, Organization for Economic Co-operation and Development, Transparency International, 2005) [hereinafter TSUNAMI RELIEF OPERATIONS] . *But see* William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 54-55 (2006) (discussing the difficulties that the Senate and House had in creating a glitch-free and functioning internet-based program to publicize disclosures).

<sup>107</sup> Elisabeth Bassett, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1081 (2008); Luneburg & Susman, *supra* note 106, at 55 (recommending the use of a system that allowed for “immediate posting on the Internet and full-text searches as well as search by category”).

<sup>108</sup> See generally Memorandum from Cass Sunstein, OIRA Administrator, Disclosure and Simplification as Regulatory Tools (June 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/infocore/disclosure\\_principles.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/infocore/disclosure_principles.pdf).

<sup>109</sup> *Meeting Conclusion and Framework for Action*, in TSUNAMI RELIEF OPERATIONS, *supra* note 106, at 4. For further discussion of the potential role of NGOs and watchdog groups, see *infra*, text accompanying notes 158-162.

Such systems have already been suggested and implemented to track aid flows in response to major disasters.<sup>110</sup> The United Nations, with assistance from PriceWaterhouseCooper, used an online disclosure system to track the donations that were given in response to the 2004 tsunami in Asia.<sup>111</sup> This system, however, was not mandatory and under-used,<sup>112</sup> because “the information [was] only as complete as the various governments’ willingness to report.”<sup>113</sup>

In the FCPA Safe Harbor Option, corporations will have a much greater incentive to provide accurate and complete information: a rebuttable presumption of legitimacy for their donations. This presumption will be awarded to companies that accurately disclose their charitable contributions through the online tracking system,<sup>114</sup> subject to only minimal monitoring by the newly created board or commission.<sup>115</sup> The legitimacy presumption should be considered “rebutted” if the new board finds clear and convincing evidence, whether from an outside watchdog report or through its own monitoring process, that the information disclosed was not accurate or was not actually intended as a charitable donation.

Drawing examples from scenarios discussed above, the facts of the Schering-Plough settlement<sup>116</sup> would rebut this presumption because the “donations” were actually considered

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<sup>110</sup> Kaufmann, *supra* note 25.

<sup>111</sup> Jak Jabes, *Improving the Transparency of Aid Flows*, in TSUNAMI RELIEF OPERATIONS, *supra* note 106, at 14.

<sup>112</sup> *Id.*

<sup>113</sup> RHODA MARGESSON, CONG. RESEARCH SERV., RL3271, INDIAN OCEAN EARTHQUAKE AND TSUNAMI: HUMANITARIAN ASSISTANCE AND RELIEF OPERATIONS 21 n.41 (2005).

<sup>114</sup> This is similar to how the DOJ currently views situations that have been sanctioned through the Opinion Release procedure. *See supra*, note 64. If a company follows advice and guidance given by the DOJ in response to the corporation’s Opinion Request, then the activity is presumed to be in compliance with the FCPA, but if the information provided to the DOJ was not accurate or complete, the presumption will be rebutted. 28 C.F.R. § 80.10.

<sup>115</sup> *See supra*, note 104 and accompanying text.

<sup>116</sup> For a discussion of the Schering-Plough case, see notes 71-76 and accompanying text.

“dues” paid to gain cooperation of a foreign official.<sup>117</sup> Alternatively, from the information available, it would seem that payments such as those made by Chevron in Angola,<sup>118</sup> although certainly deserving of public scrutiny, would not rebut the presumption of legitimacy because there was not clear and convincing evidence the gifts were considered dues rather than donations.<sup>119</sup>

If the new monitoring board finds clear and convincing evidence to rebut the presumption of legitimacy, it should then pass the case on to the DOJ or the SEC for traditional investigation or enforcement.<sup>120</sup> If corporations choose not to disclose their payments, their payments will remain open to traditional FCPA investigation and enforcement action.

### III. REGULATING BY DISCLOSURE

This Part explores the benefits of creating a Safe Harbor Option within FCPA enforcement that will incentivize disclosure by granting corporate philanthropy a rebuttable presumption of legitimacy. This Part discusses the specific regulatory benefits of the Safe Harbor Option and how it will ameliorate both the over- and under-inclusive aspects of the FCPA’s treatment of corporate charity.<sup>121</sup>

This section will discuss why the Safe Harbor Option proposed by this Comment is an important addition to how the FCPA is enforced against corruption in corporate charity. It will show how the Safe Harbor Option will ameliorate the over-inclusive effects of the FCPA by offering the presumption of legitimacy and by relying on disclosure rather than strict prohibition.

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<sup>117</sup> *In re Schering Plough*, *supra*, note 71

<sup>118</sup> *See supra*, text accompanying note 16.

<sup>119</sup> *Id.*

<sup>120</sup> *Cf.* James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 273 (2003).

<sup>121</sup> For a general introduction to regulatory systems that rely on disclosure, see Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618-29 (1999).

The Safe Harbor Option will also ameliorate the under-inclusive nature of the FCPA by encouraging disclosure and allowing for public monitoring of both legal and illegal corporate charity.

A. *Ameliorate FCPA's Over-Inclusivity*

The Safe Harbor Option will offer corporations the opportunity to gain a rebuttable presumption of legitimacy for their charitable donations. This presumption will ease FCPA liability concerns that might otherwise discourage charity. Unlike current FCPA compliance, which focuses on strict prohibition (i.e., “confirm that none of the recipient’s officers are affiliated with the foreign government”<sup>122</sup>), the Safe Harbor Option will encourage charity to be regulated through disclosure.

The FCPA system should be updated from its traditional, prohibitive system because such systems are “limited in their ability to regulate corporations’ sustainable economic development.”<sup>123</sup> A disclosure based-system is often seen as a “second generation” regulatory strategy that is useful for updating older prohibitive-based systems.<sup>124</sup> The FCPA, like many major regulations, was created in the 1970s and relies on “command and control,” or a prohibitive system of regulation.<sup>125</sup> Such systems can have a chilling effect on the activity regulated,<sup>126</sup> just as the FCPA has caused corporations to hesitate before donating abroad.<sup>127</sup>

Disclosure based regulations are more flexible than strict prohibitions and “incorporate[] basic

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<sup>122</sup> See *supra* note 68, and accompanying text.

<sup>123</sup> David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 263 (2007).

<sup>124</sup> Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 21-23 (2001); Katherine Renshaw, *Sounding Alarms: Does Informational Regulation Help or Hinder Environmentalism?*, 14 N.Y.U. ENVTL. L.J. 654, 663 (2006).

<sup>125</sup> Stewart, *supra* note 124, at 21-23.

<sup>126</sup> Bassett, *supra* note 107, at 1083-84.

<sup>127</sup> See *supra*, notes 20-25, and accompanying text.

economic and social changes” with greater ease than prohibitive systems.<sup>128</sup> Such flexibility and inclusiveness is especially desirable for charitable programs, which may need to change quickly based on a company’s evolving social goals or in response to a sudden humanitarian disaster.<sup>129</sup>

The Safe Harbor Option grants corporations the ability to choose the regulatory program that makes the best economic sense for their company.<sup>130</sup> The current cost of FCPA compliance causes considerable dismay in the business community:<sup>131</sup> even relatively “small” FCPA penalties are in the hundreds of thousands of dollars and may be accompanied by millions of dollars in investigation and compliance fees.<sup>132</sup> However the alternative disclosure-based system has also been criticized for its cost: at the creation of the FCPA, Congress rejected a form of the law based on disclosure because of concerns regarding the high costs and paperwork requirements.<sup>133</sup> Within the narrow realm of corporate charity, however, costs of disclosure are likely to be much lower. This is especially true because many corporations already disclose this information directly to shareholders or to the “popular media . . . where public relations benefits are anticipated.”<sup>134</sup>

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<sup>128</sup> Stewart, *supra* note 124, at 130.

<sup>129</sup> This will be discussed further in Part C. *See* text accompanying footnote 200.

<sup>130</sup> The factors and considerations that already go into a company’s decision to voluntarily disclose FCPA matters are numerous. Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures*, American Conference Institute, Foreign Corrupt Practices Act, 9-11 (March 27, 2007).

<sup>131</sup> *See generally* RESTORING BALANCE, *supra* note 61.

<sup>132</sup> *Id.* at 5 (discussing the impact of current FCPA costs on US companies); Ryan, *supra* note 70.

<sup>133</sup> Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 419-20 (2010).

<sup>134</sup> Kahn, *supra* note 11, at 583. *See also* Letter from National Mining Association, To Elizabeth M. Murphy, Sec’y, Sec. and Exch. Comm’n, Re: Disclosure of Payments by Resource Extraction Issuers, File No. S7-42-10, 10 (Dec. 23, 2010) (“Such payments will typically be covered by the voluntary sustainable development reports in any event.”). *See also* Low, *supra* note 130, 6-8 (discussing a variety of other laws, besides the FCPA, which might mandate disclosure).

It is crucial that the Safe Harbor remains optional, regardless of which regulatory system is theoretically more expensive.<sup>135</sup> There are other factors, beside compliance costs, which may influence a company's preferences regarding disclosure. If a corporation donates to an unpopular cause in the foreign country, they may face retribution if their support becomes public. Even in the US, it is not unheard of for some corporate support, such as funding for Planned Parenthood, to anger customers who support alternative goals.<sup>136</sup> The Supreme Court has recognized the importance of allowing "advocates of unpopular causes" to remain anonymous<sup>137</sup> and even disclosure requirements for US non-profits include special procedures when charities might "be the target of harassment campaigns."<sup>138</sup>

Just as engaging in philanthropic activity is a choice that individual companies make, it is important that participation in the Safe Harbor Option also remains a choice, to adequately address the FCPA's over-inclusive treatment of corporate charity.

#### B. *Ameliorate FCPA's Under-Inclusivity*

Putting a greater emphasis on disclosure through the Safe Harbor Option will also help punish corrupt activity that the current FCPA fails to criminalize or capture. The presumption of

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<sup>135</sup> UNITED NATIONS GLOBAL COMPACT & BERTELSMANN STIFTUNG, THE ROLE OF GOVERNMENTS IN PROMOTING CORPORATE RESPONSIBILITY AND PRIVATE SECTOR ENGAGEMENT IN DEVELOPMENT 17 (2010) (discussing the benefits of "soft law" and the "importance of volunteerism in the [Corporate Responsibility] Agenda") [hereinafter *ROLE OF GOVERNMENTS IN CORPORATE RESPONSIBILITY*].

<sup>136</sup> See Marianne M. Jennings & Jon Entine, *Business with a Soul*, 20 *HAMLINE J. PUB. L & POL'Y* \*1, 35. Rene Lynch, *Susan G. Komen's Reversal: What Does it Really Mean?*, *LA TIMES* (Feb. 3, 2012), <http://latimesblogs.latimes.com/nationnow/2012/02/susan-g-komen-planned-parenthood-reversal.html>.

<sup>137</sup> *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 167 (2002) (cited by Lunenburg & Susman, *supra* note 106, at 39-40).

<sup>138</sup> Fishman, *supra* note 120, at 271.

legitimacy will encourage and reward disclosure, which will in turn allow civil society to monitor corporate donations, even if the payments are not illegal under the FCPA.<sup>139</sup>

As a “second generation” regulatory structure,<sup>140</sup> disclosure-based systems are more inclusive of civil society than prohibitive systems.<sup>141</sup> Accordingly, the Safe Harbor Option will empower NGOs, watchdog groups, and journalists to monitor corporate donations, legal or illegal.<sup>142</sup> Disclosure-based systems rely upon the weight of public opinion to judge corporate action<sup>143</sup> and because “corporations depend on the goodwill of clients and customers,” reputational harm can have far greater repercussion for businesses than government-imposed fines.<sup>144</sup> However these programs are only successful if a company’s transgressions provoke sufficient public outrage.<sup>145</sup> For example, public backlash against corporate misbehavior can sometimes be less robust if a corporation has harmed an “unrelated third party,” as opposed to a

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<sup>139</sup> Sunstein, *supra* note 121, at 625.

<sup>140</sup> See *supra* note 124 and accompanying text, discussing “second generation” regulations.

<sup>141</sup> Not only will the disclosure system allow civil society to monitor corporate donations, as this section discusses, but it may also allow the public to monitor how the government itself chooses to enforce the FCPA. Current DOJ and SEC interpretations of the FCPA and enforcement actions have been roundly criticized by many commentators. See generally Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 99 (2011). Furthermore, the majority of FCPA cases are resolved through Deferred- or Non-Prosecution Agreements, both of which can be characterized as a series of “privately negotiated agreements” with very little actual information provided to the public. Mike Koehler, *The Façade*, *supra* note 70, at 934. This may be of special public interest given the tendency of companies that agree to DPA or NPA (but who are not actually prosecuted or convicted) to still be awarded lucrative government contracts. Drury D. Stevenson and Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775 (2011).

<sup>142</sup> Sunstein, *supra* note 121, at 625; Luneburg & Susman, *supra* note 106 at 34.

<sup>143</sup> Sunstein, *supra* note 121, at 625; David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1821-22 (2001) (citing Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998)).

<sup>144</sup> Garrett, *supra* note 57, at 1851.

<sup>145</sup> Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 489-90 (1999).

customer or business partner.<sup>146</sup> Commentators question whether customers buying a Siemens kitchen appliance, for example, would actually be “troubled by the payment of bribes in a third world development project.”<sup>147</sup>

The strength of consumer interest in ethical business belies these concerns. The amount of consumer spending dedicated to supporting ethical and sustainable businesses is estimated at close to \$300 billion.<sup>148</sup> Furthermore, corporations are certainly sensitive to how the public perceives their company ethics—this is the very reason why some corporations engage in philanthropy in the first place.<sup>149</sup> Corporations often advertise their contributions “where public relations benefits are anticipated,” but are unlikely to advertise “gifts that might appear self-serving or prove controversial.”<sup>150</sup> If reports of companies bribing or hiding corruption in charity came to light, the ethical reputation of that company will certainly be negatively impacted. Alternatively, a greater accounting of a corporation’s social engagement will no doubt benefit the company.<sup>151</sup> and the company’s willingness to disclose in the first place will tell the public “that the company has nothing to hide” and “speak[] loudly of the firm’s integrity.”<sup>152</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> Garrett, *supra* note 57, at 1790. The Siemens FCPA enforcement investigation uncovered more than \$1.4 billion in bribes paid around the world and the company paid \$800 million in fines in the US alone. *Id.* at 1785-86.

<sup>148</sup> Maurie J. Cohen, *Consumer Credit, Household Financial Management, and Sustainable Consumption*, 31 INT’L J. OF CONSUMER STUD. 57, 63 (2007) (citing to publications by the Natural Marketing Institute). See Dr. Larry Dossey, Natural Marketing Institute, *LOHAS Market Size*, LOHAS J. (Spring 2010) available at <http://www.lohas.com/sites/default/files/lohasmarketsize.pdf>.

<sup>149</sup> See *supra* note 11 and accompanying text.

<sup>150</sup> Kahn, *supra* note 11, at 583.

<sup>151</sup> Sprinkle, *supra* note 9, at 449-52 (enumerating the various benefits of a company’s social responsibility activities).

<sup>152</sup> Jane Heath, *Who's Minding the Nonprofit Store: Does Sarbanes-Oxley Have Anything to Offer Nonprofits?*, 38 U.S.F. L. REV. 781, 806 (2004).

This focus on ethical, sustainable business is not unique to consumer interest. Socially responsible investment groups, which evaluate investment opportunities based on criteria such as corporate governance and community engagement, will no doubt be interested in greater information regarding corporate activity and philanthropy abroad.<sup>153</sup> Investment portfolios that focus on socially responsible investing have grown from \$639 billion in 1995 to over \$3 trillion in 2010.<sup>154</sup> Even investors who do not focus specifically on ethical concerns are likely to be interested in the disclosures, especially since: “today’s social issue is tomorrow’s financial issue.”<sup>155</sup> This connection is especially clear in FCPA matters, since FCPA enforcement actions against companies are often followed by shareholder derivative suits and securities litigation.<sup>156</sup> Thus, even though the companies might be acting—and bribing—in a foreign country, the effects of the corporate activities and any subsequent public backlash will be felt by investors within the US, demonstrating the interest that even purely “economic investors” might have in a corporation’s philanthropy disclosures.<sup>157</sup>

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<sup>153</sup> For a general discussion of socially responsible investing, see Williams, *supra* note 105, at 1273-300.

<sup>154</sup> 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES, SOCIAL INVESTMENT FORUM FOUNDATION, *available at* <http://ussif.org/resources/research/documents/2010TrendsES.pdf>. *But see* Maura O’Neill, *The Hunt for Impact Investments: Are Philanthropists Key?* (April 26, 2012), US Dep’t of State Blog, *available at* [http://blogs.state.gov/index.php/site/entry/are\\_philanthropists\\_key](http://blogs.state.gov/index.php/site/entry/are_philanthropists_key) (citing a figure from JP Morgan that “estimated that the potential capital market for “impact investing – putting dollars into enterprises that would deliver positive social impact – was between \$400 billion and \$1 trillion.”). \$20 trillion in world-wide assets are managed by companies that have signed the UN’s Principles for Responsible Investment. ROLE OF GOVERNMENTS IN CORPORATE RESPONSIBILITY, *supra* note 135, at 18. *But see* Firger, *supra* note 103, at 1078.

<sup>155</sup> Williams, *supra* note 105, at 1284.

<sup>156</sup> Raymond Wong, *FCPA Settlements: It’s a Small World After All*, NERA ECONOMIC CONSULTING (Jan. 28, 2009) 7-12.

<sup>157</sup> *Id.* at 10, 11 exhibit 6. As another example, when the New York Times published an expose on Walmart’s Mexican subsidiary’s FCPA violations, Walmart stocks experienced a market cap loss of \$16 billion. Thomas Kase, *Walmart, Mexico, FCPA and Cultural Sensitivity* (April 27, 2012), SPEND MATTERS, *available at*

This interest in socially responsible investing also counters another common criticism of disclosure-based monitoring: that monitoring efforts will be lax due to non-profit funding constraints or a selective monitoring focus on exposé-type corruption stories.<sup>158</sup> However even “cash-starved non-profits” can expand the reach and scope of their missions and publications through social media programs or viral videos.<sup>159</sup> Furthermore, non-profit organizations are not the only groups interested in corporate charity disclosures. Socially responsible investment firms will be likely to evaluate improper payments disclosed by companies without focusing solely on the sensational. For-profit newspapers often use disclosures as sources of news stories.<sup>160</sup> Corporate governance issues are also often favorite topics of publications such as Newsweek and the Wall Street Journal, which often cover recent scandals and reach a highly educated community of potential investors and business partners.<sup>161</sup>

Journalists and watchdog groups play another important role in a disclosure based system by digesting and distilling the released information.<sup>162</sup> These groups can help the public

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<http://www.spendmatters.com/index.cfm/2012/4/27/Walmart-Mexico-FCPA-and-Cultural-Sensitivity-No-Not-the-Politically-Correct-Sort>. The report also spurred a variety of other setbacks for the company, including delays on US building permits, delayed land deals, and formal audits. Stephanie Clifford and Steven Greenhouse, *Wal-Mart's U.S. Expansion Plans Complicated by Bribery Scandal* (April 29, 2012), NY TIMES, available at [http://www.nytimes.com/2012/04/30/business/wal-mart-bribery-scandal-complicates-us-expansion-plans.html?\\_r=1&smid=tw-nytimes&seid=auto](http://www.nytimes.com/2012/04/30/business/wal-mart-bribery-scandal-complicates-us-expansion-plans.html?_r=1&smid=tw-nytimes&seid=auto).

<sup>158</sup> Firger, *supra* note 103, at 1086-87; Skeel, *supra* note 143, at 1838 – 41.

<sup>159</sup> Allison Fine, Opinion, *It's Time to Get Serious About Using Social Media*, CHRONICLE OF PHILANTHROPY Aug. 21, 2011.

<sup>160</sup> Lunenburg & Susman, *supra* note 106, at 34. Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450, at 467 (noting that State Attorneys General, for example, often do not investigate domestic charitable trusts unless newspapers have first reported wrongdoings).

<sup>161</sup> Skeel, *supra* note 143, at 1844 (discussing the impact and investor criticism results from investigative reports and exposés published in Wall Street Journal and Businessweek).

<sup>162</sup> Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act-1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 119 (2010) (listing several NGOs that “serve as watchdogs to report corruption”); Lunenburg & Susman, *supra* note 106, at 34 (discussing how civil society

understand what the released information means. Disclosure based systems often run the risk of ineffectiveness because the information released is “data-rich but information-poor,” confusing, and ultimately useless to consumers.<sup>163</sup> However this phenomenon is likely most prominent in the disclosure of scientific or “highly technical” information, and released data about corporate charity projects are not likely to implicate the same issues as complex scientific data.<sup>164</sup>

Finally, including civil society in the monitoring of disclosed corporate donations will alleviate many of the burdens that current FCPA monitoring places on government investigators.<sup>165</sup> The discussion above mentioned the costs of FCPA compliance on corporations but the high cost of FCPA enforcement is also a significant problem for government agencies.<sup>166</sup> As a general matter, regulatory systems based on disclosure and shame are cheaper than prohibition and punishment<sup>167</sup> because they rely on the weight of public opinion to pressure “bad actors” rather than an investigation or prosecution.<sup>168</sup> Even further, the disclosures originally made by the corporation are likely to assist prosecutors in building their case if presumption of legitimacy happens to be rebutted.<sup>169</sup>

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organizations capture the disclosed information and “published that information in an Internet-accessible database, allowing searches that easily reveal important aspects of federal lobbying activity”).

<sup>163</sup> Bradley C. Karkkainen, *Information As Environmental Regulation: Tri and Performance Benchmarking, Precursor to A New Paradigm?*, 89 GEO. L.J. 257, 285. (2001). See generally Alexander Volokh, *The Pitfalls of the Environmental Right-to-Know*, 2002 Utah L. Rev. 805 (2002).

<sup>164</sup> Volokh, *supra* note 163, at 807; Williams, *supra* note 105, at 1290 (“Environmental data can be one of the hardest types of information to obtain in usable form”).

<sup>165</sup> See also Bixby, *supra* note 162 (NGOs may “also help business firms design and implement compliance policies to detect bribery before it becomes public.”).

<sup>166</sup> Philip Segal, *Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT’L L. 169, 175 (2006) (concluding that the FCPA is under-enforced due to enforcement costs).

<sup>167</sup> Segal, *supra* note 166, at 199.

<sup>168</sup> Skeel, *supra* note 143, at 1816.

<sup>169</sup> See Luneburg, *supra* note 139, at 110.

The Safe Haven Option will not function as a way for corporations to hide corrupt activity, despite the need to assuage corporate concerns regarding the FCPA's ambiguous application to charity. As discussed in Section IIIA, it is vital that the presumption of legitimacy can be rebutted in cases of truly egregious bribery or a total failure to maintain an accounting system that prevents bribery. As one commentator noted: "it is a fallacy to believe that the public outcry over the economic and human consequences of corporate scandals is itself sufficient to cause corporations to change their for-profit nature . . . unilaterally."<sup>170</sup> With the presumption of legitimacy of the Safe Haven Option fully rebuttable, the FCPA will still remain a strong anti-corruption tool.

#### IV. MOVING FORWARD: BENEFITS OF THE SAFE HARBOR OPTION

In practice, offering the option of the Safe Harbor from FCPA enforcement should have substantial benefits for both the regulated communities as well as for corporate charity programs in general. First, this section will discuss another law, the newly enacted Dodd-Frank Section 1504, which also relies on disclosure-based regulation to combat corruption. It will identify potential problems within Section 1504 and how the FCPA Safe Harbor Option might improve the application of Section 1504. Finally, Section B will detail how the Safe Harbor Option and an emphasis on disclosure will benefit corporate philanthropy and international development in general.

##### A. *Drawling Parallels: Dodd-Frank Section 1504*

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<sup>170</sup> Besmer, *supra* note 11, at 304; ROLE OF GOVERNMENTS IN CORPORATE RESPONSIBILITY, *supra* note 135, at 9 ("[V]oluntary business activity should never be treated as a substitute for effective regulation.").

The US has attempted to further combat international corruption through Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>171</sup> However this disclosure-based law appears to have many of the same defects as the FCPA when applied to corporate charity. Although Section 1504 represents an excellent example of regulation by disclosure, many of its defects might be ameliorated by offering the FCPA Safe Harbor Option.

Section 1504 requires US corporations operating in the “extractive industries” (such as mining or drilling for oil or natural gas)<sup>172</sup> to disclose all payments that are made to foreign governments.<sup>173</sup> The extractive sector was singled out by this law because of the industry’s reputation for widespread corruption and role in the “resource curse.”<sup>174</sup> The resource curse refers to how some countries with great natural resources remain underdeveloped and plagued by corruption.<sup>175</sup> In these nations, the financial benefits of natural resources never reach the general population because corrupt leaders embezzle the money away from their destitute countries.<sup>176</sup>

Section 1504 attempts to increase transparency in the extractive industries to allow citizens in developing nations to hold their leaders accountable for the profits gained from natural resource extraction.<sup>177</sup> Section 1504 does not replace the FCPA. Instead, the two laws

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<sup>171</sup> 15 USCS § 78m(q).

<sup>172</sup> 15 USCS § 78m(q)(1)(D). *See generally* David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 345-49 (2011).

<sup>173</sup> 15 USCS § 78m(q)(1)(D).

<sup>174</sup> Genasci, *supra* note 31, at 42-45.

<sup>175</sup> *Id.*

<sup>176</sup> Firger, *supra* note 103, at 1044-48.

<sup>177</sup> Disclosure of Payments by Resource Extraction Issuers, 17 CFR 240, 249, Background, 6-7, (2012). Another important policy aim of Section 1504 is to provide investors and shareholders greater access to information. Letter from Senator Benjamin Cardin, To Elizabeth M. Murphy, Sec’y, Sec. and Exch. Comm’n (Dec. 1, 2010) (available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf>).

will work together to increase transparency and decrease corruption in the resource-rich countries where the extractive industry is prevalent.<sup>178</sup>

Unfortunately, the SEC's recently released rules for Section 1504 create many of the same problems with corporate charity that exist within the FCPA, specifically, its definition for exactly what "payments" made by extractive companies must be disclosed.

For example, the SEC's rules specifically exclude "social payments" from the mandatory disclosure. The SEC defines "social payments" as the kind a corporation might make to build a school or hospital abroad.<sup>179</sup> With this definition, the SEC has created a loophole that will allow significant amounts of money to be transferred to foreign governments undisclosed. As an example, a payment such as the \$130,000 that Chevron donated in Angola, discussed above,<sup>180</sup> might avoid disclosure as a "social payment," despite its clear connection to Chevron's oil negotiations in the country.<sup>181</sup> At the urging of corrupt foreign leaders, companies could simply label their payments as social development project. Then the payments would not need to be disclosed and corrupt foreign leaders could continue to embezzle money from their countries with impunity, frustrating the goals of Section 1504.<sup>182</sup>

Additionally, the lines that the SEC's draws between "infrastructure improvements" and "social payments" create ambiguity that might chill corporate giving abroad. The SEC gives

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<sup>178</sup> Grant D. Aldonas, *Analysis of Section 1504 of the Wall Street Reform and Consumer Protection Act*, SPLIT ROCK INT'L 2-4 (Feb. 10, 2011), available at [http://www.api.org/policy/upload/Analysis\\_Section\\_1504\\_paper.pdf](http://www.api.org/policy/upload/Analysis_Section_1504_paper.pdf). The FCPA targets the "supply" side of corruption by preventing corporations from paying bribes to foreign officials. Spalding, *supra* note 24, at 360-64. Section 1504 attempts to control the "demand" side of bribery in the extractive industry by empowering foreign citizens to hold their government accountable for money received from extractive corporations.

<sup>179</sup> 17 CFR 240, 249 page 12.

<sup>180</sup> See *supra* notes 14-17 and accompanying text.

<sup>181</sup> Frynas, *supra* note 12, at 584.

<sup>182</sup> 17 CFR 240, 249, Background, 6-7

examples of “infrastructure improvements” as building a road to reach oil or minerals in a country, while a “social payment” is building a hospital or school.<sup>183</sup> However it is easy to imagine potential corporate gifts that blur these lines. Would building a school still be considered a “social payment” if it was required by the host country – or if it was considered by the host country as a factor in awarding business contracts?<sup>184</sup> If a company builds a road to access its mine (a “infrastructure improvement”) but then continues the road to access the nearest local hospital (a “social payment”) must it disclose the entire cost of the road, or would it be able to bifurcate the cost of the road to the mine from the cost of the same road to the school?

Many commentators have suggested that Section 1504 might have a negative effect on US extractive business abroad.<sup>185</sup> The new law may also have a chilling effect on corporate charity, if a company is unclear about whether its community project is an “infrastructure improvement” or a “social payment,” it may hesitate to engage charitably in the host community, especially if an “infrastructure improvement,” even if charitably-motivated, might cause unpopular backlash.<sup>186</sup> Furthermore, there are other concerns that the DOJ and SEC may view

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<sup>183</sup> *Id.* at 62.

<sup>184</sup> Kazakhstan, for example, considers mining companies’ “social payments” a factor when awarding contracts, and reported 314.4 million in social and local infrastructure contributions from the extractive industry in 2009 alone. Letter from Publish What You Pay, To Elizabeth M. Murphy, Sec’y, Sec. and Exch. Comm’n, Re: Disclosure of Payments by Resource Extraction Issuers, File No. S74210 25-26, footnote 104 (Feb. 25, 2010) (available at <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>) [hereinafter PWYP Letter].

<sup>185</sup> See Branden Carl Berns, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not To?*, 2011 COLUM. BUS. L. REV. 758, 783-86 (2011); Aldonas, *supra* note 178.

<sup>186</sup> See generally, footnotes and accompanying text at 136-138. *Cf* Frynas, *supra* note 12, at 593 (discussing conflict that arose in an attempt to redistribute the benefits of an oil company’s charitable engagement).

the required Section 1504 disclosures as a “diamond mine” to ferret out possible FCPA violations.<sup>187</sup>

The creation of the “Safe Harbor Option” for FCPA enforcement ought to ameliorate many of these concerns. First, it will provide the extractive industry with the rebuttable presumption of legitimacy for FCPA enforcement, an additional benefit for disclosing (or in some cases, over-disclosing, if the line between “infrastructure improvement” and “social payment” is unclear). This rebuttable presumption of legitimacy could also help assuage some of the FCPA concerns of FCPA enforcement action following from Section 1504 disclosures, as well as provide companies additional benefit to offset the costs of making the disclosures. It may be that if the charity-focused system is successful, that regulators might find that it should be expanded: offering a rebuttable presumption of FCPA legitimacy for all payments disclosed under Section 1504.<sup>188</sup>

### *B. Improving Development*

Greater disclosure and transparency in corporate philanthropy will have beneficial effects on international charity and development in general. The FCPA Safe Harbor Option will incentivize disclosure of charitable contributions. Likewise, Dodd-Frank Section 1504, provided that the SEC writes strong rules, will also provide vital insights into corporate philanthropy. This transparency will make development and aid programs more effective on a global scale by maintaining accounting standards, increasing accountability, and allowing for greater cooperation.

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<sup>187</sup> See Low, 131, at 1 (discussing the increased reporting and certification requirements, as well as third party activities that make it more likely that an FCPA violation would be brought against a company without the DOJ or SEC independently discovering the violation).

<sup>188</sup> The wisdom of such an expansion (offering the rebuttable presumption of legitimacy for all payments disclosed under Section 1504, not merely charitable or social payments) is beyond the scope of this comment.

Furthermore, although this article deals with corporate charity and corporate social responsibility programs, NGOs and international charitable organizations often face similar problems with regards to how the FCPA might impact their work abroad.<sup>189</sup>

Greater disclosure will incentivize corporations to improve their accounting of charitable programs, something that has been a major problem with international corporate giving in the past.<sup>190</sup> Although some costs may increase for companies, higher accounting standards will enable corporations to accurately take credit for their donations and the benefits that come along with such generosity.<sup>191</sup> For consumers or investors who wish to judge corporations by their charitable impact,<sup>192</sup> disclosure will assist in distinguishing companies that are truly dedicated to philanthropy from those that merely have snazzy advertising campaigns.<sup>193</sup> Some well-known companies considered to be “ethical leaders” do not live up to their advertising claims.<sup>194</sup> For example, Ben & Jerry’s advertised their “Rainforest Crunch” ice-cream as a partnership with indigenous communities, but the company did not actually buy nuts from any indigenous communities for years.<sup>195</sup> On the other hand, greater accounting and transparency may help

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<sup>189</sup> See generally, Helmer, *supra* note 36.

<sup>190</sup> COMMITTEE ENCOURAGING CORPORATE PHILANTHROPY, *supra*, note 8, AT 12 (2009).

<sup>191</sup> Jennings, *supra* note 136, at 15 (such as tax benefits or a more favorable placement on consumers’ “ethical barometer”).

<sup>192</sup> See *supra* notes 148-155 and accompanying text.

<sup>193</sup> “In a global economy, information about the social effects of a company . . . is increasingly relevant to at least some investors in the United States, and yet that information is much less available in the market than is financial information.” Williams, *supra* note 105, at 1201.

<sup>194</sup> See generally Jennings, *supra*, note 136.

<sup>195</sup> Jennings, *supra*, note 136, at 42-46. The Body Shop is another who’s actual business activities have failed to live up to its ethical reputation, but has “escaped serious scrutiny of their corporate performance.” *Id.* at 52-55. See also Kahn, *supra* note 11, at 584 (describing corporate giving as a form of advertisement).

rehabilitate multinational corporations that have undeserved negative reputations despite a strong commitment to development abroad.<sup>196</sup>

Improved transparency will also increase the effectiveness and accountability of corporate development programs by allowing civil society to monitor the effectiveness of corporate charity, often criticized by development experts.<sup>197</sup> Commentators suggest that corporate philanthropy often falls short of its intended goals because many companies lack staff with social development experience.<sup>198</sup> With greater transparency, the NGO and development community will be able to offer feedback and advice for the corporate programs.<sup>199</sup> Finally, disclosure of projects and partners may lower costs incurred by corporations seeking local partner NGOs. For companies that are expanding development projects into new markets or responding rapidly to a natural disaster, vetting NGO partner organizations can be extremely time consuming.<sup>200</sup> A recent study by Deloitte found that the biggest challenge identified by company executives in building an anti-corruption program was “managing third-party

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<sup>196</sup> Jennings, *supra*, note 136 at 13. “Despite regular appearances on “dishonorable” lists, controversial multinationals such as natural resource and chemical companies . . . actively engage their community responsibilities [and] give millions of dollars to charity.” *Id.* at \*49.

<sup>197</sup> *See generally*, Frynas, *supra* note 12.

<sup>198</sup> *Id.* at 591. The 2009 Corporate Philanthropy report calculated that in a third of companies polled, over 100 grants were handled by each full-time philanthropy-focused employee (defined as an employee who devoted a minimum of 20% of his or her time to philanthropic activities). MARGARET COADY, COMMITTEE ENCOURAGING CORPORATE PHILANTHROPY, GIVING IN NUMBERS 44, 45 (2009).

<sup>199</sup> Frynas, *supra* note 12, at 591. Encouraging greater transparency will enable recipient communities to create “people’s audits” and demand greater accountability in their communities. *Meeting Conclusion and Framework for Action*, in TSUNAMI RELIEF OPERATIONS, *supra* note 106, at 4; Todung Mulya Lubis, *Country Ownership and Participatory Decision-making as a Means to Enhance Transparency*, in TSUNAMI RELIEF OPERATIONS, *supra* note 106, at 10.

<sup>200</sup> *See* Helmer, *supra* note 36, at 620 (“[I]n an emergency response, such as when a major disaster strikes a country, NGOs delivering humanitarian aid must hire local staff very quickly. In these circumstances, they have no time to do any sort of background or reputational check and no chance to get to know the people involved.”).

relationships.”<sup>201</sup> Providing information about other corporate-NGO partnerships will help companies create new corporate charity programs with greater ease.

Greater disclosure of corporate programs will also have a substantial impact on international giving and development as a whole. With so many diverse actors in the development sphere, it can be difficult to coordinate activity and “approach large-scale, complex problems in a top-down and scalable way.”<sup>202</sup> With greater disclosure, NGOs, government programs, and corporations will be able to coordinate their efforts. It will be less likely that duplicative projects in developing nations will receive funding,<sup>203</sup> while at the same time “holes” in development schemes or aid flows could be identified and remedied.

#### CONCLUSION

Two years after the devastating earthquake, Haiti continues to rebuild. Despite considerable challenges, reports are tentatively positive.<sup>204</sup> The response to the Haitian earthquake highlighted the generosity of US corporations. At the same time, however, it revealed the discouraging effect corruption can have on development efforts.<sup>205</sup>

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<sup>201</sup> Victoria Makarova, Deloitte Forensic & Dispute Services, *Anti-Corruption Practices Survey 2011 – Cloudy with a Chance of Prosecution?*, 1957 PLI/Corp 559 , 569.

<sup>202</sup> Little, *supra* note 7, at 1106-7. *See also* Frynas, *supra* note 12, at 592-93; Gopakumar Krishnan Thampi, *Exploring the Role of Community Feedback Mechanisms*, in TSUNAMI RELIEF OPERATIONS, *supra* note 106, at 61.

<sup>203</sup> Frynas, *supra* note 12, at 592 (“[A]n oil company in Nigeria built a road which ran parallel to another road built by the Niger Delta Development Commission.”).

<sup>204</sup> Laurent Dubois & Deborah Jenson, *Haiti Can Be Rich Again*, N.Y. TIMES (Jan. 8, 2012); <http://www.nytimes.com/2012/01/09/opinion/haiti-can-be-rich-again.html>.

<sup>205</sup> *Cf.* Margulies, *supra* note 34, at 556 (“Humanitarian aid poses a paradox . . . it furnishes a prime example of human benevolence . . . however, [it] can also fuel the very conflicts it seeks to ease.”).

This paradox was further illustrated by the effects of the FCPA on the Haitian disaster relief. The FCPA discouraged bona fide corporate charity and investment, but at the same time failed to capture the rampant corruption in the rebuilding effort.<sup>206</sup>

If the Safe Harbor Option proposed by this Comment had been available during the Haitian disaster relief efforts, corporations could have gained a presumption of legitimacy for their donations, provided they were willing to disclose their payments. This could have ameliorated corporate concerns of FCPA prosecution for bona fide charity. In turn, greater disclosure would have allowed civil society to monitor corporate gifts and create a public “shaming” process against corporations engaging in corrupt charity.

The newly enacted Section 1504 employs a similar focus on disclosure rather than prohibition. Although this law shows great promise, the SEC’s proposed rules leave significant loopholes unscrupulous companies or foreign leaders could use to funnel corruption donations around the disclosure requirements. If properly defined, Section 1504 will be an invaluable tool for anti-corruption efforts and will represent an excellent example of regulation through disclosure and transparency rather than strict prohibition.

The intersection of US anti-corruption law and corporate philanthropy deserves special attention. Foreign charity without transparency or accountability will never produce long-lasting development, but development goals will likewise be ill-served if US law discourages corporate philanthropy. Anti-corruption law will benefit from greater flexibility and inclusiveness to encourage honest corporate philanthropy around the world.

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<sup>206</sup>See, e.g., Jones, *supra* note 19; Donovan Webster, *Haiti Earthquake: Two Years Later, Where Did the Money Go?*, HUFFINGTON POST (Jan. 12, 2012), available at [http://www.huffingtonpost.com/2012/01/11/haiti-earthquake-funds\\_n\\_1200229.html](http://www.huffingtonpost.com/2012/01/11/haiti-earthquake-funds_n_1200229.html).