

ARTICLE

A NEW STRATEGY FOR PREVENTING BRIBERY AND EXTORTION IN INTERNATIONAL BUSINESS TRANSACTIONS

BRUCE W. KLAW*

Over the last thirty-five years, governments worldwide have been engaged in an important and laudable battle against bribery in international business transactions. The core of the U.S. anti-bribery strategy is the Foreign Corrupt Practices Act, a federal law that imposes criminal penalties on those—and only those—who give bribes to foreign officials and that largely relies on voluntary disclosure to detect such corruption. This supply-side criminalization strategy, however, is ineffective, incomplete, inefficient, and inequitable. It punishes many extorted persons who do not deserve it and largely fails to punish the corrupt foreign officials who do. By punishing companies that voluntarily disclose their payments and denying them opportunities to recover their losses from extortion, it also establishes a perverse incentive structure that virtually ensures bribery will remain secret in most cases. The focus of the U.S. strategy should be shifted to prevention, not punishment. To this end, Congress should decriminalize the giving of bribes, replacing it with a robust mandatory disclosure regime that will enable foreign countries and business competitors to take action against willing bribe givers and allow victims of extortion to shield themselves from needless litigation, while obtaining meaningful restitution for the losses they have incurred. The U.S. government should then use the mandatory reports of unwilling payments to criminally prosecute the corrupt foreign officials who demand such payments, if foreign governments are unwilling or unable to do so.

I. INTRODUCTION

Bribery is conservatively estimated by World Bank officials to cost the global public nearly a trillion dollars annually.¹ To address the substantial transnational component of this problem, governments around the globe are engaged in an important and laudable effort to combat corruption in international business transactions. From the seminal U.S. Foreign Corrupt Practices Act (“FCPA”)² to the domestic legislation passed by dozens of other

* Assistant Professor, Keimyung University, College of Law and Police Science, South Korea. Email: bruceklaw@kmu.ac.kr. Harvard Law School (J.D.), Binghamton University (B.A.). Prior to joining the faculty of Keimyung University, Professor Klaw practiced law for approximately six years at prominent law firms in New York and Oregon where he represented and advised clients on white collar criminal investigations and enforcement matters.

¹ See, e.g., *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann*, THE WORLD BANK, <http://go.worldbank.org/KQH743GKFI> (last visited April 7, 2012).

² Foreign Corrupt Practices Act, P.L. 95-213, 91 Stat. 1494 (1977), amended by Omnibus Trade and Competitiveness Act of 1988, P.L. No. 100-418, Title V, Subtitle A, Part I, § 5003, 102 Stat. 1107, 1415–25 (1988), and International Anti-Bribery and Fair Competition Act of 1998, P.L. 105-366, § 2, 112 Stat. 3302, 3302–04 (1998).

countries in response to international bribery-suppression treaties such as the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention”),³ the last thirty-five years have witnessed an explosion in the scope and intensity of government efforts to crack down on backhanded business deals. To date, however, these efforts have focused almost exclusively on increasing criminal penalties against those who give bribes to foreign officials for the purposes of obtaining or retaining business.

While the effort to promote transparency and ethics in international business is both necessary and well-intentioned, the supply-side bribery criminalization strategy embodied by the FCPA and OECD Anti-Bribery Convention has been largely ineffective, inefficient, incomplete, and in some cases, inequitable. The supply-side strategy (focusing only on the bribe-giver) is ineffective because it does little to provide the proper incentives for disclosure of payments to foreign officials or to actually prevent corruption. It is inefficient because governments continue to devote ever-increasing amounts of resources each year on prosecuting bribe-givers while business competitors and foreign governments stand ready and willing, in most cases, to police violators at a fraction of the cost to U.S. taxpayers. It is incomplete because it does little to address the demand-side of bribery by punishing the persons responsible for requesting such bribes, or compensating the victims of such extortion. It is inequitable because enforcement action is regularly taken against the victim of coercive extortion.

This Article argues for a paradigmatic shift in current law and practice. The goal of U.S. anti-corruption efforts should be prevention, not punishment. Part II of this Article provides background on the development and structural limitations of the FCPA’s anti-bribery and accounting provisions. It highlights the Act’s singular focus on the issue of bribe-giving—a wrong that is viewed in largely absolutist terms without a meaningful defense for coercive solicitation or economic extortion. It traces Congress’s amendments to the Act’s anti-bribery provisions, which have aimed to deter bribery by increasing penalties upon and expanding jurisdiction over those who pay bribes, while failing to address the demand-side of bribery or provide a private right of action for competitors harmed by bribery. It also examines the failure of the FCPA accounting provisions and other federal securities laws, including the Private Securities Litigation Reform Act, the Sarbanes-Oxley Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, to unequivocally require the disclosure of payments to foreign officials.

³ Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

Part III examines the perverse incentives and unjust gaps evident in current FCPA enforcement. Specifically, it identifies four problems that inhibit the disclosure and prevention of corruption: (1) the punishment of extorted companies due to the failure to legally distinguish between unwilling and willing bribe givers; (2) the general impunity of corrupt foreign officials; (3) the penalization of companies that voluntarily disclose such payments; and (4) the denial of redress to the victims of extortion as a result of a judicially-created “co-conspirator exception” to recovery under federal restitution statutes.

Part IV argues for a number of significant changes to the FCPA that, if implemented together, should better serve the interests of justice and provide the appropriate incentive structure for reducing (if not preventing) international bribery and extortion. Chief among the proposed changes is decriminalizing the act of giving bribes to foreign officials. Decriminalization is not only morally appropriate in some cases, but also likely to prevent bribery in the long run. Decriminalization will help bring corruption out of the shadows, have a nominal impact on the numbers of bribes offered, and ultimately reduce the incidence of bribe solicitation and acceptance by foreign officials.

In place of criminalization, Congress should focus on strengthening payment disclosure requirements. Congress should impose upon all companies subject to U.S. jurisdiction—not just financial reporting issuers—a strict requirement of mandatory disclosure of all bribe solicitations by foreign officials, and all payments to foreign intermediaries or foreign officials above a certain monetary threshold, similar to the requirement currently imposed on financial institutions to report suspicious activity. Once disclosed and investigated, payments to foreign officials will tend to fall into two categories: willing and unwilling. The distinction rests on the absence or presence of express or implicit coercive extortion by a public official. By following the natural implications of such a distinction—that criminals should be punished and victims should be compensated—the law can incentivize the disclosure of corruption and allow victims to take appropriate action against its source.

Bribes made willingly should be publicly disclosed so that foreign governments may prosecute and take other action to rescind tainted contracts. Additionally, Congress should create a limited private right of action under the FCPA with sufficient statutory remedies so that, upon disclosure of willing bribes, competitors harmed by such unfair business practices may take action against those willing payers to recover damages, unobstructed by the difficulties associated with pursuing claims under other statutes. In the case of truthfully disclosed unwilling payments to foreign officials, such payers should be granted safe harbor to insulate them not only from U.S. enforcement action, but also from private civil litigation, the threat of which currently impedes disclosure. Congress should expand U.S. jurisdiction under the FCPA to prosecute foreign officials who solicit or demand unwilling

payments, if foreign governments are unwilling or unable to do so. Congress should also provide viable avenues for persons who make such unwilling payments to protect an existing business (rather than obtain new business) to recover their non-speculative losses.

II. THE DEVELOPMENT AND STRUCTURAL LIMITATIONS OF THE FCPA

The FCPA is a two-part statute at the core of the U.S. strategy to combat corruption in international business transactions. The first part consists of anti-bribery provisions, which generally make it a federal crime for any U.S. person or company,⁴ issuer of securities registered on a U.S. exchange, or its employees,⁵ or foreign person acting while in the territory of the United States⁶ to directly or indirectly offer, promise to give, or pay anything of value to a foreign official or foreign political party for purposes of obtaining or retaining business.⁷ The anti-bribery provisions are criminally enforced by the Department of Justice (“DOJ”) when committed by companies and when committed “willfully” by any natural person.⁸ They may also be enforced through civil enforcement action by the Attorney General⁹ or, in the case of issuers, the Securities and Exchange Commission (“SEC”).¹⁰

The second part of the FCPA consists of accounting provisions—or so-called “books-and-records” provisions—that require issuers with securities registered on a U.S. exchange to (1) make and keep books and records

⁴ Section 78dd-2 of title 15 of the United States Code regulates “domestic concerns,” which is defined as “any individual who is a citizen, national, or resident of the United States,” 15 U.S.C. § 78dd-2(h)(1)(A) (2006), and “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd-2(h)(1)(B) (2006).

⁵ “Issuers” regulated under 15 U.S.C. § 78dd-1 are entities that have a class of securities registered pursuant to 15 U.S.C. § 78l or that are required to file reports under 15 U.S.C. § 78o(d), which has been interpreted to include non-U.S. companies that have American Depository Receipts (“ADRs”) traded on a U.S. stock exchange. 15 U.S.C. § 78dd-1(a) (2006). *See, e.g.,* Information at ¶ 2, *United States v. Magyar Telekom, Plc.*, No. 11-CR-597 (E.D. Va. Dec. 29, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom.html> (asserting criminal jurisdiction over FCPA antibribery and accounting violations by Hungarian corporation relating to bribery of public officials in Macedonia and Montenegro because “[d]uring the relevant time period, MAGYAR TELEKOM’s American Depository Receipts (“ADRs”) traded on the New York Stock Exchange (“NYSE”) . . . [and] accordingly, MAGYAR TELEKOM was an “issuer” within the meaning of the FCPA, Title 15 United States Code, Section 78dd-1(a).”); *Deferred Prosecution Agreement* at ¶ 6, *Magyar Telekom*, No. 11-CR-597 (E.D. Va. Dec. 29, 2011) (agreeing to pay penalty of \$59,600,000 in exchange for deferred prosecution).

⁶ Section 78dd-3 regulates persons other than issuers and domestic concerns, who corruptly make use of the mails or another means of interstate commerce in furtherance of a bribe while in the territory of the United States. 15 U.S.C. § 78dd-3(a) (2006).

⁷ 15 U.S.C. §§ 78dd-1(a), 2(a), 3(a) (2006).

⁸ *See* 15 U.S.C. § 78dd-2(g)(2)(a) (2006).

⁹ 15 U.S.C. §§ 78dd-2(g)(1)(B), (g)(2)(B) (2006).

¹⁰ 15 U.S.C. § 78u(d)(3)(A) (2006).

which, in reasonable detail, accurately reflect the disposition of company assets; and (2) devise and maintain a system of internal accounting controls sufficient to reasonably assure that transactions are authorized, recorded accurately, and periodically reviewed.¹¹ “Knowing” violations of these accounting provisions are criminally enforced by the DOJ while other violations are enforced civilly against issuers by the SEC.¹²

A. *Enactment of the FCPA*

The FCPA arose in the wake of corruption scandals in the 1970s, the most notorious of which was Lockheed Martin’s bribery of public officials in Japan, the Netherlands, and Italy in order to obtain government contracts.¹³ Scandals such as this prompted the SEC to institute a voluntary disclosure program under which more than four hundred companies, including “some of the largest and most widely held public companies in the United States,” free from the risk of enforcement action, acknowledged making more than three hundred million dollars in questionable or illegal payments to foreign government officials, politicians, and political parties.¹⁴ In major market sectors—including oil and gas, food, healthcare, aerospace, airlines, and chemicals—the disclosures revealed instances of “bribery of high foreign officials in order to secure some type of favorable action by a foreign government” as well as “facilitating payments” allegedly made to ensure that government functionaries discharged their clerical duties.¹⁵

During the numerous hearings that followed the publication of the SEC’s Report on Questionable and Illegal Corporate Payments and Practices in 1976, members of Congress decried such payments as “unethical” and “counter to the moral expectations and values of the American public.”¹⁶ Such payments, they argued, served to undermine “public confidence in the integrity of the free market system” and “short-circuit[] the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products.”¹⁷

Congress concluded that such payments were harmful, “unnecessary,” and “bad business.”¹⁸ According to Congress, corporate bribery of foreign officials results in “adverse competitive affects [that] are entirely domestic” because “in a number of instances, ‘payments have been made not to ‘out-compete’ foreign competitors, but rather to gain an edge over other U.S.

¹¹ 15 U.S.C. § 78m(b)(2)(A)–(B) (2006).

¹² See 15 U.S.C. §§ 78m(b)(4)–(5), 78u(d)(3)(A) (2006).

¹³ See H.R. REP. NO. 95-640, at 5 (2006).

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5.

manufacturers.’”¹⁹ Bribery of foreign officials by U.S. persons and companies also, according to Congress, “creates severe foreign policy problems for the United States” as it can undermine pro-American, albeit corrupt, regimes.²⁰ After lengthy debates over how the problem of corruption should best be tackled, the two houses of Congress drafted a compromise bill that President Carter signed into law in 1977.²¹

1. *Anti-Bribery Provisions*

Opting to focus only on the supply-side of bribery, the original version of the FCPA provided penalties of up to one million dollars on any issuer or domestic entity that paid a bribe for the purposes of “influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions” or “inducing such foreign official to use his influence with a foreign government or instrumentality” for purposes of “obtaining or retaining business.”²² Any U.S. person, any officer or director of an issuer or domestic concern, or any stockholder acting on behalf of such issuer or domestic concern found to “willfully” violate the anti-bribery provisions could be both criminally fined up to ten thousand dollars and imprisoned for up to five years.²³ Similarly, when any issuer or domestic concern was found to have violated the anti-bribery provisions, any of its employees or agents who willfully carried out such bribery could also be subject to the same penalties, provided they were U.S. citizens, residents or otherwise subject to U.S. jurisdiction.²⁴

Viewing the giving of payments as a culpable wrong in nearly all circumstances, Congress chose not to permit any defense for situations in which foreign officials solicited or demanded the bribe. The Senate explained that the Act was intended “to cover payments and gifts intended to influence the recipient, regardless of who first suggested the payment or gift.”²⁵ It explained that the fact “that the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe.”²⁶ Thus, while a minority of the House argued that the FCPA should not cover “payments made under duress to protect a business investment,”²⁷ the Senate ultimately

¹⁹ *Id.* (quoting former Secretary of Commerce Elliot Richardson).

²⁰ *Id.*

²¹ See Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C. (2006)).

²² *Id.* secs. 103(a), § 30A(a)(1)(A), (a)(1)(B), (c)(1), 104(a)(1)(A), (a)(1)(B), (b)(1)(A), 91 Stat. at 1495–97 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2 (2006)).

²³ *Id.* secs. 103(a), § 30A(c)(2), 104(b)(1)(B), (b)(2), 91 Stat. at 1496–97.

²⁴ *Id.* secs. 103(a), § 30A(c)(3), 104(b)(3).

²⁵ S. REP. NO. 95-114, at 10 (1977).

²⁶ *Id.* at 11.

²⁷ H.R. REP. NO. 95-640, at 21 (1977) (minority views).

took the position that only “true extortion” situations, such as the threatened dynamiting of an oil rig, would be exempt.²⁸

Notwithstanding Congress’s nearly absolute prohibition against giving bribes, the FCPA “did not reach the foreign officials who received the bribes.”²⁹ The drafting history of the FCPA provides evidence of an “affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law.”³⁰ Although it was recognized that “[i]n some instances, improper payments have been extorted from U.S. companies by corrupt foreign officials or agents purporting to speak for such officials,”³¹ Congress appears to have adopted a one-sided approach to bribery largely out of prudential concerns that revealing corrupt payments could “embarrass friendly governments”³² and undermine U.S. foreign policy.³³

2. *Books-and-Records Provisions*

It was not just the anti-bribery provisions that were incomplete; the accounting provisions were flawed as well. First, they applied (and continue to apply) only to “issuers” of U.S. registered securities,³⁴ not as President Ford and his Task Force on Questionable Payments Abroad had alternatively suggested, “all American business entities, whether or not they have securities registered with the SEC[.]”³⁵ Moreover, instead of augmenting the existing registration and financial reporting requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934 in a way that would have required, as President Ford’s Task Force suggested, the reporting of “all payments in excess of some floor amount, made directly or indirectly to any

²⁸ S. REP. NO. 95-114, at 11.

²⁹ *United States v. Lazarenko*, 564 F.3d 1026, 1038 n.6 (9th Cir. 2009); *see also* *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (per curiam) (dismissing indictment against Canadian officials for FCPA and conspiracy violations because of “overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power”).

³⁰ *Castle*, 925 F.2d at 836.

³¹ Letter from Elliot L. Richardson, Secretary of Commerce, to Senator William Proxmire (June 11, 1976) reprinted in Exhibit 22 to Decl. of Prof. Michael J. Koehler in Supp. of Defs.’ Mot. to Dismiss, *United States v. Carson*, Case No. SA CR 09-00077-JVS, at 42 (C.D. Cal. Feb. 21, 2011); *see also* Org. for Econ. Co-Operation & Dev. [“OECD”], *OECD Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 1 (1997), available at <http://www.oecd.org/dataoecd/5/48/39360623.pdf> (recognizing that “in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active [party]”).

³² Letter from Elliot L. Richardson, *supra* note 31, at 42.

³³ 122 CONG. REC. S6516 (1976) (floor statement of Sen. Frank Forrester Church (D-Idaho) introducing S. 3379 International Contributions, Payments, and Gifts Disclosure Act, stating that “[w]hen these payments become known . . . [they can lead to] revolution . . . and may very well advance the communists”).

³⁴ Foreign Corrupt Practices Act, Pub. L. No. 95-213, sec. 102, § 13(b)(2), 91 Stat. 1494, 1494 (1977) (codified as amended in scattered sections of 15 U.S.C. (2006)).

³⁵ Letter from Elliot L. Richardson, *supra* note 31, at 63.

person employed by or representing a foreign government or to any foreign political party or candidate for foreign political office in connection with obtaining or maintaining business with, or influencing the conduct of, a foreign government,"³⁶ the FCPA's accounting provisions required issuers only to "make and keep" accurate books and records and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized, executed, recorded, and periodically reviewed.³⁷ Consequently, even after the implementation of the FCPA, federal securities law continued to contain "no specific requirement that questionable payments to foreign officials be disclosed in registration statements filed pursuant to the 1933 Act or in the annual or periodic reports or proxy materials filed pursuant to the 1934 Act."³⁸

3. *No Private Right of Action*

Finally, although Congress considered creating a private right of action within the FCPA to allow private parties, such as competitors harmed by losing business to a bribe-payer, to police the statute through civil suits, the text that ultimately emerged failed to include such a provision. When the House Committee on Interstate and Foreign Commerce voted on House Resolution 3815 (which, along with Senate Bill 305, ultimately became the FCPA), its report stated that "[t]he Committee intends that the courts shall recognize a private cause of action based on this legislation . . . on behalf of persons who suffer injury as a result of prohibited corporate bribery."³⁹ The Committee realized that "recognition of such a private cause would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice."⁴⁰

For a time, the Senate also apparently realized the deterrent value of a private right of action, as its draft bill initially included a provision that expressly conferred a private right of action under the FCPA on competitors.⁴¹ However, because of apparent ambiguities in the initial drafting of that provision, the Senate committee ultimately deleted it with a view to potentially reinserting it by way of a floor amendment after Congressional

³⁶ *Id.*

³⁷ Foreign Corrupt Practices Act, sec. 102(2), § 13(b)(2), 19 Stat. at 1494 (codified at 15 U.S.C. § 78m(b)(2)(A) (2006)).

³⁸ Letter from Elliot L. Richardson, *supra* note 31, at 45.

³⁹ H.R. REP. NO. 95-640, at 10 (1977).

⁴⁰ *Id.*

⁴¹ 122 CONG. REC. 12,605, 12,607 (1976) (finding merit in a proposed "private cause of action for any person who could establish actual damage to his business resulting from illegal payments made by a competitor" while rejecting a proposed shareholder cause of action on the belief that it would have "duplicated and possibly confused existing remedies available to shareholders"); *see also* 122 CONG. REC. 12,604, 12,605 (1976) (floor statement of Sen. Frank Forrester Church (D-Idaho) introducing S. 3379 International Contributions, Payments, and Gifts Disclosure Act, stating that "[t]o encourage the private sector to police itself, shareholders and competitors are ensured rights of action when damaged").

staff redrafted more acceptable language.⁴² However, “the availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that produced the compromise bill passed by both houses and signed into law.”⁴³ Ultimately, instead of creating a private cause of action, the 1977 Act merely supplemented the power of the SEC to take civil action by also providing for the Attorney General to institute a civil action to obtain an injunction “[w]hensoever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or is about to engage” in foreign bribery.⁴⁴

B. 1988 Amendments

As some in Congress had feared, the FCPA initially proved to be a “paper tiger.”⁴⁵ There were only twenty-three FCPA enforcement actions during the first decade of the Act,⁴⁶ and bribery almost certainly remained secret and rampant.⁴⁷ Finally, after ten years of legislative discussion, Congress decided to amend the FCPA in Title V of the Omnibus Trade and Competitiveness Act of 1988.⁴⁸

Chief among the changes was an amendment to make the penalties for bribery harsher. Notwithstanding the fact that the Alternative Fines Act already enabled the maximum fine for foreign bribery to the greater of twice the gross gain or twice the gross loss,⁴⁹ fines under the FCPA for criminal violations of its anti-bribery provisions were increased from one million dollars to two million dollars per violation for organizations,⁵⁰ and from ten thousand dollars to one hundred thousand dollars for willful violations by natural persons.⁵¹ In civil enforcement actions, the government became em-

⁴² S. REP. NO. 1031, at 13 (1976).

⁴³ *Lamb v. Phillip Morris*, 915 F.2d 1024, 1029 (6th Cir. 1990) (referring to 15 U.S.C. § 78dd-2 (2006)).

⁴⁴ Foreign Corrupt Practices Act, Pub. L. No. 95-213, § 104(c), 91 Stat. 1494, 1498 (1977).

⁴⁵ H.R. REP. NO. 95-640, at 20 (1977) (minority views to H.R. 3815).

⁴⁶ See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 192 (1994).

⁴⁷ See generally Moisés Naím, *The Corruption Eruption*, 2 BROWN J. WORLD AFFAIRS 245 (1995).

⁴⁸ Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1 to 78dd-3, 78ff (2006)).

⁴⁹ See Pub. L. No. 98-473, § 3571(b), 98 Stat. 1837, 1995 (1984) (codified at 18 U.S.C. § 3571 (2006)) (limiting fines for defendant organizations to five hundred thousand dollars for felonies or misdemeanors with loss of human life, to one hundred thousand dollars for any other misdemeanor, and to ten thousand dollars for an infraction), amended by Pub. L. No. 100-185, § 6, 101 Stat. 1279, 1280 (1987) (codified at 18 U.S.C. § 3571(d) (2006)) (authorizing a fine for the amount specified in the law creating the offense and an alternative fine based on gain or loss and in addition to those enumerated above).

⁵⁰ Pub. L. No. 100-418, sec. 5003(c)(1)(A), 102 Stat. 1107, 1419 (1988) (codified at 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1) (2006)).

⁵¹ *Id.* sec. 5003(b)(2)(A) (codified at 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2) (2006)).

powered to seek not only an injunction, but also civil monetary penalties of ten thousand dollars for anti-bribery violations.⁵²

Congress also clarified the scope of liability under the anti-bribery provisions. It listed another prohibited quid pro quo in the statute, such that payments made to foreign officials for the purpose of “inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official” were expressly criminalized.⁵³ It repealed the portion of the law that had provided that employees or agents could not be prosecuted for FCPA violations unless the domestic concern or issuer had been found to have violated the Act.⁵⁴ And with respect to issuers’ and domestic concerns’ liability for improper payments made to third party consultants and intermediaries that were later improperly offered or given to foreign officials, Congress deleted the provision that would have imposed liability if the payer gave the money to the intermediary while “having reason to know” it would be used as a bribe (which was akin to a negligence standard). Congress continued to make clear, however, that the retained concept of “knowing”⁵⁵ encompassed the concepts of “conscious disregard” or “willful blindness.”⁵⁶ Congress also enacted an express exception for so-called “grease”⁵⁷ payments to facilitate “routine governmental action” ordinarily and commonly performed by a foreign official,⁵⁸ as well as affirmative defenses for payments that are

⁵² *Id.* sec. 5003(c)(1)(B) (codified at 15 U.S.C. § 78dd-2(g)(2)(B) (2006)).

⁵³ *See* 15 U.S.C. §§78dd-1(a)(1)(A)(ii), 78dd-2(a)(1)(A)(ii), 78dd-3(a)(1)(A)(ii) (2006). This amendment was designed to conform the FCPA to language used in the federal domestic bribery statute, 18 U.S.C. § 201. *See* H.R. REP. NO. 100-576, at 918 (1988) (conference report).

⁵⁴ H.R. REP. NO. 100-576, at 919 (1988).

⁵⁵ *See* 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (2006) (prohibiting payments to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official”). Subsection (f)(2)(A) of § 78dd-1 explains that “[a] person’s state of mind is ‘knowing’ with respect to conduct, a circumstance, or a result if—(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.” § 78dd-1(f)(2)(A). Subsection (f)(2)(B) adds that “[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” § 78dd-1(f)(2)(B).

⁵⁶ *See* H.R. REP. NO. 100-576, at 919. The U.S. Supreme Court has recently explained that a “willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070–71 (2011). Because the standard for willful blindness “surpasses recklessness and negligence,” *id.*, it shields defendants more than the “having reason to know” standard. *Id.* *See also* *United States v. Kozeny*, Docket No. 09-4704-cr(L), 2011 U.S. App. LEXIS 24740, at *19 (2d Cir. Dec. 14, 2011) (affirming conviction for conspiracy to violate the FCPA where jury was instructed that “knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact.”).

⁵⁷ H.R. REP. NO. 95-640, at 4 (1977).

⁵⁸ Instead of continuing to define “foreign official” to exclude “ministerial and clerical” persons, Congress instead created a new exception for “routine government action.” 15 U.S.C.

legal under the written laws of the foreign country⁵⁹ or payments that are reasonable and bona fide expenses related to product promotion or contract performance.⁶⁰

While Congress was clarifying and intensifying FCPA's anti-bribery provisions, it declined in the 1988 amendments to meaningfully enhance the FCPA's accounting provisions to affirmatively require disclosure of such corrupt payments. To the contrary, Congress arguably weakened the books-and-records provisions by amending Section 13(b) to make clear that "no criminal liability shall be imposed for failing to comply" with the books and records provisions unless a person "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account."⁶¹ It rejected a proposed "safe harbor" that would have shielded firms from liability if they used "due diligence" to prevent an accounting violation,⁶² but nonetheless added a new paragraph to explain that issuers that own an interest of fifty percent or less of a domestic or foreign subsidiary would not be liable for accounting violations of such subsidiaries if they make a good-faith effort to encourage the subsidiary to comply with the requirements of Section 78m(b)(2).⁶³

Not surprisingly, the 1988 amendments proved insufficient to eliminate corruption in international business transactions.⁶⁴ So too did a 1992 amendment to the Money Laundering Control Act⁶⁵ that made a felony violation of the FCPA a predicate offense for money laundering, and a 1993 rule that provides for government-wide debarment and suspension from government procurement programs for those found to violate federal laws like the FCPA.⁶⁶

C. *OECD Convention and 1998 Amendments*

In addition to failing to prevent bribery, the 1988 amendments also drew the ire of U.S. businesses operating abroad, who were convinced that

§ 78dd-1(b) (2006). This limited carve-out allows certain payments for the purpose of facilitating or expediting "routine governmental action" such as obtaining permits, processing visas, providing police protection, protecting perishable products or commodities from deterioration or actions of a similar nature. *See* 15 U.S.C. § 78dd-1(f)(3)(A) (2006). Congress also rejected another proposed amendment that would have provided an affirmative defense for "nominal" payments. H.R. REP. NO. 100-576, at 922-23 (1988).

⁵⁹ *See* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) (2006).

⁶⁰ *See* 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2) (2006).

⁶¹ *See* 15 U.S.C. § 78m(b)(4)-(5) (2006).

⁶² H.R. REP. NO. 100-576, at 916 (conference report).

⁶³ *Id.* at 922; *see* 15 U.S.C. § 78m(b)(6) (2006).

⁶⁴ *See generally* Naím, *supra* note 47.

⁶⁵ *See* Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, § 1584, 106 Stat. 4066 (1992) (codified at 18 U.S.C. § 1956(c)(7)(D) (2006)).

⁶⁶ *See* 58 Fed. Reg. 28,759, 28,761 (May 17, 1993) (codified at 5 C.F.R. § 970 (1996)) (final rule regarding government-wide non-procurement debarment and suspension); *see also* 48 C.F.R. § 9.407-2 (1984) (causes for suspension of contractor under federal acquisition regulations).

the FCPA was harming U.S. companies in relation to foreign competitors that were not prohibited from making bribes by their own domestic law.⁶⁷ Thus, following a decade-long effort to convince other governments to adopt anti-bribery legislation, the United States agreed with other members of the Organisation for Economic Co-Operation and Development (“OECD”) to sign and ratify the OECD Anti-Bribery Convention in 1998. The Convention entered into force in February 1999 and has thirty-eight state parties. Following the FCPA approach, the Convention addresses only “active corruption” or “active bribery,” punishing the person who promises or gives the bribe, as contrasted with “passive bribery,” focusing on the recipient of the bribe.⁶⁸ The Convention was also “implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe.”⁶⁹

To make the FCPA generally conform to the OECD Convention, Congress passed the International Anti-Bribery and Fair Competition Act of 1998.⁷⁰ It added to the list of prohibited quid pro quos those payments made for purposes of “securing an improper advantage” from foreign officials to assist with obtaining or retaining business.⁷¹ And it expanded liability under the FCPA, by making clear that foreign nationals working as employees or agents for U.S. businesses could also be subject to criminal penalties (not just civil penalties).⁷²

Congress also expanded American jurisdiction under the FCPA in two ways. First, it expressly adopted the nationality principle as an alternative basis for jurisdiction over domestic concerns, issuers, and U.S. persons working for such issuers or domestic concerns.⁷³ Now, any U.S. persons or companies that commit active bribery abroad can be held liable irrespective of whether such persons make use of the mails or any means or instrumentality of interstate commerce.⁷⁴ Second, Congress added a new section to the FCPA under which persons that are not issuers or domestic concerns (including foreign persons that are not employees or agents of U.S. entities) who use the mails or commit any act in furtherance of foreign bribery “while in the territory of the United States” could be held liable for violating Section

⁶⁷ See *Proposed Legislative History to International Anti-Bribery Act of 1998*, DEP’T OF JUSTICE 1, <http://www.justice.gov/criminal/fraud/fcpa/docs/leghistory.pdf> (last visited February 28, 2012) (“Since the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty.”).

⁶⁸ OECD, *supra* note 31, at 1.

⁶⁹ *Id.* at 28.

⁷⁰ Pub. L. No. 105-366, 112 Stat. 3302 (1998).

⁷¹ See 15 U.S.C. §§ 78dd-1(a)(1)(A)(iii), 78dd-2(a)(1)(A)(iii) (2006).

⁷² See *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004) (dismissing FCPA charges against Swiss national who acted as agent of domestic concern in furtherance of bribery committed prior to 1998 amendments).

⁷³ 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2006).

⁷⁴ *Id.*

78dd-3 of the Act⁷⁵—except, of course, for the foreign official who actually solicits or demands the bribe.

D. Amendments to the 1934 Securities Exchange Act Under the Private Securities Litigation Reform Act (1995), the Sarbanes-Oxley Act (2002), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)

In addition to amending the FCPA twice since 1977, Congress has also amended federal securities laws on several occasions since 1977 and, in so doing, affected the regulations governing disclosure of foreign corrupt transactions.⁷⁶ Notable amendments resulted from the Private Securities Litigation Reform Act of 1995 (“PSLRA”),⁷⁷ the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley” or “SOX”),⁷⁸ and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 (“Dodd-Frank”).⁷⁹ Yet while these acts are laudable in many respects, they still fall short of requiring public disclosure of bribery in most cases.⁸⁰

Title III of the PSLRA added Section 10A to the 1934 Securities Exchange Act.⁸¹ Section 10A requires that each audit under the 1934 Act include procedures designed, among other things, “to provide reasonable assurance of detecting illegal acts that would have a direct and material effect on the determination of financial statement amounts.”⁸² If, in the course of a required audit of an issuer’s financial statements, an independent public accounting firm detects or otherwise becomes aware of information indicating that an “illegal act” (including an FCPA violation)⁸³ may have occurred, it must determine whether it is likely that an illegal act has in fact occurred and, if so, determine the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary effects, such as fines, penalties, and damages.⁸⁴ Unless the accountant determines that the illegal act is “clearly inconsequential,” she must inform the management

⁷⁵ 15 U.S.C. § 78dd-3 (2006).

⁷⁶ See, e.g., Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

⁷⁷ Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C. (2006)).

⁷⁸ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

⁷⁹ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered titles of U.S.C.).

⁸⁰ See Lucinda Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures* (Am. Conference Inst. on the FCPA, 2007), available at <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf>.

⁸¹ Pub. L. No. 104-67, § 301, 109 Stat. 737 (1995) (codified at 15 U.S.C. § 78j-1 (2006)).

⁸² 15 U.S.C. § 78j-1(a)(1) (2006).

⁸³ “Illegal act” is defined broadly to mean “an act or omission that violates any law, or any rule or regulation having the force of law,” which would include violations of the FCPA. 15 U.S.C. § 78j-1(f) (2006).

⁸⁴ 15 U.S.C. § 78j-1(b)(1)(A) (2006).

and board of directors as soon as practicable.⁸⁵ After board notification, if the accountant concludes that the illegal act “has a material effect on the financial statements of the issuer,” the senior management has not taken “timely and appropriate remedial actions with respect to the illegal act,” and the failure to take such remedial action is reasonably expected to warrant departure from a standard report of the auditor or resignation from the audit engagement, the accountant must directly report her conclusions to management and ensure the board of directors is notified.⁸⁶ An issuer whose board of directors receives such a report from an accountant must then confidentially inform the SEC by the next business day.⁸⁷ If the issuer fails to provide such notice to the SEC, the accountant is required to confidentially report directly to the SEC and resign from the engagement (which is a publicly reportable event).⁸⁸

Although Section 10A’s reporting mechanism is a noteworthy improvement to the 1934 Act, it essentially amounts only to a requirement to disclose illegal acts that have a material effect on the issuers’ financial statements *and* that remain uncorrected by the board. Moreover, although the confidentiality of Section 10A reports makes it difficult to know how many reports have actually been made, the SEC has acknowledged that “the reporting requirements under section 10A rarely will be triggered” and it expected to receive “very few issuer notices each year and even fewer auditor reports.”⁸⁹

Under Sarbanes-Oxley, the penalties for certain violations of the Securities Exchange Act (including the FCPA accounting provisions) were increased from ten to twenty years in prison and one million dollars to five million dollars (for individuals) and from two and a half million dollars to twenty-five million dollars (for organizations).⁹⁰ Issuers were also required for the first time to include a report on the “effectiveness” of their internal controls and procedures, including information regarding “whether or not there were significant changes in internal controls” or “any corrective actions with regard to significant deficiencies and material weaknesses.”⁹¹

⁸⁵ 15 U.S.C. § 78j-1(b)(1)(B) (2006).

⁸⁶ 15 U.S.C. § 78j-1(b)(2) (2006).

⁸⁷ 15 U.S.C. § 78j-1(b)(3) (2006); *see also* SEC Rule 10A-1(c), 17 C.F.R. § 240.10A-1(c) (1997) (providing that Section 10A reports to the SEC are “non-public and exempt from disclosure pursuant to the Freedom of Information Act”).

⁸⁸ *See* 15 U.S.C. § 78j-1(b)(3) (2006); *see also* 17 C.F.R. § 249.308 (2008) (describing that form 8-K is generally used for non-disclosable information); § 229.304 (2002) (requiring a registrant to file a form if their accountant/auditor resigns, declines to stand for re-election, or is dismissed); § 228.304 (2002) (applying some of the requirements of 229.304 to small businesses).

⁸⁹ Implementation of Section 10A of the Securities Exchange Act of 1934, SEC Release No. 34-38387, 62 Fed. Reg. 12,743, 12,748 (Apr. 17, 1997) (codified at 17 C.F.R. pt. 210, 240 (2011)).

⁹⁰ Pub. L. No. 107-204, § 1106, 116 Stat. 745, 810 (2002) (codified at 15 U.S.C. § 78ff(a) (2006)).

⁹¹ *Id.* § 302(a)(6), 116 Stat. at 777 (codified at 15 U.S.C. § 7241(a)(6) (2006)).

CEOs and CFOs are now required to “evaluate[] the effectiveness of the issuer’s internal controls” within ninety days of the filing of each required annual or quarterly report,⁹² and certify that, based on the officer’s knowledge, the report is materially accurate.⁹³ The certification must also confirm that upper management has disclosed to the company’s auditor and audit committee “any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls,” “all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer’s ability to record, process, summarize, and report financial data,” and “any material weaknesses in internal controls.”⁹⁴

Under federal securities laws, even after the passage of PSLRA and SOX, the key determinant for when the company must publicly disclose that a bribe has occurred generally remains whether the information is “material.”⁹⁵ A fact is deemed material for purposes of disclosure if “there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “‘total mix’ of information made available,”⁹⁶ or stated differently, if “there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment-related decision.⁹⁷ Although the SEC has indicated that exclusive reliance in quantitative factors to determine materiality is inappropriate because certain particularly egregious events “may well” render a misstatement or omission material from a qualitative perspective (such as when upper management is involved in fraud or intentionally seeks to “manage” their reported earnings),⁹⁸ much of the materiality calculus remains undoubtedly quantitative in nature—involving a determination of whether a particular event is of a magnitude such that it affects the reasonable accuracy of the financial information reflected in the

⁹² *Id.* § 302(a)(4)(C), 116 Stat. at 777 (codified at 15 U.S.C. § 7241(a)(4)(6) (2006)); *see also* SEC Rule 13a-14, 67 Fed. Reg. 57,276, 57,288 (Sept. 9, 2002); SEC Rule 15d-14, 67 Fed. Reg. 57,276, 57,289 (Sept. 9, 2002).

⁹³ Pub. L. No. 107-204, § 302(a)(3), 116 Stat. at 777 (codified at 15 U.S.C. § 7241(a)(1)–(3) (2006)).

⁹⁴ *Id.* § 302(a)(5), 116 Stat. at 777 (codified at 15 U.S.C. § 7246(a)(5) (2006)).

⁹⁵ *See e.g.*, 17 C.F.R. § 229.303 (2011) (requiring disclosure of “material events and uncertainties . . . that would cause reported financial information not to be necessarily indicative of . . . future financial condition”); 17 C.F.R. § 229.103 (2011) (requiring disclosure of “material pending legal proceedings . . . [including] such proceedings known to be contemplated by governmental authorities”); 17 C.F.R. § 230.408 (2011) (requiring disclosure in registration statements of “material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading”); 17 C.F.R. § 240.12b-20 (2011) (requiring disclosure of same in reports and statements).

⁹⁶ *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (defining materiality in Section 10(b) and Rule 10b-5 securities fraud context) (quoting *Basic Incorporated v. Levinson*, 485 U.S. 224, 232 (1988)).

⁹⁷ *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 439 (1976) (defining the proper standard of materiality of omissions from proxy statements).

⁹⁸ SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,152 (Aug. 12, 1999) (codified at 17 C.F.R. pt. 211 (2011)).

company's periodic reports to such an extent that there is a substantial likelihood that a reasonable investor would consider it important.⁹⁹ The determination of whether a bribe is material for purposes of disclosure requires a company to consider, among other things, whether the amounts at issue are substantial and/or would result in substantial potential fines, if detected, and whether the conduct affects a substantial business area.¹⁰⁰ Indeed, neither the SEC nor any court has unequivocally declared that payment of a bribe to a foreign official must always be disclosed.¹⁰¹

Dodd-Frank also made certain changes to the laws governing the disclosure of foreign corrupt practices, yet it too might reasonably be expected to have a limited impact on disclosure of FCPA violations. First, Dodd-Frank established a new whistleblower program to encourage the reporting of violations of the federal securities laws, including the FCPA.¹⁰² On May 25, 2011, the SEC announced final rules to implement the program under which whistleblowers that voluntarily provide "original information" about violations of the FCPA would be protected against retaliation and may receive monetary rewards of between ten to thirty percent of any monetary sanction in excess of one million dollars collected in an SEC or DOJ enforcement action.¹⁰³ While this whistleblower program increases the likelihood of detecting FCPA violations, commentators have suggested that "the extraordinary potential of the whistleblower reporting mechanism envisioned by the Act likely will not be fully realized, particularly in regions reported to have the most pervasive levels of corruption."¹⁰⁴ This is because most whistleblowers with "original information" to share will likely be foreign nationals whose countries are hostile to whistleblowers, and once their iden-

⁹⁹ See, e.g., *id.* (recognizing widespread use of certain quantitative rules-of-thumb to determine materiality, such as whether the resulting financial overstatement is less than five percent); Staff Accounting Bulletin No. 108, 71 Fed. Reg. 54,580, 54,581 (Sept. 13, 2006) (noting that the materiality analysis "generally begins with quantifying potential misstatements to be evaluated").

¹⁰⁰ F. Joseph Warin & Andrew S. Boutros, *FCPA Investigations: Working Through A Media Crisis*, 22 ANDREWS LITIG. REP.: WHITE COLLAR CRIME 3 (2007), available at http://www.gibsondunn.com/publications/Documents/Warin-FCPA_InvestigationsMediaCrisis.pdf.

¹⁰¹ See Letter from Elliot L. Richardson, *supra* note 31, at 45–46 ("The courts have not yet addressed the issue of whether and under what circumstances questionable payments made by a U.S. corporation to foreign officials would be material information which should be disclosed publicly."); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 27 (1st Cir. 1987) (affirming dismissal of shareholder securities fraud action premised on company's failure to disclose bribe until shortly before indictment, despite noting such information could possibly be material, because there was no duty to disclose in the absence of insider trading, or prior inaccurate, incomplete, or misleading disclosures); see also SEC Staff Accounting Bulletin No. 99, *supra* note 98 ("Whether events may be material to investors for non-financial reasons is a matter not addressed by this SAB.").

¹⁰² Pub. L. No. 111-203, §§ 922–924, 124 Stat. 1376, 1841–50 (2010) (codified at 15 U.S.C. §§ 78u-6, 78u-7 (2006 & Supp. IV 2010)).

¹⁰³ See 17 C.F.R. §§ 240.21F-1–240.21F-17.

¹⁰⁴ See Patrick Collins, Lee Stein & Caryn Trombino, *Consider the Source: How Weak Whistleblower Protection Outside the United States Threatens to Reduce the Impact of the Dodd-Frank Reward Among Foreign Nationals* 1 (Am. Conference Inst. on the FCPA, 2010), available at http://www.perkinscoie.com/files/upload/10_25Article.pdf.

tities are disclosed in the course of a U.S. government investigation, such foreign whistleblowers will, as a practical matter, be unprotected from social alienation and/or retaliation in their home countries.¹⁰⁵

Second, Dodd-Frank required the SEC to establish rules requiring each “resource extraction issuer” to include in its annual report “information relating to any payment” made by such an entity,¹⁰⁶ its subsidiaries, or an entity under its control “to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals[.]”¹⁰⁷ Although the SEC proposed rules to implement the new payment disclosure requirement in December 2010,¹⁰⁸ the rules have been met with significant resistance and have not yet been implemented. It is therefore too early to know whether such rules will have any substantial effect upon corrupt foreign transactions. In short, notwithstanding thirty-five years of legislative efforts to combat corruption in international business transaction, disclosure of payments to foreign officials remains largely voluntary.

III. PERVERSE INCENTIVES AND UNJUST GAPS IN FCPA INTERPRETATION AND ENFORCEMENT

In the last five years, the DOJ and SEC have embarked on a well-publicized program to aggressively police the corruption in international business transactions. From a quantitative perspective, these supply-driven enforcement efforts appear impressive. The U.S. leads all OECD nations in the number of civilly and criminally resolved bribery-related enforcement actions.¹⁰⁹ Between 1999 and 2010, the U.S. obtained criminal convictions for forty-eight individuals and entered into twenty-seven plea agreements with organizations (not including some thirty-two deferred-prosecution or non-prosecution agreements during that same period).¹¹⁰ Non-criminal sanctions were also imposed against a total of thirty-seven individuals and forty-five organizations.¹¹¹ In 2011, the enforcement bonanza continued, with an additional forty-eight FCPA enforcement actions initiated by the DOJ

¹⁰⁵ *Id.*

¹⁰⁶ Section 1504 of Dodd-Frank defines “resources extraction issuer” an issuer that “(i) is required to file an annual report with the Commission; and (ii) engages in the commercial development of oil, natural gas, or minerals.” Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1504, § 13(q)(1)(D), 124 Stat. at 2220 (codified at 15 U.S.C. § 78m(q)(1)(D) (2006 & Supp. IV 2010)).

¹⁰⁷ *Id.*

¹⁰⁸ See Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80978 (Dec. 23, 2010).

¹⁰⁹ Org. for Econ. Co-Operation & Dev. Working Group on Bribery: *2010 Data on Enforcement of the Anti-Bribery Convention, Comparative Table of Enforcement Data Collected from the 38 Parties to the Anti-Bribery Convention, Decisions on Foreign Bribery Cases from 1999 to December 2010*, at 4 (Apr. 2011), available at <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

(twenty-three actions) and SEC (twenty-five actions).¹¹² This increased enforcement shows no signs of slowdown either, as estimates put the number of open FCPA investigations somewhere between one and two hundred.¹¹³

It is now not uncommon for the government to seek imprisonment of individuals it deems to be involved in the bribery of a foreign official.¹¹⁴ Moreover, through plea agreements, deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”), federal prosecutors and regulators now commonly extract millions of dollars in financial penalties from organizations they determine are involved in foreign bribery.¹¹⁵ In 2010, the DOJ’s FCPA Unit accounted for one billion dollars in penalties, the most ever recorded in the thirty-eight year history of the Foreign Corrupt Practices Act.¹¹⁶

A. *Unjust Prosecutions of Companies Whose Payments Were Unwilling*

Notwithstanding these statistics, a qualitative assessment reveals a far less impressive story—one that is marked by punishment of numerous companies who arguably do not deserve it, de facto immunity for many public officials who do, continued secrecy of payments to foreign officials, and an almost certain failure to prevent ongoing corruption. The recent history of FCPA enforcement indicates that, on a number of occasions, enforcement action has been taken against individuals whose payments were made unwillingly. By “unwilling” payments, I mean payments that, while made intentionally and knowingly, are not made voluntarily or corruptly because the

¹¹² GIBSON, DUNN & CRUTCHER, 2011 Year-End FCPA Update (2012), available at <http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf>.

¹¹³ GIBSON, DUNN & CRUTCHER, 2011 Mid-Year FCPA Update (2011), available at <http://www.gibsondunn.com/publications/Documents/2011Mid-YearFCPAUpdate.pdf>.

¹¹⁴ In April 2010, Charles Paul Edward Jumet was sentenced to the “longest prison term imposed against an individual for violating the FCPA”—eighty-seven months in prison—for paying more than two hundred thousand dollars worth of bribes to Panamanian officials in exchange for a twenty-year no-bid contract to maintain lighthouses and buoys along Panama’s waterway. See Press Release, U.S. Dep’t of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>.

¹¹⁵ Noteworthy financial penalties include the four hundred fifty million dollars in criminal fines and disgorgement imposed by the DOJ and SEC on Siemens AG and three of its subsidiaries in 2008; the \$579 million settlement with Halliburton and its former engineering and construction subsidiary Kellogg, Brown & Root in 2009; the four hundred million dollars criminal fine imposed on BAE Systems in 2010. See, e.g., Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>; Press Release, Sec. and Exch. Comm’n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), available at <http://www.sec.gov/news/press/2009/2009-23.htm>; Press Release, Dep’t of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

¹¹⁶ Joe Palazzolo, *FCPA Fines Made Up Half Of All DOJ Criminal Division Penalties in Fiscal 2010*, WALL ST. J. (Jan. 24, 2011), <http://blogs.wsj.com/corruption-currents/2011/01/24/fcpa-fines-made-up-half-of-all-doj-criminal-division-penalties-in-fiscal-2010/>.

payer is subject to express or implicit coercive extortion, placing them in reasonable fear that if they do not pay, they will be treated unfairly.

Consider federal extortion law. Under the Hobbs Act, extortion is “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”¹¹⁷ While obtaining payments through the use of direct threats of force or violence certainly constitutes extortion, a public official may also commit extortion by expressly or implicitly soliciting payments without such express threats.¹¹⁸ In such cases, “the coercive element is provided by the public office itself.”¹¹⁹

As numerous federal courts have recognized, the key inquiry for determining whether a person made his payment because of extortion is whether the payer acted out of fear, including “fear of economic loss.”¹²⁰ Courts have held that “the absence or presence of fear of economic loss must be considered from the perspective of the victim, not the extortionist” and that the alleged victim must have actually and reasonably believed “first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim’s detriment.”¹²¹ The fear requirement is satisfied where the payer actually and reasonably believes “that nonpayment would result in preclusion from or diminished opportunity for some existing or potential economic benefit.”¹²² Thus, for example, a person may be held liable for committing domestic extortion where he demands a one thousand dollar kickback as a condition for the award of a contract.¹²³ Using this broad definition of how and when extortion may be committed—at least insofar as it is committed by a *domestic* public official—it should become apparent that coercive extortion may occur at any point in the international investment process when a *foreign* official places an investor in fear of economic loss by expressly or implicitly demanding a private payment, whether as the price for obtaining new business or for permitting the payer to retain an existing business with the government.

Although the Supreme Court held in *United States v. Evans* that U.S. public officials may be punished for extortion by merely receiving a payment to which they were not entitled while knowing that the payment was

¹¹⁷ 18 U.S.C. § 1951(b)(2) (2006).

¹¹⁸ *Evans v. United States*, 504 U.S. 255, 268 (1992) (upholding conviction for extortion where “a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts”).

¹¹⁹ *Id.* at 266 (citing, e.g., *United States v. Paschall*, 772 F.2d 68, 72–74 (4th Cir. 1985) (recognizing that “[w]hen the public official invites the payment, it is, of course, inducement, but some public offices, by their very nature, provide the inducement”).

¹²⁰ *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (en banc) (quoting *United States v. Brecht*, 540 F.2d 45, 52 (2d Cir. 1976)).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Brecht*, 540 F.2d at 47–48.

made in return for official actions,¹²⁴ this Article does not contend that mere receipt of a payment by a foreign public official under such circumstances always renders the payment unwilling. Rather, in the interests of preserving the helpful and often regrettably blurred distinction between criminal and victim, this Article seeks to define extortion (the presence of which renders a payment unwilling) in the more limited sense understood by a layman and aptly captured by Professor Lindgren's definition: "[t]he seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment or to make the payor worse off than he is now."¹²⁵ Using such a definition, "the payee is guilty of extortion; the payor is the victim of extortion."¹²⁶ It seems, however, that U.S. enforcement officials are making little effort to consistently and clearly distinguish victims from criminals in the battle against corruption in international business transactions.¹²⁷ While the U.S. concedes that "[i]n many cases . . . the foreign public official solicited the bribe,"¹²⁸ it generally takes the position that it is both too difficult and legally unnecessary to determine who solicited whom.¹²⁹

¹²⁴ *Evans*, 504 U.S. at 268 (upholding conviction for extortion where "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

¹²⁵ James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common-Law to the Hobbs Act*, 35 UCLA L. REV. 815, 825 (1988).

¹²⁶ *Id.*

¹²⁷ For a basic illustration of the difference between willing and unwilling payments in practice, it is instructive to compare two reported FCPA enforcement actions: (1) the Monsanto matter in Indonesia; and (2) the Tyson Foods Inc. matter in Mexico. In the first case, Monsanto's Government Affairs Director for Asia directed an Indonesian consulting firm to make a secret payment of fifty thousand dollars in cash to a senior Indonesian environment official in an unsuccessful effort to convince him to dispense with the need for an environmental impact statement. See Press Release, Dep't of Justice, Monsanto Company Charged With Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), available at http://www.justice.gov/opa/pr/2005/January/05_crm_008.htm. In the second case, during the course of Tyson's participation in a required agricultural inspection program, veterinarians employed by the government of Mexico expressly threatened to disrupt the operations of two of its chicken processing plants unless their wives were placed on Tyson's payroll. See *United States v. Tyson Foods Inc.*, No. 1:11-cr-00037-RWR, at ¶¶ 16(b), (h) (D.D.C. Feb. 10, 2011). Although Monsanto voluntarily paid the official to induce him to violate his duty and Tyson reluctantly acquiesced so that foreign officials would not carry out their threats, both companies were subject to enforcement action. And indeed, Monsanto was ordered to pay fines totaling one and a half million dollars for its outright willing bribery, while Tyson Foods Inc. was ordered to pay penalties totaling \$5.2 million for its unwilling bribery. See *Steps Taken 2011*, *infra* note 131, at 21–23, 108–10.

¹²⁸ Response of the United States, Questions Concerning Phase 3 OECD Working Group on Bribery, at 26 (May 3, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

¹²⁹ See *id.* See also Press Release, Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), available at <http://www.fbi.gov/washingtondc/press-releases/2010/wfo011910.htm> (announcing unsealed indictments against twenty-two individuals in connection with FBI operation by which bribes for military contracts were solicited by undercover agents posing as agents for the Minister of Defense for a country in Africa); Response of the United States, *supra* note 128, at 26.

[I]t is often difficult to determine whether the bribe was solicited or not. Whether the bribe was solicited or voluntarily offered has no bearing on the legality of the conduct, and thus the U.S. is not obligated to determine who first proposed the illegal transaction.¹³⁰

According to the United States' recent progress report to the OECD on the steps that it has taken to implement and enforce the OECD Anti-Bribery Convention, the United States resolved one hundred separate FCPA-related enforcement actions (often involving multiple parties) from January 1, 1998 to May 31, 2011.¹³¹ Of those one hundred actions, at least fourteen appear, on the face of the government's own summary of the relevant facts, to have involved situations in which bribes were made pursuant to coercive solicitations or outright demands by foreign officials.¹³² If federal law as applied to domestic public officials (under the Hobbs Act) were to be applied to foreign public officials (under the FCPA), this should mean that the foreign public officials have committed extortion. It should also logically mean that, under such circumstances, the payers are victims. However, this is not how FCPA enforcement works.

Part of the reason for prosecutors' failure to distinguish between willing and unwilling payments is that the law does not clearly provide for such distinctions. The statute imposes criminal punishment upon natural persons where their unlawful actions were done "willfully," but courts have made clear that willfully does not mean willingly.¹³³ The statute also requires of both natural and corporate defendants that culpable payments be made "corruptly," but neither Congress nor the courts have clearly explained whether actions taken to guard against the misuse of an official's position are necessarily done with such intent.¹³⁴ And while some of the legislative history of the FCPA suggests that "payments" made under duress should not be covered,¹³⁵ other parts of it appear to expressly limit the defense to "true extortion situations," (e.g., threatened dynamiting of an oil rig)¹³⁶ which courts have taken to mean that there should be no economic extortion defense.¹³⁷

¹³⁰ Response of the United States, *supra*, note 128, at 26.

¹³¹ See Org. for Econ. Co-operation and Dev. Working Group on Bribery, *Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, United States*, at 7 (May 31, 2011) [hereinafter *Steps Taken 2011*], available at www.oecd.org/dataoecd/18/8/42103833.pdf.

¹³² See *id.* at 12–13, 21–23, 55–56, 66–68, 87–88, 90–92, 97–99, 106–08, 118, 122–23, 129–31, (citing the following enforcement actions: *Rockwell Automation*; *Tyson Foods, Inc.*; *Natco Group, Inc.*; *Novo Nordisk A/S*; *Akzo Nobel, N.V.*; *Vitol SA*; *Chevron Corporation*; *Electronic Data Systems Corporation*; *Paradigm B.V.*; *Baker Hughes Incorporated*; *Oil States International, Inc.*; *HealthSouth Corporation*; *Owl Securities and Investment Ltd.*; *Allied Products Corporation*).

¹³³ See *infra* Section II.A.1.

¹³⁴ See *infra* Section II.A.2.

¹³⁵ H.R. REP. NO. 95-640, at 21 (1977) (discussing minority views).

¹³⁶ S. REP. NO. 95-114, at 11 (1977).

¹³⁷ See *infra* Section II.A.3

1. “Willfully” Does Not Mean “Willingly”

One reason why seemingly extorted persons have been subject to FCPA enforcement actions appears to stem from the FCPA’s use of the term “willfully.” Under the text of the statute, the requirement of “willfulness” applies only to natural persons, not organizational defendants.¹³⁸ Yet, even where willfulness is clearly required in the context of natural defendants, courts have confirmed that willfulness (which turns on the defendant’s knowledge that the payment violates the law) is not synonymous with “willingly” (which goes to the issue of voluntariness).

The chief case addressing the “willfulness” requirement under the FCPA is the 2007 decision of the Fifth Circuit in *United States v. Kay*, which involved improper payments made to Haitian officials to reduce applicable taxes.¹³⁹ The *Kay* court explained that “willfulness” could mean any one of three things, depending on the statute.¹⁴⁰ First, “willful” could mean “committing an act, and having knowledge of that act.”¹⁴¹ Under this definition “the defendant need not have known of the specific terms of the statute or even the existence of the statute.”¹⁴² Mere knowledge that the defendant committed the act is sufficient. Second, “willful” could “require[] the defendant to have known that his actions were in some way unlawful.”¹⁴³ Although he need not have known of the specific statute, he must have acted with the knowledge that he was doing a “bad” act under the general rules of law,¹⁴⁴ that the “defendant knew that he was doing something generally ‘unlawful’ at the time of his action,”¹⁴⁵ and/or “that the act was in some way wrong.”¹⁴⁶ Third, “willful” could “require[] that the defendant knew the terms of the statute and that he was violating the statute.”¹⁴⁷ Although all three definitions vary significantly—and all three require that the defendant acted intentionally rather than by accident or mistake—all the definitions focus the “willfulness” inquiry on degree of the defendant’s “knowledge,” rather than voluntariness.¹⁴⁸

The *Kay* court held that the third level of willfulness was applicable only to a limited number of “complex” statutes, not including the FCPA.¹⁴⁹ It therefore affirmed the trial court’s instructions to the jury that the element of willfulness simply required “knowledge that the acts committed were un-

¹³⁸ See 15 U.S.C. § 78dd-2(g)(1)(A) (2006).

¹³⁹ *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007).

¹⁴⁰ *Id.* at 447.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Kay*, 513 F.3d at 448.

¹⁴⁵ *Id.* at 450.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 448.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

lawful acts.”¹⁵⁰ The determination of whether a payment was made “willfully” thus rests on the knowledge held by the payer. It does not turn on whether the payment was willing.

2. *The Ambiguous Meaning of “Corruptly”*

A second reason why there have been enforcement actions taken against persons whose payments seem to be unwilling appears to lie in the fact that the FCPA criminalizes actions taken “corruptly” but does not define the meaning of this legal element of the crime. Both the context in which this term is used in the statute and Congress’s legislative history offer little definitional clarity. However, they appear to suggest that there may be at least two ways of interpreting the term: the broad way (which is that one acts corruptly anytime she makes a payment to a foreign official to influence any official act, provided it relates to obtaining or retaining business) or the narrow way (which is that one only acts corruptly by intending to have the official misuse his position, which would seemingly exclude payments made in response to coercive extortion that are merely intended to ensure that the official does his job and does not provide less than fair treatment to the payer). The few courts to address the meaning of this element have therefore struggled to determine Congress’s intent by looking to the FCPA’s legislative history and, as instructed by that legislative history, the domestic bribery statute for guidance. And in the absence of legislative and judicial clarity, prosecutors wielding the threat of indictment have largely been allowed to apply the broad definition of “corruptly” without challenge.

a. *The Context of “Corruptly” Within the Statute*

Since the text of the FCPA does not define the term “corruptly,” it may be instructive to look at the way in which the term is used in the statute. Sections 78dd-1 and 78dd-2 make it unlawful for issuers and domestic concerns respectively “to make use of the mails or any means or instrumentality of interstate commerce *corruptly*,” and Section 78dd-3 makes it unlawful for foreign persons and entities “*corruptly* to make use of the mails or any means or instrumentality of interstate commerce,” in furtherance of any offer, promise to pay, or payment of anything of value to a foreign official for purposes of

¹⁵⁰ *Id.* at 449. In a subsequent appeal in the same matter, the Fifth Circuit affirmed its approach to willfulness, explaining that “[a] ‘willful’ act is one undertaken with a ‘bad purpose’ In other words, in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful’ . . . [and t]he jury must find that the defendant acted *with an evil-meaning mind*, that is to say, that he acted with knowledge that his conduct was unlawful.” *United States v. Kay*, 513 F.3d 461, 463 n.1 (5th Cir. 2008) (quoting *Bryan v. United States*, 524 U.S. 184, 191–92 (1998)).

(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . . in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.¹⁵¹

Similarly, the alternative jurisdiction provisions of the FCPA make it unlawful for U.S. businesses and nationals to “corruptly” do any act outside the United States in furtherance of an offer, promise or payment for any of the three prohibited purposes.¹⁵²

Under a plain reading of the term in context, “corruptly” is a modifier for the way in which one uses interstate commerce or does any act in furtherance of making an offer, promise or payment for a prohibited purpose. It is not, on a plain reading, a qualification on the nature or intent of the payment itself.

Because the “corruptly” element is placed within the statute in such a way that it appears to relate only to the way in which one uses interstate commerce, it would seem that the real means of distinguishing corrupt payments from non-corrupt payments is by referring to the other parts of the FCPA’s anti-bribery provisions. The three impermissible quid pro quos specifically listed are (1) “influencing any act or decision” of a foreign official in his official capacity;¹⁵³ (2) “inducing” a foreign official to violate his duty;¹⁵⁴ or (3) “securing any improper advantage.”¹⁵⁵

Yet, if payments rendered as part of *any* of these quid pro quos—including “influencing any act or decision” of the foreign official—are necessarily unlawful if done in order to assist in obtaining or retaining business in any way, then the “corruptly” element must be interpreted in the broad sense, and is largely superfluous. One would necessarily satisfy the “corruptly” element of the crime any time one uses the mails in furtherance of a payment intended to “influence *any* act or decision,” provided it was done in order to obtain *or retain* business and does not fall into an existing exception or affirmative defense. And this would seemingly include payments made in order to influence the foreign official to *not* misuse her position by improperly harming an existing business.

¹⁵¹ 15 U.S.C. §§ 78dd-1(a)(1)(A), 78dd-2(a)(1)(A), 78dd-3(a)(1)(A) (2006).

¹⁵² §§ 78dd-1(g), 78dd-2(i) (2006).

¹⁵³ § 78dd-1(a)(1)(A)(i).

¹⁵⁴ § 78dd-1(a)(1)(A)(ii).

¹⁵⁵ § 78dd-1(a)(1)(A)(iii). The other portions of the statute that help distinguish proper payments from improper ones are (1) the business nexus requirement—that is, the requirement that payment be made in order to assist the payer “in obtaining or retaining business for or with, or directing business to, any person,” § 78dd-1(a)(1); and (2) the portions that provide an express statutory exception for facilitating payments, and affirmative defenses for bona fide promotional payments and those that are legal under the written law of the foreign country to whom the official belongs. §§ 78dd-1(b)–(c).

b. *The Legislative History of “Corruptly”*

Notwithstanding this statutory structure, there is ample evidence that Congress intended for the word “corruptly” to be an independent element of the crime speaking to the intent behind the payment, as it does under the domestic bribery statute. The Senate report that accompanied the enactment of the FCPA explained:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.¹⁵⁶

A House of Representatives report provided a similar definition, and further explained that it intended the meaning of “corruptly” within the FCPA to mean the same thing that the term means in the federal domestic bribery statute,¹⁵⁷ 18 U.S.C. § 201, which subjects to criminal punishment anyone who

directly or indirectly, corruptly gives, offers, or promises anything of value to any public official . . . with intent (A) to influence any official act; (B) to influence such public official . . . to commit or aid in committing, or collude in, or allow any fraud . . . on the United States, or (C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or person.¹⁵⁸

Accordingly, the legislative history of the FCPA indicates that the term “corruptly” is intended to be an independent and meaningful element of the crime, going to the intent behind the payment. And that is also how prosecutors are instructed to apply it.¹⁵⁹ Moreover, by consistently suggesting that, to

¹⁵⁶ S. REP. NO. 95-114, at 10 (1977).

¹⁵⁷ H.R. REP. NO. 95-640, at 7 (1977) (explaining that “[t]he word ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function” and adding that “[t]he word ‘corruptly’ connotes an evil motive or purpose such as that required under 18 U.S.C. [§] 201(b) which prohibits domestic bribery. As in 18 U.S.C. [§] 201(b), the word “corruptly” indicates an intent or desire wrongfully to influence the recipient”).

¹⁵⁸ 18 U.S.C. § 201(b)(1) (2006).

¹⁵⁹ See OFFICE OF THE U.S. ATTORNEY, U.S. DEP’T OF JUSTICE, U.S. ATTY’S CRIM. RESOURCE MAN. 1018 (2000) (“The antibribery provisions of the FCPA make it unlawful to offer, promise, or make a *corrupt payment* to a foreign official, a foreign political party, a party official, a candidate for public office, or to an intermediary to influence an act or deci-

be corrupt, the payment “must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation,” the legislative history of the FCPA suggests that the narrow interpretation of “corruptly” should prevail.¹⁶⁰

c. Judicial Definitions of “Corruptly”

To date, the Supreme Court has not decided the meaning of this element under the FCPA. Moreover, in the 35-year history of the FCPA, only four circuit courts of appeals cases have addressed the meaning of “corruptly” under the statute.

The first circuit to address the meaning of “corruptly” within the FCPA was the Eighth Circuit in *United States v. Liebo*.¹⁶¹ *Liebo* involved the appeal of an aerospace executive convicted of FCPA anti-bribery violations because he provided honeymoon airplane tickets to the cousin of a captain of the Niger Air Force who helped recommend Liebo’s company for a contract with the Niger government.¹⁶² Liebo argued, among other things, that the tickets were a gift and that the trial judge gave erroneous jury instructions on the term “corruptly.”¹⁶³ Rejecting Liebo’s arguments, the Eighth Circuit affirmed the trial court’s jury instruction that the term “corruptly” meant that “the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to *misuse* his official position or to influence someone else to do so,” and that “an act is ‘corruptly’ done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”¹⁶⁴ Although the court’s statement that the payment “must be intended to induce the recipient to misuse his official position” mirrors the legislative history and suggests that the narrow view of “corruptly” ought to apply, its further explanation that an act is corruptly done if performed with “a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means” tends to suggest application of the broad view, since one would be acting corruptly even if the private payment to the official were intended to simply get the fair treatment to which the payer was otherwise legally entitled. And although these two formulations may well produce different results in an extortion setting, the Eighth Circuit was not forced to address this problem under the facts of that case. The court went on to easily affirm the executive’s conviction, after finding that the facts that the tickets were given only a few weeks before the

sion made in his or its official capacity, to induce him or it to do or omit to do any act in order, or to obtain an improper advantage to obtain or retain business.”) (emphasis added).

¹⁶⁰ H.R. REP. NO. 95-640, at 7 (1977).

¹⁶¹ 923 F.2d 1308 (8th Cir. 1991).

¹⁶² *Id.* at 1309–12.

¹⁶³ *Id.* at 1311.

¹⁶⁴ *Id.* at 1312.

contract was signed and were internally booked as a “consulting fee,” gave the jury ample evidence to conclude that the tickets were given with “corrupt” intent.¹⁶⁵

The next circuit court to address the meaning of “corruptly” was the Second Circuit in *Stichting v. Schreiber*, a civil malpractice case against a lawyer for providing allegedly bad FCPA advice that apparently led its recipient to erroneously believe that a voluntary payment offered to a Panamanian official to obtain a lease would not fall within the purview of American authorities under the FCPA if processed through its non-U.S. affiliate company.¹⁶⁶ Because continuation of that suit turned on the estoppel effect of a guilty plea under the FCPA, Judge Sack examined the elements of an FCPA violation, including the term “corruptly.”¹⁶⁷ To determine the meaning of this term, Judge Sack examined and quoted from the Act’s legislative history (which, as discussed above, tends to support the narrow view of corruptly).¹⁶⁸ And since the legislative history from the House of Representatives also indicates that the term “corruptly” as used within the FCPA is modeled on the way that term is used within the domestic bribery statute,¹⁶⁹ Judge Sack looked to the domestic bribery statute and its case law for guidance on that term. He explained that “a fundamental component of a ‘corrupt’ act is a breach of some official duty owed to the government or the public at large.”¹⁷⁰ It requires proof of a “bad purpose”—“in essence . . . an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.”¹⁷¹ “Corruptly,” according to Judge Sack, means “in addition to the element of ‘general intent’ present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position.”¹⁷² Therefore, although the facts of *Stichting* did not involve allegations of extortion by a foreign public official, Judge Sack’s opinion correctly suggests that the narrow view of extortion ought to prevail. If one makes a payment that is not intended to cause the official to misuse his official position—or, as in the context of coercive extortion, makes a payment in order to induce an official *not* to misuse his official position by threatening unfair action against the payer—then the payment would not meet the definition of “corruptly.”¹⁷³

¹⁶⁵ *Id.*

¹⁶⁶ *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 327 F.3d 173 (2d Cir. 2003).

¹⁶⁷ *Id.* at 175–76, 179.

¹⁶⁸ *Id.* at 182 (quoting S. REP. NO. 95-114 at 10 (1977)).

¹⁶⁹ *See id.* at 182 (citing H.R. REP. NO. 95-640, at 7–8 (1977)).

¹⁷⁰ *Id.* at 182 (internal citations omitted).

¹⁷¹ *Id.* at 182–83 (internal citations omitted).

¹⁷² *Id.* at 183.

¹⁷³ *Id.* Judge Sack further suggested that, even if a person’s payment actually caused the foreign official to violate his duty, he might nonetheless be able to argue that he did not satisfy the “corruptly” *mens rea* requirement, if he could show that he reasonably believed (based on the advice of counsel) that the giving of a payment would not cause the foreign official to violate his duty. *Id.*

In 2007, the Fifth Circuit in *United States v. Kay* also analyzed the meaning of “corruptly” in an appeal by two Houston executives convicted of making payments to Haitian officials for the purposes of reducing applicable customs and sales taxes on their company’s rice shipments.¹⁷⁴ In *Kay*, the court affirmed a jury instruction, virtually identical to the second formulation endorsed by the Eighth Circuit in *Liebo*, which appears to set forth the broad view of “corruptly.”¹⁷⁵ Notably, the Fifth Circuit also affirmed the trial court’s denial of an alternative instruction offered by the defendants that would have explained that “corruptly” meant to “achieve an unlawful result by influencing a foreign public official’s action in one’s own favor.”¹⁷⁶ Apparently, the Fifth Circuit believed that acting with a general intent to “accomplish[] an unlawful end” means substantially the same thing as acting with intent to influence an official’s action in one’s own favor, at least when coupled with a “willfully” instruction.¹⁷⁷ While this equation is suspect, the court’s ultimate decision in that matter—that defendant’s conduct was criminally “corrupt” under the FCPA—is difficult to dispute, even under a narrow definition of “corruptly,” since the payments in that case were essentially designed to gain an unfair advantage by obtaining a reduction in regularly applicable taxes.¹⁷⁸

The latest circuit court decision to address the “corruptly” requirement is that of the Second Circuit in the 2011 case of *United States v. Kozeny*.¹⁷⁹ In that appeal, Frederick Bourke challenged the jury instructions that led to his conviction for conspiring to violate the FCPA and making false statements in connection with an alleged scheme masterminded by one of his investment partners to provide potentially lucrative investment shares and other things of value to officials of Azerbaijan in order to ensure they would privatize a state-owned oil company and allow his investment consortium to profit from it. The Second Circuit, however, affirmed the district court’s jury instruction that set forth a “broad” “corruptly” instruction virtually identical

¹⁷⁴ *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007).

¹⁷⁵ *Id.* at 446 (corruptly means an act “done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means”).

¹⁷⁶ *Id.* at 449.

¹⁷⁷ *Id.* at 447–49.

¹⁷⁸ While Defendants “believed that if [their companies] were required to pay the full amount of duties and taxes that should have been paid on [their] imported rice they would not have been able to sell the rice at a competitive price, would have lost sales to competitors, and would not have realized an operating profit,” the presence of such economic fears would not dispel the finding that they were acting corruptly, even using the narrow definition of the term, because their fears were not caused by the Haitian officials but rather the marketplace itself. Second Superseding Indictment at ¶ 4, *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002) (Criminal Case No. 4-01-914), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kayd/12-15-04kay-indict.pdf>.

¹⁷⁹ See *United States v. Kozeny*, Docket No. 09-4704-cr(L), 2011 U.S. App. LEXIS 24740 (2d Cir. Dec. 14, 2011).

to that in *Liebo*.¹⁸⁰ And since there was evidence that Bourke knowingly entered into a conspiracy whose objective, as far as Bourke knew or deliberately sought to avoid knowing, was to pay Azeri officials to facilitate a profitable privatization, his conviction was upheld.¹⁸¹

Since none of these four court of appeals opinions squarely explained the meaning of “corruptly” as applied to a clear extortion setting, they offer little definitive guidance for use in such cases. However, with the exception of Judge Sack’s decision in the Second Circuit’s *Stichting* case, each of the courts of appeal to consider the meaning of “corruptly” under the FCPA appears to suggest that one can act “corruptly” simply by acting with a general intent to accomplish an unlawful result or by acting with an intent to achieve a lawful result through unlawful means like a secret payment. Only Judge Sack’s decision in *Stichting* correctly suggests that something more should be required to be convicted of making “corrupt” payments—an intent to influence the foreign official’s action to obtain something more than the fair treatment to which you were entitled.

Yet there are two further reasons to believe that Judge Sack’s narrow definition of “corruptly” might not be applied by prosecutors and might not necessarily prevail if and when a criminal case involving a payment made in response to clear foreign extortion comes to court, even in the Second Circuit. As discussed in-depth in the following section, the first reason is that the district court in *Kozeny* refused to permit an economic extortion defense¹⁸²—an issue not addressed on appeal.¹⁸³ The second reason is that when the Second Circuit did actually hear an alleged extortion case in the context of the domestic bribery statute on which the FCPA’s “corruptly” element is modeled—the 2002 case of *United States v. Alfisi*—the majority took the view that one acts corruptly even if the payment is made simply to have the official do his job properly.¹⁸⁴ And Judge Sack—the author of the *Stichting* decision—was in the dissent in that case.

United States v. Alfisi involved an alleged violation of the domestic bribery statute, 18 U.S.C. § 201. Alfisi, a produce wholesaler, was convicted of bribing a federal food inspector, but he claimed that the payments were made in response to extortion and to ensure that the inspector would simply do his job properly.¹⁸⁵ On appeal, Alfisi argued that, to satisfy the “corruptly” element, the prosecutor should be required to prove, and the jury should have been required to find, that Alfisi intended to induce a quid-pro-

¹⁸⁰ *Id.* at *29 (“[a] person acts corruptly if he acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result or a lawful result by some unlawful method or means,” and added that “[t]he term ‘corruptly’ is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position.”) (internal citations omitted).

¹⁸¹ *Id.* at *19–27 (2011).

¹⁸² See *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

¹⁸³ See *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011).

¹⁸⁴ *United States v. Alfisi*, 308 F.3d 144, 150 (2d Cir. 2002).

¹⁸⁵ *Id.* at 146.

quo beyond simply the inspector's performance of his duty.¹⁸⁶ In a split decision, the majority of the Second Circuit rejected Alfisi's argument. It found that the additional proof was not required under the broadly worded federal bribery statute.¹⁸⁷ The majority held that there were good reasons for using a broad definition of corruptly that would criminalize payments made simply to ensure an official does his job properly and does not take worse than fair treatment against the payer. The majority was concerned about the risk of "underinclusion"—i.e., failing to punish the givers of such payments even where the recipient did not actually violate his duty.¹⁸⁸ Although the majority also recognized that "there is of course a danger of overinclusion in a broad definition, in particular the risk here that marginally culpable conduct by those facing insistent extortionists will be criminalized," it believed that the danger is "eliminated or at least minimalized, [] by the existence of the economic coercion defense"¹⁸⁹ (which, notably, does not appear to exist in FCPA jurisprudence, as discussed in the following section).

Judge Sack—the author of the majority opinion in *Stichting*—wrote the dissent in *Alfisi*. He contended that a "payment made in the course of a shakedown where the public official demands payment as a quid pro quo for proper execution of his duty is not a bribe."¹⁹⁰ He reasoned that since bribery is a crime of specific intent,¹⁹¹ one does not commit the crime unless he intends to bring about the evil sought to be prevented, which is "the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty."¹⁹² When one makes a payment subject to extortion, he "does not act 'corruptly' within the meaning of the statute because he does not seek the lawlessness that the bribery statute aims to prevent."¹⁹³ Judge Sack also recognized, under the majority view, the use of the term "corruptly" is superfluous.¹⁹⁴ If corruptly means merely the intent to seek a quid pro quo, then it effectively means the same as intending to "influence an official act."¹⁹⁵

Although Judge Sack appears to have the more persuasively reasoned argument, his narrow definition of "corruptly" (which would seemingly exclude payments made in response to coercive extortion, economic or otherwise) does not seem to represent a consensus view under the domestic bribery statute or the FCPA. Indeed, at least three other circuit court deci-

¹⁸⁶ *Id.* at 150.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 151.

¹⁸⁹ *Id.*

¹⁹⁰ *Alfisi*, 308 F.3d at 155; *accord Kozeny*, 582 F. Supp. 2d at 540 n.29 ("[I]n the American system, it is generally accepted that a payment that was extorted was not a 'bribe.'").

¹⁹¹ *Alfisi*, 308 F.3d at 155 (citing *United States v. Barash*, 365 F.2d 395, 402 (2d Cir. 1966)).

¹⁹² *Id.* (quoting *United States v. Jacobs*, 431 F.2d 754, 759 (2d Cir. 1970)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 156.

¹⁹⁵ *Id.*

sions appear to have endorsed the broad view of “corruptly” under the FCPA. As a consequence of the limited and arguably conflicting case law discussed above, the meaning of “corruptly” in the extortion context continues to remain somewhat unclear. Prosecutors are thus left free to impose a broad view of the term to hold victims of coercive extortion liable—and this view is seldom challenged in the courts.

3. *Denial of an Economic Extortion Defense*

The third reason that unwilling bribe-givers have been subject to enforcement action under the FCPA is that economic extortion is not an available defense.¹⁹⁶ Thus, while one will not be held liable for a payment made in response to a threat to destroy property or inflict serious bodily injury or death,¹⁹⁷ a payment made in response to a threat of economic loss is still criminally culpable. This is particularly problematic since, as the majority recognized in *Alfisi*, the availability of an economic extortion defense is a safety valve for ensuring that a broad bribery statute is not overinclusive.¹⁹⁸

In the recent case of *United States v. Kozeny*,¹⁹⁹ discussed above, one of the defendants wanted to argue to the jury that he should be entitled to an affirmative defense under the FCPA because some of his business partner’s payments to officials in Azerbaijan were allegedly legal under Azeri law since they were the product of extortion and promptly self-reported.²⁰⁰ In ruling that Bourke’s argument was precluded because Azeri law did not actually render the payments legal under its written law—it merely relieved a person of criminal responsibility for them²⁰¹—Judge Scheindlin explained that “[i]f Bourke provide[d] an evidentiary foundation for the claim that he was the victim of ‘true extortion,’ [the court would] instruct the jury on what constitutes a situation of ‘true extortion’ such that Bourke would not be found to have possessed the ‘corrupt’ intent required for a violation under the FCPA.”²⁰² However, she refused to extend this rationale to a claim of economic extortion:

¹⁹⁶ See S. REP. NO. 95-114, at 10–11 (1977) (“The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice.”); see also *United States v. Kozeny*, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

¹⁹⁷ See *Kozeny*, 582 F. Supp. 2d at 541 n.31 (explaining that “an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA” because such actions would be under “duress,” and explaining that to establish coercion or duress a defendant must show (1) “a threat of force directed at the time of the defendant’s conduct”; (2) “a threat sufficient to induce a well-founded fear of impending death or serious bodily injury”; and (3) “a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity” (quoting *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005))).

¹⁹⁸ *United States v. Alfisi*, 308 F.3d 144, 151 (2d Cir. 2002).

¹⁹⁹ 582 F. Supp. 2d 535.

²⁰⁰ *Id.* at 537.

²⁰¹ *Id.* at 539.

²⁰² *United States v. Kozeny*, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

The legislative history of the FCPA makes clear that ‘true extortion situations would not be covered by [the FCPA].’ Thus, while the FCPA would apply to a situation in which a ‘payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,’ it would not apply to one in which payment is made to an official ‘to keep an oil rig from being dynamited,’ an example of ‘true extortion.’ The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the ‘conscious decision’ to pay the official. In other words, in the first example, the payer could have turned his back and walked away—in the latter example, he could not.²⁰³

Judge Scheindlin’s position tracks with other portions of the legislative history, which explain that the anti-bribery provisions “cover payments and gifts intended to influence the recipient, regardless of who first suggested the payment or gift” and that “the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe.”²⁰⁴ It appears to miss the point, however, recognized under analogous federal extortion law, that economic pressure can also rise to the level of extortion when the payer is placed in reasonable fear “that nonpayment would result in preclusion from or diminished opportunity for some existing or potential economic benefit.”²⁰⁵ Consequently, the district court’s ruling means that businesses that succumb to economic extortion will continue to face undeserved liability under the FCPA.

B. General Impunity of Corrupt Foreign Officials

In stark contrast to bribe payers, corrupt foreign officials largely remain free to engage in corruption with impunity. As noted by Senator Church (D-Idaho) in his floor statement introducing legislation that would later become the FCPA, “[f]or every giver there is a taker. And often the initiative comes from the foreign government official. Indeed, in some cases this initiative amounts to extortion.”²⁰⁶ Yet the implications of this truism appear to have been ignored. Apparently fearing foreign relations problems that could ac-

²⁰³ *Id.* at 540 n.32 (quoting S. REP. NO. 95-114, at 10–11 (1977)).

²⁰⁴ S. REP. NO. 95-114 at 10–11 (1977).

²⁰⁵ *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (en banc); *see also, e.g., United States v. Brecht*, 540 F.2d 45, 51 (2d Cir. 1976) (affirming Hobbs Act extortion conviction where defendant “induced fear in his victim, i.e., a fear of economic loss in that unless the victim paid \$1,000 to the appellant, the victim would not be able to compete successfully for the subcontract”).

²⁰⁶ 94 CONG. REC. S6516 (May 5, 1976) (statement of Sen. Frank Forrester Church (D-Idaho) introducing S. 3379 International Contributions, Payments, and Gifts Disclosure Act).

company a focus on corrupt foreign officials,²⁰⁷ the drafters of the statute made a conscious decision to focus only on the supply-side of bribery.²⁰⁸ Because of this statutory limitation, attempts to prosecute foreign officials under the FCPA or for conspiracy to violate the FCPA have been emphatically rejected by U.S. courts.²⁰⁹

Consequently, notwithstanding the more than one hundred different matters in which U.S. enforcement agencies have taken action to address foreign bribery violations and associated accounting violations, the DOJ has only prosecuted five foreign officials in three different matters related to foreign corruption. And prosecutors have had to resort to novel legal theories and alternative statutes to do so. As a result, the prosecutions are more costly and drawn out, and the sentences more lenient than need be. Consider the following examples:

- *Pavel Ivanovich Lazarenko* - In May 2008, U.S. federal prosecutors indicted the former Prime Minister of Ukraine in a fifty-three count indictment arising from Lazarenko's alleged abuse of his official position to commit economic "extortion," by "requir[ing] businesses to pay him fifty percent of their profits in exchange for his influence to make the businesses successful."²¹⁰ Because the FCPA cannot be used against corrupt foreign officials, prosecutors resorted to allegations of conspiracy, money laundering, wire fraud, interstate transportation of stolen property, and defrauding the Ukrainian people of their honest services.²¹¹ Yet these statutes were not designed to address foreign bribery and extortion, and after a jury trial, Lazarenko was convicted on only fourteen of the fifty-three counts. Moreover, on appeal, only eight of the original counts withstood scrutiny by the Fifth Circuit.²¹²
- *Robert Antoine and Jean Rene Duperval* - In December 2009, the DOJ charged two former directors of international relations at the Republic of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti ("Haiti Teleco") in connection with a scheme by which they received more than eight hundred thousand dollars in bribes from a Floridian telecommunications company in exchange for preferred telecom-

²⁰⁷ See *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991).

²⁰⁸ See 15 U.S.C. § 78dd-1 (active bribery by issuers); § 78dd-2 (active bribery by domestic concerns); § 78dd-3 (2006) (active bribery by persons other than issuers or domestic concerns "while in the territory of the United States").

²⁰⁹ See, e.g., *Castle*, 925 F.2d at 831.

²¹⁰ *United States v. Lazarenko*, 564 F.3d 1026, 1030 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 491 (2009).

²¹¹ *Id.* at 1029.

²¹² *Id.* at 1038 (upholding only the money laundering counts, the Fifth Circuit found that Lazarenko could be found liable for money laundering, using "extortion" as a predicate offense).

munications rates, reducing the number of minutes for which payment was owed, and giving a variety of credits.²¹³ Again, due to the fact that the FCPA cannot be used against foreign officials, prosecutors were forced to rely on money laundering charges. Fortunately for the government, Antoine pled guilty rather than seeking to go to trial. Duperval, however, decided to fight the charges and it took more than two years of expensive litigation before he was finally convicted in a jury trial in March of 2012.²¹⁴

- *Juthamas Siriwan and Jittsopa Siriwan* – On January 28, 2009, the DOJ indicted the former Governor of the Tourism Authority of Thailand and his daughter in connection with improper payments of approximately \$1.8 million in exchange for contracts to manage the “Bangkok International Film Festival,” for contracts related to a promotional book on Thailand and for contracts to provide an elite tourism privilege card marketed to wealthy foreigners.²¹⁵ Again, because prosecutors were not able to charge the defendants directly under the FCPA, the two were instead charged with conspiring to violate and violating federal statutes that prohibit money laundering to promote specified unlawful activity, i.e., bribery of a foreign official. In response to this attempted end-run around the FCPA’s limitations, defense lawyers predictably sought to dismiss the indictment,²¹⁶ contesting the government’s novel interpretation of the promotional money laundering statute, jurisdiction and the propriety of litigating in the United States since Thai authorities have the means and apparent inclination to do so. After no less than five rounds of substantive briefing on the motion and oral argument, the case was simply stayed.²¹⁷ Thus, more than three years after the initial indictment, the case remains pending.

As evidenced by the fact that there have only been three bribery-related cases brought against foreign officials compared with the more than one hundred separate FCPA enforcement actions brought against alleged payers of foreign bribes in the FCPA’s thirty-five year history, prosecutions of foreign officials on charges related to bribery or extortion are disturbingly rare.

²¹³ See *Steps Taken 2011*, *supra* note 131, at 52–53.

²¹⁴ Press Release, U.S. Dep’t of Justice, Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies, Laundered Funds Were Proceeds of Violations of the Foreign Corrupt Practices Act (Mar. 13, 2012), available at <http://www.justice.gov/opa/pr/2012/March/12-crm-310.html>.

²¹⁵ *Steps Taken 2011*, *supra* note 131, at 68–70.

²¹⁶ Motions to Dismiss, *United States v. Siriwan*, CR. Nos. 09-00081-1, 09-00081-2 (C.D. Cal. Aug. 19, 2011), ECF No. 64.

²¹⁷ Order to Stay the Action, *United States v. Siriwan*, CR. Nos. 09-00081-1, 09-00081-2 (C.D. Cal. Jan. 30, 2011), ECF No. 90.

They also tend to be more difficult, more expensive and less effective than they would be if the FCPA were redrafted to cover corrupt foreign officials and dispense with the need to employ complex legal theories or argue about ambiguous jurisdictional issues. This track record of infrequent and ineffective action against foreign officials is likely to mean one thing: corrupt foreign officials will continue to solicit, demand and accept bribes because the chances of getting punished are exceedingly low.

C. *Discouraging Disclosure Payments to Foreign Officials*

Another reason why corruption is likely to persist under the current regime is because those who voluntarily disclose their payments to foreign officials are often severely punished.²¹⁸ The current strategy of encouraging disclosure of corrupt transactions in the United States involves giving “credit” to those companies who voluntarily disclose FCPA violations. In its 2001 Seaboard Report, the SEC explained that it would possibly forgo penalties for companies that “promptly, completely, and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators.”²¹⁹ Similarly, the DOJ has identified nine factors that federal prosecutors will consider when deciding whether to indict a company, including “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”²²⁰

Taking these principles into account, and to promote voluntary disclosure of improper payments to foreign officials, the DOJ has adopted a policy of entering into deferred-prosecution agreements (“DPAs”) or non-prosecution agreements (“NPAs”) with those who voluntarily disclose their role in foreign bribery.²²¹ On January 13, 2010, the SEC announced a similar initia-

²¹⁸ See *e.g.*, Low et al., *supra* note 80, at 11; see also, Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L. J. 393, 402 (2010).

²¹⁹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001) [hereinafter Seaboard Report].

²²⁰ Memorandum from Deputy Attorney Gen. Larry Thompson to Heads of Dep’t Components, Principles of Fed. Prosecution of Bus. Org. (Jan. 20, 2003), available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm; Memorandum from Deputy Attorney Gen. Paul J. McNulty to Heads of Dep’t Components, Principles of Fed. Prosecution of Bus. Org. 4 (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; Memorandum of Deputy Attorney Gen. Mark R. Filip, Principles of Fed. Prosecution of Bus. Org. 4 (Aug. 28, 2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

²²¹ See, *e.g.*, Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep’t of Justice, to Eric A. Dubelier, Reed Smith, L.L.P. (Feb. 8, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf>; Letter from Mark F. Mendelson, Deputy Chief, Fraud Section, U.S. Dep’t of Justice, to Martin J. Weinstein, Wilkie Farr & Gallagher, L.L.P. (Nov. 4, 2007), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech/11-14-07lucent-agree.pdf>; Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep’t of Justice, to Saul M. Pilchen, Skadden Arps Slate Meagher & Flom, L.L.P. (Sept. 21, 2007), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements

tive to make increased use of DPAs and NPAs to “incentivize companies to fully and truthfully cooperate and assist with SEC investigations and enforcement actions.”²²² The United States Sentencing Guidelines also advise judges to take account of voluntary disclosure, should an FCPA matter come to sentencing. The commentary to Chapter Eight on the Sentencing of Organizations explains that one of the factors that “mitigate[s] the ultimate punishment of an organization” is “self-reporting, cooperation, or acceptance of responsibility.”²²³

While efforts to incentivize disclosure are certainly a step in the right direction, this system is flawed for a number of reasons, which largely have to do with the incentives it creates for many bribe-givers to take their chances to see if they get caught. First, the provision of “credit,” NPAs, or DPAs is unlikely to encourage prompt cooperation because bribe-givers do not know until after they disclose whether they will be granted a coveted deferred prosecution or non-prosecution agreement. Indeed, the SEC has made clear that it will evaluate “*whether*, how much, and in what manner to credit cooperation by individuals in its investigations and enforcement actions” according to a series of criteria that “requires a case-by-case analysis of the specific circumstances presented.”²²⁴

Second, even when companies do voluntarily disclose, a vast majority are nonetheless subjected to substantial sanctions. According to one study of all companies that had unambiguously volunteered information regarding their own FCPA violations from the late 1990s to 2007 (which amounted to twenty-two companies, representing approximately one-fifth of all FCPA actions during that period), half (eleven of twenty-two) were subject to enforcement actions by the SEC and/or DOJ against the company and/or its employees.²²⁵ Since the time of that study, another eight of those same twenty-two companies that voluntarily disclosed their FCPA violations faced some form of enforcement action,²²⁶ bringing the total percentage of those

/pdf/paradigm.pdf; Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep’t of Justice, to Timothy L. Dickinson, Paul Hastings Janofsky & Walker (Aug. 21, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/textron-inc/08-21-07/textron-agree.pdf>; Agreement between U.S. Dep’t of Justice, Criminal Division, Fraud Section, and InVision Technologies, Inc. (Dec. 3, 2004), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03-04invisiontech-agree.pdf>.

²²² Press Release, S.E.C., SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-6.htm>.

²²³ U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (2009).

²²⁴ Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, 17 C.F.R. § 202.12 (2011) (emphasis added).

²²⁵ Low et al., *supra* note 80, at 11.

²²⁶ See *Steps Taken 2011*, *supra* note 131, at 128–29 (Chiquita Brands International ordered to cease-and-desist and pay a one hundred thousand dollar civil penalty); *id.* at 41–44 (Dimon Inc./Alliance One International entered into NPA requiring three-year compliance monitor, guilty pleas by two subsidiaries, criminal fines totaling \$9.45 million, reached SEC settlement requiring disgorgement of ten million dollars, and had civil penalties assessed against two employees of forty thousand dollars each); *id.* at 100 (Delta & Pine Land Company ordered to retain independent compliance consultant and pay a three hundred thousand

voluntarily disclosing companies who subsequently faced government enforcement action to a stunning eighty-six percent.

Third, although a few companies that voluntarily disclose do get off with only a cease-and-desist order, many other companies that have voluntarily disclosed have been forced to make substantial payouts to U.S. regulators in the form of criminal penalties, civil penalties, and disgorgement. These direct monetary sanctions are also commonly accompanied by the obligation to hire expensive independent compliance monitors, agree to management restructuring, or have subsidiaries plead guilty to criminal charges.²²⁷ These penalties lead many companies and their lawyers to question whether voluntary disclosure of payments makes economic sense.²²⁸ According to one prominent law firm, “an attorney representing a corporation cannot recommend voluntary disclosure of potentially criminal FCPA activities without weighing the [government’s] promise of a ‘real benefit’ against the very real risks.”²²⁹

Fourth, the provision of DPAs and NPAs does nothing to ensure that disclosers will be immune from private civil suits, which can be in many ways as painful and disruptive as governmental enforcement proceedings. In his recent testimony to Congress, a representative of the U.S. Chamber of Commerce derided the phenomenon of “piggyback” civil litigation that follows on the heels of governmental proceedings, often even before such governmental actions have been concluded.²³⁰ Notably, he argued that “[w]hen companies and their senior officers and directors face personal civil liability

dollar civil penalty); *id.* at 59–61 (Faro Technologies Inc. entered into NPA requiring engagement of independent compliance monitor for two years and criminal fine of \$1.1 million); *id.* at 13–15 (Johnson & Johnson agreed to pay \$21.4 million criminal penalty, \$48.6 million in disgorgement and prejudgment interest to settle the SEC’s civil charges); *id.* at 36–37 (Pride International Inc. entered into DPA requiring payment of \$32.6 million in criminal fines, was forced to pay disgorgement of \$23,529,718 and had two of its employees ordered to pay forty thousand dollars and twenty-five thousand dollars in civil penalties respectively); *id.* at 12–13 (Rockwell Automation agreed to pay disgorgement of \$1,771,000, prejudgment interest of \$590,091, and a civil money penalty of \$400,000); *id.* at 44–45 (Universal Corp. entered into NPA requiring hiring of independent compliance monitor for three years, fine of \$4.4 million and its subsidiary to plead guilty and also paid disgorgement of \$4,581,276.51).

²²⁷ *See id.*

²²⁸ *See* Low et al., *supra* note 80, at 24 (“Counsel that fails adequately to apprise clients of not just the potential advantages but also of the likely disadvantages of disclosure may find they have unhappy clients or worse.”); GIBSON, DUNN & CRUTCHER, 2009 YEAR-END FCPA UPDATE 15 (2010), available at <http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx> (“Although it is certain that companies do receive some benefit for self-reporting FCPA violations, the real question is whether the company considering a voluntary disclosure is better off for having made the disclosure, which is not necessary [sic] one-and-the-same.”).

²²⁹ JACQUELINE C. WOLFF & PAMELA SAWHNEY, COVINGTON & BURLING, FCPA VOLUNTARY DISCLOSURES: A RISK/BENEFIT ANALYSIS 1 (2008), available at <http://www.cov.com/files/Publication/97ca6c31-614b-4ace-a441-6dab61135c65/Presentation/PublicationAttachment/3980bda8-c3b1-4f62-9df9-7845d53e1764/FCPA%20Voluntary%20Disclosures%20-%20A%20Risk-Benefit%20Analysis.pdf>.

²³⁰ *Can We Sue Our Way to Prosperity?: Litigation’s Effect on America’s Global Competitiveness: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 29 (2011) (statement of John H. Beisner, Skadden, Arps L.L.P., on behalf of the

in addition to any exposure to the DOJ and SEC, their judgments regarding what issues to investigate and what results to report to the DOJ and SEC necessarily will be affected, possibly to the detriment of the integrity of the government's investigation."²³¹ Simply put, the fear of civil litigation means companies may not fully disclose corrupt payments.

Fifth, despite the obvious difficulties associated with getting accurate numbers on how many undisclosed bribes are occurring by persons subject to the FCPA, the likelihood of getting independently caught without making a disclosure almost certainly remains low.²³² As argued in Part II above, Section 10A reports by auditors "rarely will be triggered,"²³³ and the new Dodd-Frank whistleblower rules may not have a significant impact.²³⁴

These factors suggest that the current regime of voluntary disclosure is flawed because it does not, as hoped, properly incentivize many FCPA violators to come forward. The likelihood of facing severe consequences upon voluntary disclosure may simply be too great when compared to the threat of even harsher sanctions upon detection, when discounted by the significantly lower risk of getting independently caught. Moreover, the premise that those who bribe foreign officials are risk-adverse or at least risk-neutral—i.e., that such persons would prefer to disclose payments to foreign officials rather than face the harsher penalties that would likely ensue if they were to get caught without having disclosed the payments—may be faulty as well. Indeed, ample criminological research suggests that a number of white-collar criminals may actually be risk-prone—whether due to personality traits, socialization or otherwise.²³⁵ If this is true, then the lack of an independent upside incentive to disclosure, wholly apart from the "benefit" of avoiding the *risk* of harsher penalties upon independent detection, may prove fatal to efforts to prompt voluntary self-disclosure.

D. Denying Legal Redress to Victims of Coercive Extortion

The U.S. Supreme Court long ago noted that "[t]he victim of an extortion . . . has a right to restitution."²³⁶ The fact that the extortionist "secured the money with the consent of his victim" is "irrelevant."²³⁷ Nevertheless, in

U.S. Chamber Institute for Legal Reform), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg66540/pdf/CHRG-112hrg66540.pdf>.

²³¹ *Id.* at 41.

²³² Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FL. J. INT'L L. 169, 186 (2006) ("Disguising bribery is cheap. The chances of being detected are low.").

²³³ Implementation of Section 10A of the Securities Exchange Act of 1934, 62 Fed. Reg. 12743, 12748 (Mar. 18, 1997) (codified at 17 C.F.R. pts. 210, 240 (2011)).

²³⁴ See Collins et al., *supra* note 104, at 1.

²³⁵ JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME* 186–87 (5th ed. 2002) (quoting studies that conclude that white-collar offenders are "reckless" and "risk-seekers" after surveying and interviewing them).

²³⁶ James v. United States, 366 U.S. 213, 216 (1961).

²³⁷ *Id.* at 217.

the context of foreign business transactions, victims of extortion have been denied recovery for their losses in federal courts.²³⁸

The Mandatory Victim's Restitution Act ("MVRA") enacted in 1996, provides for mandatory restitution to victims of certain crimes, including "offense[s] against property under [title eighteen] . . . including any offense committed by fraud or deceit"²³⁹ provided "an identifiable victim or victims has suffered a physical injury or pecuniary loss."²⁴⁰ Extortion of money has been held to fall within the meaning of "offenses against property" under the MVRA.²⁴¹ A person forced to pay money as a result of extortion would also fall within the definition of "victim," which is defined under the statute as "a person directly and proximately harmed as a result of the commission of an offense" including "any person directly harmed by the defendant's criminal conduct in the course of the scheme, pattern, or conspiracy."²⁴²

Courts have nevertheless been reluctant to classify those who make payments to foreign officials as a result of clear extortion as "victims" under the MVRA. They have summarily denied recovery to payers not directly referenced in the prosecutor's indictment against the extortionate foreign official.²⁴³ They have also fashioned a "co-conspirator exception to the MVRA"²⁴⁴ which provides that "in the absence of exceptional circumstances, a co-conspirator cannot recover restitution for crimes in which he or she participates."²⁴⁵

The "co-conspirator exception" was applied in the case of the restitution claim brought by Ukrainian businessman Peter Kiritchenko after the successful money laundering prosecution of Former Ukrainian Prime Minister Pavel Lazarenko, discussed above. As a predicate offense to the money laundering charge against Lazarenko, the government alleged and the jury concluded that Kiritchenko had been economically extorted by Lazarenko.²⁴⁶ Consequently, after Lazarenko's conviction, Kiritchenko sought and obtained from the district court an order for nineteen million dollars in restitution under the MVRA.²⁴⁷ On appeal by Lazarenko, however, the Court of

²³⁸ See, e.g., *Sedco Int'l, S.A. v. Cory*, 522 F. Supp. 254, 286–89, 321 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir. 1982) (payment of bribe solicited by Qatari official to secure concession unrecoverable by estate of investor).

²³⁹ 18 U.S.C. § 3663A(c)(1)(A)(ii) (2006).

²⁴⁰ 18 U.S.C. § 3663A(c)(1)(B) (2006).

²⁴¹ *United States v. Lazarenko*, 624 F.3d 1247, 1249–50 (9th Cir. 2010).

²⁴² 18 U.S.C. § 3663A(a)(2) (2006).

²⁴³ See *United States v. Lazarenko*, No. C00-00284 MJJ (N.D. Cal. May 30, 2007) (order denying restitution to Alexei Ditiatkovsky in connection with funds allegedly extorted from him by former Ukrainian Prime Minister Pavel Lazarenko, after Lazarenko's conviction for extorting other individuals, including Peter Kiritchenko).

²⁴⁴ *United States v. Lazar*, 770 F. Supp. 2d 447, 450 (D. Mass. 2011). See also *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) (vacating restitution order that compensated "co-conspirators" in pump-and-dump scheme).

²⁴⁵ *Lazarenko*, 624 F.3d. at 1251.

²⁴⁶ *Id.* at 1250.

²⁴⁷ *Id.* at 1249.

Appeals for the Ninth Circuit reversed the order of restitution. According to the court, the text of the MVRA could not control as to Kiritchenko because it would lead to “absurd results.”²⁴⁸ Applying the co-conspirator exception, the court found that Kiritchenko was not entitled to restitution because he “was both a victim and a participant.”²⁴⁹ It reached this conclusion because, rather than seeking to withdraw from the extortionate scheme, Kiritchenko continued to do business “even though he knew that his own past ‘victimization’ was the basis of the laundered money.”²⁵⁰ Even more important to the court—and perhaps the deciding factor in its analysis of the co-conspirator exception—was that Kiritchenko “profited greatly from the overall criminal enterprise.”²⁵¹

The decision to deny recovery to Kiritchenko may well have been a fair and reasonable one on its facts. After all, it comports with the facially reasonable policy that courts ought not to encourage corrupt transactions or to allow a participant in a corrupt transaction to benefit from his misconduct.²⁵² However, the reasoning of the Ninth Circuit’s decision—which focuses on the profit obtained by Kiritchenko as a result of Lazarenko’s extortionate scheme—is troubling for its breadth. Since one profits anytime she is not forced to delay, terminate, or withdraw a successful business, the “co-conspirator exception” would seemingly apply not only in cases where the bribe was paid to obtain new business, but also where it was paid to protect an existing one from an extortionate threat.²⁵³ In the latter case, we may want the victims of such an extortionate threat to reluctantly pay the bribe since it is likely to save money and jobs in the short-term. And in the long-run, payments are likely to diminish under the proposal outlined below because foreign officials will become increasingly afraid of demanding them out of fear of prosecution.²⁵⁴ Moreover, even if such a broad application of the “co-conspirator exception” was not the Ninth Circuit’s intent, it is likely such a message has been heard, as few payers have come forward to claim restitution—or independently file civil suits for damages against foreign offi-

²⁴⁸ *Id.* at 1251.

²⁴⁹ *Id.* at 1250.

²⁵⁰ *Id.* at 1252. The court rejected Kiritchenko’s argument that “a co-conspirator/victim is entitled to restitution whenever the harm arose from criminal conduct in which he or she did not participate.” *Id.* It distinguished Kiritchenko’s case from a prior case in which a woman who conspired to be smuggled into Guam was granted restitution because she subsequently became enslaved by her co-conspirator because in contrast to that woman, Kiritchenko exhibited a “deep and willing complicity in the heart of the conspiracy, following his initial victimization.” *Id.*

²⁵¹ *Id.* at 1251.

²⁵² *Sedco Int’l, S.A. v. Cory*, 522 F. Supp. 254, 317–19 (S.D. Iowa 1981).

²⁵³ Indeed, given the court’s focus on whether the payer profited through payment of the extortion, one wonders whether a person who pays a bribe to avoid the dynamiting of their oil rig (i.e., a “true extortion situation”) might also be denied restitution since she will undoubtedly have profited from the use of the rig.

²⁵⁴ See *supra* Section III.A.2.

cials²⁵⁵—notwithstanding the fact that significant numbers may have been extorted.²⁵⁶

IV. SUGGESTED IMPROVEMENTS TO THE CURRENT ANTI-BRIBERY REGIME

In view of the above issues, this Part of the Article adds another voice to the parade of those calling for a revision of the FCPA. It advances six interlocking proposals:

- (1) Congress should decriminalize the act of giving a bribe to a foreign official.
- (2) Congress should require all U.S. persons, domestic concerns, and issuers to truthfully and accurately report, on a confidential basis to law enforcement authorities, all bribe solicitations by foreign officials, all non *de minimis* payments to intermediaries, and all non *de minimis* payments to foreign officials in much the same way it currently requires Reports of Suspicious Activity from financial institutions.
- (3) Congress should establish an express safe harbor, such that persons who truthfully and accurately disclose payments made to foreign officials would be immune from all U.S. criminal prosecution. The safe harbor should also immunize persons whose payments were made unwillingly, or payments that fall within an existing FCPA exception or affirmative defense, from civil suits.
- (4) Congress should, after such reports are investigated and payments are segregated into those made “willingly” and “unwillingly,” let competitors and foreign governments punish those who willingly make payments to foreign officials. To do so, it should authorize the public disclosure of the aforementioned mandatory reports in cases where it is determined that willing bribery not falling within an existing FCPA exception or affirmative defense has occurred. It should also create an express private right of action under the FCPA to

²⁵⁵ In addition to the MVRA, a very limited number of states, including California and possibly Texas, recognize a cause of action for civil extortion. *See, e.g.,* Monex Deposit Co. v. Gilliam, 666 F. Supp. 2d 1135 (C.D. Cal. 2009); CFJ Mfg., L.P. v. Sweetworks, Inc., No. 3:04-CV-0070-J-99TEM, 2005 U.S. Dist. LEXIS 33953, at *33–34 (M.D. Fla. Apr. 14, 2005) (citing elements of claim under Texas law). *But see* Margaux Warren Park Partners, Ltd. v. GE Bus. Fin. Servs., (*In re* Margaux Warren Park Partners, Ltd.), No. 08-43388, Adversary Case No. 09-04022, 2009 Bankr. LEXIS 4128, at *9 (E.D. Tex. Dec. 15, 2009). However, even in states that recognize such a claim, there appear to be no reported cases of such a claim being filed in the U.S. against a foreign official.

²⁵⁶ *See* TRANSPARENCY INTERNATIONAL, 2009 GLOBAL CORRUPTION REPORT: CORRUPTION AND THE PRIVATE SECTOR 4 (2009), available at http://www.transparency.org/publications/gcr/gcr_2009.

allow competitors harmed by such willing bribery to sue willing bribe givers for significant statutory damages.

- (5) Congress should amend the FCPA to expressly authorize the criminal prosecution of corrupt foreign officials who solicit, extort and/or receive bribes, in cases where their home governments are unwilling or unable to do so.
- (6) Congress should codify and clarify the “co-conspirator” exception to restitution under the MVRA to allow U.S. persons who truthfully and accurately disclose unwilling payments to foreign officials that are made to protect an existing business (rather than acquire a new one) to recover their losses.

A. *Congress Should Decriminalize Active Bribery*

The exclusive focus of the FCPA, as explained above, is on punishing those who commit active bribery, generally regardless of whether such payments were made willingly or unwillingly. As a result, the regime unjustly punishes some who do not deserve it while providing de facto immunity to many corrupt foreign officials who do. Moreover, the imposition of punishment upon payers who disclose payments—even when made unwillingly—deters the disclosure of such payments, virtually ensuring that foreign officials will continue to demand bribes. It is thus ineffective. In order to make the FCPA more just and effective at preventing corruption, active bribery should be decriminalized, in the case of both unwilling and willing payers. This section explains the reasons for this somewhat counter-intuitive conclusion.

1. *The Case for Decriminalizing Unwilling Bribery*

While not all those who engage in active bribery do so because they have been extorted, the U.S. has recognized that “[i]n many cases . . . the foreign public official solicited the bribe.”²⁵⁷ And the term “solicited” is almost certainly a euphemism for “demanded” in many cases.²⁵⁸ In a survey by Transparency International of more than 2,700 business executives in twenty-six countries, almost forty percent reported being requested to pay a bribe in the previous year.²⁵⁹ Likewise, in another Transparency International

²⁵⁷ Response of the United States, *supra* note 128, at 26.

²⁵⁸ See *Protecting the Ability of the United States to Trade Abroad: Hearing on S. Res. 265 Before the Subcomm. on Int'l Trade of the S. Comm. on Fin.*, 94th Cong. 2 (1975) (statement of Sen. Abe Ribicoff (D-Conn.)) (acknowledging that “foreign governments accept, and frequently require bribery, unethical contributions and the like”).

²⁵⁹ TRANSPARENCY INTERNATIONAL, 2009 GLOBAL CORRUPTION REPORT: CORRUPTION AND THE PRIVATE SECTOR 4 (2009), available at http://www.transparency.org/publications/gcr/gcr_2009.

survey of more than 1,000 executives, almost twenty percent claimed to have lost business due to a competitor paying bribes.²⁶⁰

In reality, most businesses would probably prefer not to pay bribes, if it can be avoided. It also appears that a number of those who pay bribes probably do not need to pay either. As evidenced by the fact that many companies that pay bribes are global leaders in their respective industries,²⁶¹ it seems clear that their products and services are capable of succeeding on their own merits. In cases where companies neither want nor need to pay bribes, it appears safe to conclude that payments made under such circumstances may be occurring pursuant to economic coercion or extortion. Contrary to the official U.S. position, the fact that one party may have been extorted (economically or otherwise) to pay a bribe does—or at least *should*—matter. From a moral perspective, the existence of an extortionate demand casts doubt on whether the payer’s conduct is truly culpable. Coercive pressure renders the payer’s conduct involuntary, in some sense, since the choice to pay the bribe is not dictated primarily by the payer’s free will, but rather by the choice-between-evils that is presented by an extortionate demand. From a legal perspective, the existence of economic coercion and/or extortion should cast doubt on whether such payments were truly “corrupt” within the meaning of the statute,²⁶² yet the courts and prosecutors do not appear to be applying the statute that way.²⁶³ Instead, as noted above, it appears that enforcement action against bribe givers is taken in all except a very narrowly

²⁶⁰ *Id.*

²⁶¹ See H.R. REP. NO. 95-640, at 4 (1977) (companies that disclosed payments to SEC were “some of the largest and most widely held public companies in the United States”). Compare *Fortune Global 500 2011*, FORTUNE (July 25, 2011), http://money.cnn.com/magazines/fortune/global500/2011/full_list/ (which, in just the top 100, includes the following companies involved in FCPA enforcement action: Royal Dutch Shell (No. 2), Chevron (No. 10), ENI (No. 23), Daimler (No. 24), Siemens (No. 47), IBM (No. 52), Statoil (No. 67), Deutsche Telekom (via its subsidiary Magyar Telekom) (No. 75)), with *Steps Taken 2011*, *supra* note 131, at 32, 91, 17, 49, 70, 112, 131 (describing enforcement actions of these Fortune 500 companies of Shell, Chevron, ENI, Daimler, Siemens, IBM, and Statoil) and Press Release, Dep’t of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html>.

²⁶² *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 S. REP. NO. 95-114, at 10 (The word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient.).

²⁶³ *United States v. Alfisi*, 308 F.3d 144, 150 n.1 (2d Cir. 2002) (recognizing that “economic coercion is [generally] relevant to the culpability of the intent of a defendant charged with bribery”) (citing *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966)); see also *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004) (recognizing that jury instructions on economic coercion allowed the jury to adequately consider whether the defendant lacked corrupt intent, but not directly affirming the propriety of same).

defined set of so-called “true extortion” situations—that is, circumstances involving threatened jail, property destruction, injury, or death.²⁶⁴

Such a narrow view of extortion is inconsistent with the broad view of extortion that the U.S. has taken in prosecutions of corrupt officials, where domestic public officials have been found guilty of extortion in the absence of threatening jail, property destruction, injury, or death—sometimes even in the absence of solicitation.

As discussed above, in cases like *Evans* and *Lazarenko*, federal prosecutors have argued and federal courts have agreed that extortion is committed when a public official makes wrongful use of his office to obtain money not due him or his office.²⁶⁵ They have recognized, as other courts have, that “[t]he public officer’s misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear.”²⁶⁶ Indeed, implicitly or expressly placing someone in reasonable fear that “nonpayment would result in preclusion from or diminished opportunity for some existing or potential economic benefit” qualifies as extortion.²⁶⁷

There is injustice in such inconsistent definitions of extortion. While the U.S. should continue to prosecute public officials—whether domestic or foreign—using a broad definition of extortion that includes economic extortion, it should heed to a similarly broad definition to conclude that the person subject to economic extortion is a victim who should be relieved of criminal responsibility.

Perhaps the most compelling reason for decriminalizing unwilling bribe giving, however, is because prosecution deters disclosure of the corrupt transactions. In turn, lack of disclosure reduces the likelihood that corrupt foreign officials will be caught and future bribery will be prevented. Since this rationale extends to decriminalizing willing bribe-giving, it will be discussed in the following subsection.

²⁶⁴ *United States v. Kozeny*, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008) (“By the same token, an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA.”).

²⁶⁵ See, e.g., *Evans v. United States*, 504 U.S. 255, 268 (1992); *United States v. Lazarenko*, 564 F.3d 1026, 1038–39 (9th Cir. 2009). See also *United States v. Margiotta*, 688 F.2d 108, 130 (2d Cir. 1982).

²⁶⁶ *Margiotta*, 688 F.2d at 130–31.

²⁶⁷ *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987); see also *United States v. Brecht*, 540 F.2d 45, 52 (1976) (affirming extortion conviction where payment of one thousand dollars was made condition of competing for contract); *United States v. Addonizio*, 451 F.2d 49, 73 (3d Cir. 1971) (affirming extortion conspiracy conviction of mayor demanding kick-backs in exchange for participation in city water and sewer projects); *United States v. Pranno*, 385 F.2d 387, 389–90 (7th Cir. 1967) (affirming extortion conspiracy conviction of public officials paid money in exchange for issuing a building permit to a company and its contractor); *United States v. Sopher*, 362 F.2d 523, 527 (7th Cir. 1966) (affirming extortion conviction where mayor solicited cash in exchange for approval of sales contract with city).

2. *The Case for Decriminalizing Willing Bribery*

As set forth above, the case for decriminalizing unwilling bribe-giving rests in part on notions of fairness and justice. Yet even in the absence of such moral underpinnings—that is, even when bribe-givers undoubtedly *are* morally culpable—there are still good reasons to decriminalize the giving of bribes.

The most compelling reason for decriminalizing willing bribery is that criminalization not only does little to actually prevent bribery but rather allows it to quietly flourish. By criminalizing bribery, the U.S. discourages disclosure of it. Government authorities tend to lose the benefits that could be obtained by enlisting bribe-givers to their anti-corruption cause. India's Chief Economic Advisor at the Ministry of Finance, Kaushik Basu, has forcefully argued that people who pay low-level “harassment bribes”—that is, payments made to government officials “that people often have to give to get what they are legally entitled to”—should have “full immunity from any punitive action by the state.”²⁶⁸ By decriminalizing such payments, Basu argues, the incidence of bribery should decline.²⁶⁹ Although Basu's argument for decriminalization was limited to bribes that could properly be classified as “unwilling bribes,” his reasoning is persuasive for large willing bribes as well.²⁷⁰ Basu recognized that under a regime in which paying a bribe is unlawful, the bribe-payer and the foreign official are each incentivized to keep the transaction quiet.²⁷¹ However, in a world in which the bribe-giver is immunized from criminal liability “the interests of the bribe giver and the bribe taker will be at divergence” after the bribe has been paid.²⁷² Basu explains that “the bribe giver will be willing to cooperate in getting the bribe taker caught.”²⁷³ To help get his money back, he may even begin to gather evidence of the extortionate demands.²⁷⁴ More importantly, “[k]nowing that this will happen, the bribe taker will be deterred from taking a bribe” in the first place.²⁷⁵

Critics of decriminalization may argue that it will lead to a rise in the numbers of bribes promised, offered, and given. However, there are at least two reasons why this seems unlikely to occur. First, willing bribe givers that

²⁶⁸ Kaushik Basu, *Why, for a Class of Bribes, the Act of Giving a Bribe Should be Treated as Legal* 3–4, 8 (Min. of Fin., Gov't of India, Working Paper S.No. 1/2011-DEA), available at http://finmin.nic.in/WorkingPaper/Act_Giving_Bribe_Legal.pdf. Such payments might well be classified as “facilitation payments” under the FCPA.

²⁶⁹ *See id.* at 5.

²⁷⁰ Basu has reservations about legalizing bribery in such cases because the bribe-giver will have received what he does not deserve (e.g., a lucrative government contract). *See id.* at 8. There are, however, legal mechanisms by which this problem can seemingly be resolved, including the remedies of disgorgement and contract rescission.

²⁷¹ *See id.* at 5.

²⁷² *Id.* at 3.

²⁷³ *Id.*

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 3.

disclose such payments would still be subject to legal action by competitors and those foreign governments, and those that do not disclose would be subject to criminal sanction in the U.S. for failing to do so. Second, our personal ethics are not so weak as to be necessarily dictated by criminal law. Criminological research shows that “[s]ome acts of crime, including corporate crime, are not committed simply because it is believed to be wrong to commit them.”²⁷⁶ And indeed, if the recent decriminalization of prostitution in certain countries offers any example by analogy, there is reason to believe that fears of an explosion in previously-unlawful behavior may not be realized.²⁷⁷ But even if the incidence of bribe offers were to increase as a result of legalizing them, foreign officials would be less likely to accept them out of fear of getting reported and punished.²⁷⁸ This should be particularly true under the proposed regime because mandatory reporting requirements would immediately reveal the identities of the foreign officials involved who would then be exposed to criminal prosecution, as well as civil claims for restitution.²⁷⁹ Section III.E, below, explains how such corrupt officials could be prosecuted in the U.S., if their home governments are unwilling or unable to do so.

Prevention is not the only reason for decriminalizing bribery; efficiency is another. The U.S. government need not devote increasing amounts of its valuable resources on prosecuting those who engage in willingly giving bribes because those who are harmed by such acts—including competitors and foreign governments—are fully incentivized to mete out justice. After all, when we consider that the American interest in prohibiting foreign bribery is largely to vindicate our sense of ethics and ensure “the integrity of a fair commercial market,”²⁸⁰ it becomes clear that business competitors, foreign countries, and their citizenry—all of whom suffer tangible losses from

²⁷⁶ Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 *LAW & SOC'Y REV.* 549, 554, 574 (1996) (recognizing that “the decision to commit corporate crime is also likely to be affected by normative factors, such as one’s moral evaluation of the act” and concluding after study that “personal moral rules that proscribed a particular act of corporate crime was the single best predictor of intentions”).

²⁷⁷ New Zealand’s Prostitution Reform Act of 2003 decriminalized prostitution for persons over age 18. In a 2007 report commissioned by the Health Research Council and the Ministry of Justice of New Zealand, researchers who conducted quantitative and qualitative analysis including comparisons pre- and post-decriminalization, concluded that decriminalization had “no discernable impact on the number of people entering the sex industry” and sex workers were “more likely post-decriminalization to report a bad incident to them.” See GILLIAN ABEL, LISA FITZGERALD & CHERYL BRUNTON, *THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS: REPORT TO THE PROSTITUTION LAW REVIEW COMMITTEE 7, 15*, available at <http://www.otago.ac.nz/christchurch/otago018607.pdf>.

²⁷⁸ Basu, *supra* note 268, at 5.

²⁷⁹ See *infra* Sections III.B and III.E.

²⁸⁰ See David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 *STAN. L. REV.* 1371, 1372 (2008) (“[F]ederal white collar criminal law has exhibited a remarkable trend toward the principle that the victim protected by our white collar laws is an abstraction: the theoretical equilibrium (or, in more ethical terms, the ‘integrity’) of a fair commercial market.”).

corruption—are the true victims of willing bribery of foreign officials. And, one might reasonably argue that, in contrast to many other crime victims, corporations and foreign countries do not need U.S. criminal laws to protect them from the effects of corruption, particularly if federal criminal prosecution means that the restitution obtained from the criminal will fall into U.S. government coffers rather than to their own.

At its root, the theory of deterring bribery violations under the U.S. legal system is premised on inflicting the pain of imprisonment and monetary penalties upon those who commit such acts. But there are few, if any, obvious reasons why the U.S. government needs to be the one inflicting such pains, provided others could do it just as effectively. If the threat of U.S. imprisonment is a deterrent, the threat of spending time in a foreign prison should be greater. All that would seem to be required in many cases is a means to assist foreign governments in detecting when such misconduct occurs, and by whom.²⁸¹ If the threat of being forced to pay money is a deterrent, the relevant question would appear to simply be “how much?” not “who makes the offender pay?” On this issue, all that would seem to be required is for Congress to give the green light by creating a private cause of action with the appropriate amount and type of statutory remedies.²⁸²

B. Congress Should Mandate Detailed Disclosure of All Intermediary Fees, Bribe Solicitations and all Non-De Minimis Payments Made to Foreign Officials by All U.S. Companies

The FCPA, as noted in Section I.D, does not currently require disclosure of payments to foreign officials or intermediaries. Other federal securities laws, such as the PSLRA, Sarbanes-Oxley, and Dodd-Frank, generally make disclosure merely optional in most cases,²⁸³ if the company determines that the payments are “material” to the integrity of the company’s financial statements or internal controls. Consequently, American businesses have significant discretion to keep such payments secret. Yet the government currently relies mostly on the chance that a whistleblower will act, as well as

²⁸¹ See, e.g., S. REP. NO. 94-1031, at 4-5 (1976) (statement of Chairman William Proxmire (D-Wis.) (“[D]eveloping countries have difficulties in discovering offenses committed by U.S. corporations in so far as their bribing and corrupting local government officials.” (quoting Attorney General of Botswana))); African Union Convention on Preventing and Combating Corruption, Preamble, *opened for signature* July 11, 2003, 43 I.L.M. 5 (expressing concern of AU member states effects of corruption upon the continent, and acknowledging need to address its root causes).

²⁸² See *infra* Section III.D.

²⁸³ See *supra* Section I.D. There are, of course, certain limited circumstances under which disclosure (to shareholders) would seem to be legally and practically required, as in the case of the heightened due diligence requirements associated with a pending merger. See Low et al., *supra* note 80, at 7 (“[I]t is possible in certain circumstances that FCPA disclosures in corporate transactional documents may be necessary in order to avoid ‘materially misleading’ statements, to the extent those documents are provided to shareholders.”).

fear of increased sanctions in the absence of voluntary disclosure, to detect bribery. A better solution is available.

1. *Expansion of Requirements to All U.S. Businesses*

To reduce and/or prevent corruption in international business transactions, Congress should mandate disclosure by all U.S. persons and companies engaging in business in both the United States and abroad, regardless of whether they are issuers or not. The chief reason for this is simple: ensuring detailed disclosure of the payment of bribes will assist in the detection of corrupt transactions. As noted by Senator Church at the Trade Abroad Hearings that preceded the enactment of the original FCPA, “[f]ull public disclosure would allow for the legitimate use of agents and consultants while making it very difficult for corporations to disguise payoffs to Government officials.”²⁸⁴ In large part, this is why President Ford’s Task Force on Questionable Corporate Payments Abroad argued for the broad legislation covering “[a]ll American business entities.”²⁸⁵

Congress unquestionably has the constitutional power, under Article 1 section 8, to bring all companies engaging in interstate and foreign commerce into the reporting fray.²⁸⁶ Nevertheless, by limiting reporting requirements only to issuers, the majority of privately held companies and foreign non-issuers who commit bribery will almost always evade detection, even if the substantive reporting requirements were augmented along the lines discussed below. Likewise, without expanding reporting requirements to non-public companies, hedge funds and private equity firms may secretly engage in foreign bribery.²⁸⁷ The disclosure requirement should instead be expanded.

2. *Mechanics of the Proposed Payment Disclosure Requirement*

In addition to expanding its coverage, the substance of existing accounting requirements needs to be strengthened, as has been recently recog-

²⁸⁴ See *Protecting the Ability of the United States to Trade Abroad: Hearing on S. Res. 265 Before the Subcomm. on Int’l Trade of the S. Comm. on Fin.*, 94th Cong. 2 (1975) (statement of Senator Frank Church (D-Idaho)).

²⁸⁵ Letter from Elliot L. Richardson, *supra* note 31, at 63.

²⁸⁶ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (identifying “three general categories of regulation in which Congress is authorized to engage under its commerce power”: (1) “the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, and persons or things in interstate commerce”; and (3) “activities that substantially affect interstate commerce”).

²⁸⁷ See Michael J. Gilbert & Joshua W.B. Richards, *Foreign Corrupt Practices Act: The SEC’s Investigation of FCPA Violations and Sovereign Wealth Funds—Implications for Hedge Funds*, HEDGE FUND L. REP., Feb. 3, 2011, at 1, available at http://www.dechert.com/files/Publication/9d66f31d-f613-40c6-9d0a-8c120bd1c901/Presentation/PublicationAttachment/2ea4c494-79a4-4151-8c70-18a904d3c01a/HFLR%20Reprint%202_3_11%20FCPA.pdf (discussing recent attention to the problem of bribing sovereign wealth funds).

nized by some members of Congress.²⁸⁸ As a matter of current practice, *many foreign bribery transactions are likely never disclosed*, even among issuers subject to federal financial reporting requirements and the FCPA's books and records provisions.²⁸⁹

The structure and mechanics of the payment disclosure requirement I propose is modeled in part on the one currently used by the government to detect money-laundering, structuring, and terrorist financing. Under the Bank Secrecy Act and associated federal regulations, financial institutions must file a Suspicious Activity Report ("SAR") with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FINCen") "to report any suspicious transaction relevant to a possible violation of law or regulation."²⁹⁰ Reports of payments to foreign officials should function the same way.

As with suspicious activity detected by financial institutions, solicitations by and payments to foreign officials or their intermediaries should be disclosed promptly after the initial discovery or occurrence of the demand or payment, and in no event later than after sixty days.²⁹¹ This would give the company time to internally investigate the circumstances surrounding the payment.

Although all bribe solicitations by foreign officials should be disclosed, disclosure of payments to intermediaries and foreign officials should be required only if the payment(s) or thing(s) of value offered or given exceeded a certain minimum dollar threshold in the aggregate. Under existing laws, SARs are generally required only where the amount involved is at least five thousand dollars or more, or when multiple payments to the same person

²⁸⁸ Representative John Moss (D-Cal.) proposed H.R. 13870 which would have required (for issuers only) the filing of:

[P]eriodic reports relating to any payment of money or furnishing of anything of value in an amount in excess of \$1,000 paid or furnished or agreed to be paid or furnished by the issuer during the period covered by the report: (i) to any person or entity employed by, affiliated with, or representing directly or indirectly, a foreign government or instrumentality thereof; (ii) to any foreign political party or candidate for foreign political office; or (iii) to any person retained to advise or represent the issuer in connection with obtaining or maintaining business with a foreign government or instrumentality thereof or with influencing the legislation or regulations of a foreign government.

H.R. 13870, 95th Cong. (1977). Among other things, H.R. 13870 required the following information to be disclosed:

the name of the person or entity to which the payment was or is to be made or the thing of value was or is to be furnished and in the case of a person who is an official of a foreign government or instrumentality thereof, the official position of that person.

Id.

²⁸⁹ See *supra* Section I.D, *infra* Section II.C.

²⁹⁰ See Pub. L. No. 102-550, § 1517(b), 106 Stat. 3672, 4049 (1992) (codified as amended at 31 U.S.C. § 3518(g)(1)). See also 12 C.F.R. § 21.11 (2011).

²⁹¹ See 12 C.F.R. § 21.11(d) (2011).

aggregate to at least five thousand dollars.²⁹² The reason for imposing a similar threshold in the context of payments to foreign officials is because most payments below these amounts likely would be too inconsequential to result in the obtaining or retaining of business, would fall into the existing FCPA exception for facilitation payments or the affirmative defense for bona fide promotional payments, or result in the needless inundation of federal investigators responsible for receiving, investigating and confirming the veracity of the mandatory reports.

As with SARs, reports of solicitations and/or payments to foreign officials or their intermediaries should be accompanied by a narrative description of the underlying conduct.²⁹³ At a minimum, the report should provide the name of the individual persons and entities involved in the transaction (including the name and position of the foreign official), an estimate of the monetary amounts at issue, and the context in which the solicitation/payment was made.

Where the payment has actually been made to a foreign official (whether directly or through an intermediary) the report should also characterize the payment, if made, as “willing” or “unwilling” based on whether it was paid under threats of extortion, either economic or otherwise. The burden of proving the existence of extortion would fall upon the payer. Additionally, the report should also address whether the purpose of the payment was “to obtain new business” or “to protect existing business,” based on (1) whether the company was already invested in the foreign country and line of business at issue; and (2) whether the company was subject to a wrongful threat of action that would result in harm to or discontinuance of the business.²⁹⁴ Such self-classification would determine the consequences of disclosure, as I will explain below.

These payment reports should then be signed by the principal executive officers of the company, as is required for periodic reports of financial internal controls after Sarbanes-Oxley. This would deter misclassification by opening the door for easy U.S. prosecutions of corporate officers in the event of knowingly false statements.²⁹⁵

Like SARs (and Section 10A reports), the reports of payments to foreign officials should initially be kept confidential and should not be disclosed to the public or the foreign official at issue.²⁹⁶ This would give the government time to (1) review the report and demand additional detail as required; (2) verify the claim of willing or unwilling bribery; (3) determine

²⁹² 12 C.F.R. § 21.11(c)(2), (4) (2011).

²⁹³ See U.S. DEP'T OF TREASURY, TD F90-22.47, SUSPICIOUS ACTIVITY REPORT FOR DEPOSITORY INSTITUTIONS (2011).

²⁹⁴ The government should, of course, provide appropriate guidance to companies on the meaning of the relevant classifications, along the lines of the definitions provided in this article. See *supra* Section II.A.

²⁹⁵ See 18 U.S.C. § 1350(c) (2006).

²⁹⁶ 12 C.F.R. § 21.11(k) (2011).

if a prosecution of the foreign official is appropriate and, if so, whether the foreign official's home government is willing and able to do so; and (4) determine the entitlement and appropriate mechanism for providing redress to the payer.²⁹⁷ Confidentiality will also benefit the company by preventing an immediate onslaught of distracting and expensive civil litigation.

Reports of "willing bribery" should generally be handled as follows. The government should investigate to determine whether the payment fits into the existing exception for facilitation payments and/or the affirmative defenses for bona fide marketing expenses or payments that are legal under the written law of the foreign country. If such circumstances exist, the government should grant safe harbor from civil and criminal prosecution and the report should remain confidential. If the government determines after investigation, however, that neither the facilitation payments exception nor affirmative defense applies, the report of willing bribery should publicly be disclosed. Willing payers would then likely face an immediate barrage of civil suits from competitors,²⁹⁸ criminal prosecutions by the foreign country whose official was corrupted, and potentially other action by the foreign government to rescind the contracts/benefits obtained through bribery.

Knowingly false or unsubstantiated reports of "unwilling bribery" should be handled in the same way. If, after investigation, the government rejects the payer's claim that the payment was "unwilling," the government may then choose to prosecute the payer for making knowingly false statements associated with the untruthful certified report as well as the lack of appropriate internal controls,²⁹⁹ and disclose the report to enable competitors and foreign governments to take action. Likewise, if the report of an unwilling payment is simply unsubstantiated (e.g., the payer and government disagree over the characterization of the payment as unwilling), the government should not prosecute but should disclose the report so that the matter can be

²⁹⁷ Due to the current uncertainty regarding how many bribe solicitations and/or payments to foreign officials or intermediaries are being made by U.S. businesses or entities each year (and which would therefore be subject to the new reporting requirement), Congress may be wise to delegate the mechanics of such investigations to an executive agency that could adjust the monetary reporting thresholds and process for confirming the veracity of incoming reports in light of the volume and expense associated with such investigations. Although reports of "willing" bribery should require little, if any, investigation prior to public disclosure, reports of unwilling bribery may well require government investigators to conduct witness interviews, take sworn statements under penalty of perjury, and/or request additional documents in order to confirm their veracity. In its discretion, the agency may reasonably decide that the volume of reports and time associated with their investigation requires the agency to merely sample reports of unwilling bribery, or to create a database that would trigger an audit if the same entity claims "unwilling bribery" on repeated occasions.

²⁹⁸ See *infra* Section III.D. See also Testimony of John H. Beisner, *supra* note 209, at 11.

²⁹⁹ See 18 U.S.C. § 1350(c)(1) (2006) (providing for criminal penalties of one million dollars and/or ten years in prison for certifications while knowing that that the periodic report does not comport with requirements of Section 13(a)); § 1350(c)(2) (2006) (providing for criminal penalties of five million dollars and/or twenty years in prison for willful certifications while knowing the report does not comport with requirements of Section 13(a)).

resolved in court litigation between the payer and competitors and/or foreign governments.

If, however, the government confirms that a payment was made “unwillingly,” it should immediately grant the payer a statutory safe harbor from all domestic criminal prosecution *and civil suits* with respect to that payment.³⁰⁰ In such cases, the government should also then determine what, if any, actions it would like to take to help the payer obtain redress (e.g., diplomatic protection) and/or to punish the bribe-demanding foreign official. The payer, free from the risk of prosecution or civil litigation, would also then be in a position to determine whether it would like to pursue redress against the individual foreign official³⁰¹ or her government by way of a federal action for restitution or international arbitration.³⁰²

Finally, a company should be subject to severe civil and/or criminal penalties if it fails to make full and timely disclosure of its payments to foreign officials, as financial institutions are subject to penalties when they fail to submit SARs.³⁰³ If the non-disclosure was the result of falsification of underlying books and records, civil and/or criminal penalties should be imposed for that as well.³⁰⁴ The government should then handle the underlying payments in the same way it would as if a report had been filed—disclosing willing payments not falling within an exception or affirmative defense and keeping confidential unwilling payments. Moreover, regardless of whether the payment was made unwillingly to protect an existing business, the non-disclosing entity should be barred from recovery of any restitution and/or damages.

3. *Benefits of the Proposed Payment Disclosure Requirement*

The chief advantage of such a mandatory disclosure system would be to deter foreign bribery by ferreting out the corrupt payments that currently go undisclosed.³⁰⁵ When Congress was debating whether the problem of foreign

³⁰⁰ While it is undoubtedly true that an entity might truthfully claim that it has been extorted on multiple occasions, such a situation ought not be a cause to condemn the entity for paying bribes with impunity, but rather provide a call to action by U.S. authorities to focus their anti-corruption efforts upon the foreign official, industry, and/or foreign country repeatedly implicated in such extortion schemes. Having identified the source of the corruption through mandatory reports, government pressure ought to be brought to bear upon it.

³⁰¹ See *infra* Section III.F.

³⁰² In certain cases, an entity extorted to pay a bribe may reasonably decide that the need for future business contacts with the government to whom the extortionate foreign official belongs militates against bringing a legal claim to obtain restitution. Nevertheless, this choice should be given to the victim.

³⁰³ 18 U.S.C. §§ 5321–5322 (2006).

³⁰⁴ See 15 U.S.C. § 78ff(a) (2006) (authorizing criminal penalties for certain “knowing” and/or “willful” violations of the Securities Exchange Act, including the FCPA’s accounting provisions, of up to five million dollars and twenty years in prison (for natural persons) and twenty-five million dollars (for organizations)).

³⁰⁵ The late international lawyer, speech writer, and Kennedy advisor, Milton Gwirtzman, perhaps put the rationale for a strict disclosure regime best, noting “[f]orty years of experi-

bribery would best be tackled by a disclosure requirement or criminalization, both the SEC and President Ford's Task Force on Questionable Payments Abroad were against criminalization of foreign active bribery, and instead advocated for a strong disclosure-only requirement.³⁰⁶ In a letter to Congress outlining the Task Force's recommendation, Secretary of Commerce Elliot Richardson explained:

The disclosure-plus-criminalization scheme would, by its very ambition, be ineffective. The existence of criminal penalties for certain questionable payments would deter their disclosure and thus the positive value of the disclosure provisions would be reduced. In our opinion the two approaches cannot be compatibly joined.³⁰⁷

Requiring detailed disclosure of bribe solicitations and payments to foreign officials and intermediaries would also promote deterrence by adjusting the incentives to actors on both the supply and demand side of bribery. Mandatory disclosure would affect supply-side incentives by exposing those who willingly bribe foreign officials to increased risks of (1) reputational damage arising from the shame attendant to disclosure of corruption; (2) foreign criminal prosecution and civil suits aimed at contract rescission; and (3) domestic civil litigation by competitors who would have additional factual ammunition without the need for discovery fishing expeditions.

Mandatory disclosure would affect demand-side incentives by exposing foreign officials who solicit, demand, or extort bribes to increased risks of job loss and/or criminal prosecution by the official's home country or the United States. It would also expose the corrupt foreign official to civil actions to obtain restitution and damages for losses associated with bribery, i.e., refunds of bribery payments and potentially other actions for damages suffered when a company refuses to pay a bribe. Finally, mandatory disclosure would affect demand-side incentives by exposing corrupt foreign governments to the risk of capital flight, as investors gain more knowledge of

ence with securities legislation has shown that if gamey activities must be exposed in public, they will usually—but not always—die a natural death.” Milton S. Gwirtzman, *Is Bribery Defensible?*, N.Y. TIMES MAG. sec. 6, Oct. 5, 1975, reprinted in *Protecting the Ability of the United States to Trade Abroad: Hearing on S. Res. 265 Before the Subcomm. on Int'l Trade of the S. Comm. on Fin.*, 94th Cong. 2 (1975).

³⁰⁶ Professor Koehler provides a thorough review of the FCPA's extensive legislative history in his Declaration in *United States v. Carson*, Case No. SA CR 09-00077-JVS (Feb. 21, 2011) at ¶¶ 105–111. He explains that the Senate was considering three bills: (1) Senate Bill 3418 which proposed only internal controls and books-and-records requirements, S. 3418, 94th Cong. (1976); (2) Senate Bill 3379, which also proposed only a disclosure requirement, but went further to require disclosure of private commercial bribery in addition to bribery of public officials, S. 3379, 94th Cong. (1976); and (3) Senate Bill 3133, which proposed both books-and-records requirements as well as the prohibition of certain payments, S. 3133, 94th Cong. (1976). The SEC advocated for the disclosure-only approach set forth in Senate Bill 3418 and an SEC Report to Congress made clear that the Commission did not support Senate Bill 3133.

³⁰⁷ *Id.* at ¶ 122.

the risk that they will be forced to pay a bribe if they do business in that country.

4. *Objections and Obstacles to Mandatory Disclosure*

A mandatory disclosure requirement is likely to be subject to several objections. These objections, as discussed below, can all be addressed under the proposed interlocking system.

The first objection might be that a disclosure regime amounts to compulsory self-incrimination in violation of the Fifth Amendment. Such an objection would be misguided for at least two reasons. First, corporations are not entitled to Fifth Amendment protection.³⁰⁸ Second, under the interlocking regime, the act of committing foreign bribery would be decriminalized. There would therefore be no risk that the person forced to disclose such payments would be compelled “in any criminal case” to be a witness against himself, particularly as the U.S. Supreme Court has held that “concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.”³⁰⁹

A second objection might be that in a world in which companies are forced to self-describe their bribery as either “willing” or “unwilling,” there might be nothing to prevent all payers from claiming that their payments were “unwilling.” The short answer is that imprisonment and fines for false statements and/or inaccurate books-and-records should prevent companies from making knowingly false claims.³¹⁰ Under existing law, the fines for a criminal violation of the FCPA’s accounting provisions can be as much as five million dollars (for individuals) and twenty-five million dollars (for entities) or twice the gain or loss caused by the violation.³¹¹ Likewise, the threat of civil litigation or foreign prosecution prompted by a U.S. govern-

³⁰⁸ See *Braswell v. United States*, 487 U.S. 99, 110 (1988); *Curcio v. United States*, 354 U.S. 118, 122 (1957).

³⁰⁹ See *United States v. Balsys*, 524 U.S. 666, 669 (1998) (denying Fifth Amendment privilege, on the basis of the “same-sovereign rule” to witness in deportation proceeding who feared that inquiry into his activities as Nazi war criminal in World War II would subject him to criminal prosecution by Lithuania, Israel, and potentially Germany). The Supreme Court did not decide whether Fifth Amendment protection would apply if the United States and a foreign nation had enacted substantially similar criminal codes aimed at prosecuting offenses of international character and the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries. *Id.* at 698–99.

³¹⁰ This method has worked in other contexts. See *e.g.*, 18 U.S.C. § 1001 (2006) (criminal penalties for knowing and willful false statements); 31 U.S.C. § 5322 (2006) (criminal penalties for willful violations of SAR rules and regulations); 31 U.S.C. § 5321(a)(2) (2006) (civil penalties for filing SAR containing material omission or misstatement); SEC Rule 13b2-1, 17 C.F.R. § 240.13b2-1 (2011) (“[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act”); SEC Rule 13b2-2, 17 C.F.R. § 240.13b2-2 (2011) (prohibiting any material false or misleading statement or any material omission to any accountant in connection with any audits or reports that must be filed with the Commission).

³¹¹ The government would also be able to use DPAs and NPAs to force corporate governance changes.

ment policy to disclose unsubstantiated reports of unwilling bribery might well lead companies to adopt more stringent policies regarding making such payments at all.

A third objection is based on the costs associated with requiring companies to investigate and report all payments. However, under the interlocking regime, the costs of internal investigation and disclosure would be balanced against other cost-savings associated with defending against FCPA-related litigation and increased opportunities for recovering losses associated with bribery. As explained below, the U.S. would provide a safe-harbor for confirmed cases of unwilling bribery. Therefore, by disclosing such payments, businesses would be insulated from the barrage of civil suits that typically accompany such payments. Those who disclose that they made payments in order to protect an existing business would also be afforded avenues to obtain restitution and damages against the foreign officials and their governments without the fear that doing so would prompt criminal prosecution, fines, or civil suits.³¹²

C. Congress Should Provide Safe-Harbor Provisions

As argued above, Congress and the SEC should implement a system of truthful mandatory disclosure of bribe solicitations by, and direct or indirect payments to foreign officials, enforced by criminal and civil penalties for the failure to disclose. But this “stick” is not enough; the “carrot” must also be employed. With this in mind, Article 37(3) of the UN Convention Against Corruption provides that “[e]ach State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.”³¹³

While the offering of “credit” to companies who voluntarily disclose their payments to foreign officials is an incentive, it is, for the reasons discussed in Section II.C., almost certainly not enough to prompt disclosure. Many companies will likely remain reluctant to report such payments, and in fact may redouble their efforts to hide such transactions from potential whistleblowers under Dodd-Frank. To encourage the disclosure of payments, Congress should enact a statutory safe-harbor from criminal prosecution under the FCPA for all those who disclose, as well as a safe-harbor that would preempt civil litigation against those who make unwilling payments.

Congress almost certainly has the Constitutional power to preempt such civil causes of action as a result of the Supremacy Clause and its power to regulate interstate and foreign commerce.³¹⁴ Since unbridled civil litigation

³¹² See *infra* Section III.F.

³¹³ G.A. Res. 58/4, art. 37 ¶ 3, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

³¹⁴ See U.S. CONST. art. VI; see also U.S. CONST. art. I, § 8.

about foreign bribery discourages its disclosure, and foreign bribery affects foreign commerce, Congress would be well within its power to preempt such civil claims. Congress has used its power to preempt certain civil actions under the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”).³¹⁵ It has also previously employed such a tool to encourage disclosure in the Criminal Penalty Enhancement and Reform Act (“CPERA”), under which corporations that qualify for amnesty by disclosing misconduct became insulated from the treble damages remedy to civil litigants under federal antitrust law.³¹⁶

The preemptive effect of the proposed civil safe-harbor should be limited, however, to those who truthfully disclose *unwilling* bribery. Those who disclose willing bribery, or submit unsubstantiated reports of willing bribery, should not be covered. While such persons would be free from U.S. criminal prosecution, they should nonetheless be exposed to the risk of foreign criminal and civil actions, as well as the threat of civil litigation under a private right of action.³¹⁷

D. Congress Should Encourage Competitors and Foreign Governments to Police Cases of Willing Bribery by Publicly Disclosing Reports of Such Bribery and Creating a Private Right of Action for Competitors under the FCPA

As argued in the foregoing pages, those who truthfully report paying bribes to foreign officials should not be criminally prosecuted in the U.S. However, those who make such payments willingly should not go unpunished. Rather, to prevent such misconduct, those who willingly bribe foreign officials should face stiff consequences for their actions. Congress and the courts would be wise to let the *real* victims of such corruption³¹⁸—that is, competitors and foreign countries—assume responsibility for meting out such consequences. Many foreign governments would seem to need little more than disclosure of willing payments in order to fulfill this deterrent function by criminally prosecuting and/or taking other legal action to rescind any contracts tainted by such corruption. Competitors, however, need more assistance to provide an effective deterrent. Accordingly, Congress should create a private right of action to enable competitors harmed by willing bribers to sue such bribe-givers.

³¹⁵ SLUSA provides that “[n]o covered class action’ based on state law and alleging ‘a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security’ ‘may be maintained in any State or Federal court by any private party,’” and the Supreme Court confirmed that “SLUSA pre-empts state-law holder class-action claims” of a certain sort. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 72 (2006).

³¹⁶ Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (codified at 15 U.S.C. § 1 note (2006)).

³¹⁷ *See infra* Section III.D.

³¹⁸ *See Mills & Weisberg, supra* note 280, at 1372.

As noted above, the FCPA currently includes no private right of action. Since neither the FCPA as enacted, nor the conference report mentioned such a cause of action, federal courts have consistently held that the FCPA does not provide for a direct cause of action.³¹⁹ Likewise, recent attempts to introduce a bill that would recognize a civil cause of action under the FCPA have met with little success.³²⁰

The establishment of a private right of action, however, would likely become a dramatically effective source of deterrence and appropriate retribution. Competitors have strong incentives to police willing bribe-givers. As Congress has recognized, in many cases, “payments have been made not to ‘outcompete’ foreign competitors, but rather to gain an edge over other U.S. manufacturers.”³²¹ In addition to the citizens and government of the foreign state whose foreign official was corrupt, competitors are the parties most concretely harmed by willing bribes.

The incentives for business rivals to litigate when another company resorts to bribery are so strong that competitors have been undeterred by the lack of an express private cause of action in the FCPA. Civil litigants determined to obtain redress have aggressively pursued alternative legal theories under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and state racketeering laws,³²² the Robinson-Patman Act,³²³ the federal and state antitrust laws,³²⁴ state unfair competition laws such as Section 17200 of California’s Business and Professions Code,³²⁵ and state laws allowing claims for tortious interference with prospective business relations.³²⁶

Due to the legal hurdles that come with pursuing such complex causes of action, however, many civil actions that could help deter willing bribe-

³¹⁹ See *Lamb v. Philip Morris*, 915 F.2d 1024, 1029 (6th Cir. 1990); *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987); *Castellanos v. Pfizer, Inc.*, Case No. 07-60646-CIV-ZLOCH, 2008 U.S. Dist. LEXIS 42586, at *5 (S.D. Fla. May 29, 2008); *J.S. Serv. Ctr. Corp. v. Gen. Elec. Tech. Serv. Co.*, 937 F. Supp. 216, 227 (S.D.N.Y. 1996); *Eisenberger v. Spectex Industries, Inc.*, 644 F. Supp. 48, 50–51 (E.D.N.Y. 1986); *Lewis v. Sporck*, 612 F. Supp. 1316, 1332–34 (N.D. Cal. 1985).

³²⁰ Representative Edward Perlmutter (D-Col.) has introduced H.R. 3531, 112th Cong. (2011), which—like proposed H.R. 6188, 110th Cong. (2008) and H.R. 2152, 111th Cong. (2009)—would authorize certain private rights of action under the FCPA for anti-bribery violations by foreign concerns that damage domestic businesses. As of January 2012, the bill was referred to the House Committee on Energy and Commerce and the House Judiciary Committee’s Subcommittee on Courts, Commercial and Administrative Law.

³²¹ S. REP. No. 95-640 at 5 (1977) (quoting Elliot L. Richardson, Secretary of Commerce).

³²² *W.S. Kirkpatrick & Co., Inc. et al. v. Evtl. Tectonics Corp. Int’l*, 493 U.S. 400, 409–10 (1990).

³²³ *Id.*

³²⁴ *Supreme Fuels Trading FZE v. Sargeant*, Case No. 08-81215-CIV, 2009 U.S. Dist. LEXIS 118142 (S.D. Fla. Dec. 17, 2009) (denying motion to dismiss RICO Act, Clayton Act and Florida state antitrust and unfair trade practices claims by fuel supply company against competitor accused of bribing Jordanian officials in order to cause such officials to grant them necessary permits for fuel supply contracts while denying similar permits to lower priced competitors).

³²⁵ See *Korea Supply Co. v. Lockheed Martin Corp.*, 109 Cal. Rptr. 2d 417, 422 (Cal. App. 2001).

³²⁶ See *id.*

givers have been stifled. Civil RICO actions premised on foreign bribery have been rejected for lack of an “enterprise.”³²⁷ Competitor claims under the Robinson-Patman Act have been rejected because that statute does not apply extraterritorially.³²⁸ One action alleging interference through bribery with a prospective economic relationship has even been dismissed on the patently absurd theory that, economically self-interested actions like willing bribery do not, by definition, establish the necessary specific intent to interfere with a competitor’s business expectancy or contract, even when the payer knows about the competitor’s contract or expectancy.³²⁹

An express private right of action for competitors would help remove existing hurdles to competitor suits premised on willing bribery. By reducing the thresholds required to sustain competitor claims, the risks and potential costs of engaging in willing bribery would increase. Although some might argue that civil sanctions are insufficient to deter bribery because such financial fines and civil money judgments will simply be absorbed as a cost of doing business, this conclusion seems overstated. Civil suits under well-crafted statutes providing for sufficient statutory penalties, such as treble damages, can result in potential monetary judgments that are just as severe as governmental monetary penalties.³³⁰ Moreover, criminological research shows that *likelihood* of detection and subsequent sanction, rather than *severity* of sanction is the key determinant to deterrence.³³¹ Civil suits are thus a particularly apt deterrent, because competitors are likely to bring them (making the costs of defending litigation a sanction in itself) and they require a lower standard of proof than criminal cases.

³²⁷ See *Nat’l Group for Commc’ns & Computers v. Lucent Tech., Inc.*, 420 F. Supp. 2d 253, 272 (S.D.N.Y. 2006) (dismissing civil RICO claim of Saudi subcontractor against American corporation, Saudi government official, and others for lack of proof of “enterprise”).

³²⁸ *Newmarket Corp. v. Innospec, Inc.*, Civil Action No. 3:10CV503-HEH, 2011 U.S. Dist. LEXIS 54901, at *11–12 (E.D. Va. May 20, 2011).

³²⁹ *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 412 (S.D.N.Y. 2009) *aff’d on other grounds* 387 Fed. Appx. 72; 2010 U.S. App. LEXIS 14970 (2d Cir. July 21, 2010) (unpublished).

³³⁰ See *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 772, 773, 780, 795 (6th Cir. 2002) (upholding as reasonable jury award of approximately three hundred fifty million dollars against competitor manufacturers moist smokeless tobacco for unlawful monopolization, which when trebled resulted in an award that exceeded one billion dollars) *cert. denied*, 537 U.S. 1148 (2003).

³³¹ STEVEN P. LAB, *CRIME PREVENTION* 152 (6th ed. 2007) (“There is little or no evidence that severity has an individual deterrent effect. Conversely, certainty of apprehension and punishment seems to have some impact on the level of offending.”); John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 *LAW & SOC’Y REV.* 7, 7 (1991) (finding “partial support for the certainty of detection as a predictor of both self-reported and officially recorded compliance with regulatory standards,” but finding “no support for the certainty or severity of sanctioning” after interviewing 410 CEOs of small organizations and recording their compliance with regulatory standards); N. Craig Smith, Sally S. Simpson & Chun-Yao Huang, *Why Managers Fail to Do the Right Thing: An Empirical Study of Unethical and Illegal Conduct*, 17 *BUS. ETHICS Q.* 633, 656 (2007) (concluding that “increased severity of formal sanctions might not have as much effect on curbing misconduct as increased attention to the perceived certainty of sanctions”).

Although some commentators assert that criminal prosecution is necessary because the government has resources and access to information that civil litigants do not,³³² civil litigants already have numerous ways to obtain access to information (such as foreign banking records) that may be necessary to prove the scope of willing foreign bribery, including interrogatories, document requests, and corporate depositions, under the Federal Rules of Civil Procedure.³³³ Indeed, since search warrants and wiretaps are still rarely used by the government in FCPA cases,³³⁴ civil litigants have most of the tools commonly used by law enforcement in FCPA cases, including subpoenas and sworn depositions. Moreover, after implementation of a mandatory disclosure requirement, any concerns regarding a dearth of evidence would presumably disappear as civil litigants would have access to public admissions certified by corporate officers.

This is not to say that all of the issues related to the creation of a private right of action for competitors have been resolved. Indeed, notwithstanding the many interesting ideas propounded by scholars regarding a private right of action under the FCPA,³³⁵ further discussion is necessary on key issues, including the degree of causation required between bribery and lost opportunities and whether competitors (or someone else) should be entitled to obtain non-restitutionary disgorgement.³³⁶

E. Congress Should Authorize Prosecution of Corrupt Foreign Officials Under the FCPA, If Their Home Governments Are Unwilling or Unable

So long as foreign officials continue to demand bribes, people will continue to pay them. Any real solution to the problem of corruption in international business must therefore adequately address the demand-side of bribery. Corrupt foreign officials that solicit, demand or receive bribes should be prosecuted. Under the FCPA, however, foreign officials are not currently covered and federal courts have held that foreign officials may not be prosecuted directly for violations of the FCPA or for conspiring to violate

³³² See Segal, *supra* note 232, at 196 (2006) (“The critical difference is that the investigative tools needed to prove criminal or civil liability in international bribery involve the cooperation of foreign governments and the investigation of international flows of money, two tasks ill-suited to the private sector, at least without government cooperation.”).

³³³ FED. R. CIV. P. 30(b)(6).

³³⁴ The government’s first apparent use of undercover techniques in an FCPA case was in 2009 as part of the SHOT Show sting operation. See DOJ/WFO Press Release (Jan. 19, 2010), *supra* note 129.

³³⁵ See, e.g., Pines, *supra* note 45, at 186; Segal, *supra* note 211, at 196.

³³⁶ In the event that a willing bribe is paid in the absence of a business competitor, or where successful claims of restitution against a willing payer by competitors or foreign governments are unable to sufficiently deprive the payer of his ill-gotten gains, there may be value in authorizing U.S. enforcement authorities to institute a civil action to obtain such non-restitutionary disgorgement. By allowing such government actions, the costs of implementing the mandatory disclosure regime may also be offset.

the FCPA.³³⁷ Consequently, U.S. enforcement officials who wish to prosecute foreign officials for bribery or extortion have thus been forced to resort to alternative statutes, such as the Money Laundering Control Act.³³⁸ This has made foreign prosecutions needlessly time consuming and difficult to prove. There is no legal reason, however, why this needs to be the case. Congress could and should expressly authorize criminal prosecution against foreign officials under the FCPA.

1. *Existence of Ample Jurisdictional Bases*

The fact that both the FCPA and OECD Convention focus solely on the supply-side of bribery should not be taken to mean that there exists, or that the FCPA simply follows, an international law against the prosecution of corrupt foreign officials. To the contrary, at least two multilateral agreements to which the U.S. is signatory call on states to criminalize not only the solicitation, demand or receipt of bribes by their own domestic officials but also such corruption by other nations' officials. Such treaties include the United Nations Convention Against Corruption³³⁹ and the Council of Europe Criminal Law Convention on Corruption.³⁴⁰ As explained by the Council of Europe's Explanatory Report:

³³⁷ United States v. Castle, 925 F.2d 831, 831 (5th Cir. 1991).

³³⁸ 18 U.S.C. § 1956(c)(7)(D) makes "any violation of the Foreign Corrupt Practices Act" and 18 U.S.C. § 1956(c)(7)(B)(iv) makes "bribery of a public official, or the misappropriation, theft or embezzlement of public funds by or for the benefit of a public official" forms of "specified unlawful activity," the promotion or concealment of which through money-laundering is punishable by up to twenty years in prison. 18 U.S.C. § 1956 (2006 & Supp. I 2007). Among other things, the Act specifically provides for jurisdiction over "any foreign person" who commits an act of money laundering, if service is properly made and the transaction "occurs in whole or in part in the United States" or the foreign person "converts, to his or her own use, property in which the United States has an ownership interest." 18 U.S.C. §§ 1956(b)(2)(A), 1956(b)(2)(B) (2006).

³³⁹ G.A. Res. 58/4, art. 16 ¶ 2, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Id. The Convention Against Corruption was ratified by the United States in 2006. United Nations Convention against Corruption, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Apr. 7, 2012).

³⁴⁰ Council of Europe, Criminal Law Convention on Corruption art. 5, Jan. 27, 1999, E.T.S. 173 ("Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the conduct referred to in Articles 2 [domestic active bribery] and 3 [domestic passive bribery], when involving a public official of any other State.") (emphasis added); see also, *id.* at art. 17(4) ("This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with national law."). Although the United States signed the Council of Europe Convention on Corruption on October 10, 2000, it has not yet been ratified.

[T]he inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official's own State.³⁴¹

Congress would have ample jurisdictional bases for prosecuting foreign officials in U.S. courts consistent with international law and U.S. case law. According to the Fifth Circuit in *United States v. Castle*, in light of international practice and in view of Congress's expansive powers under Article I, section 8 of the Constitution "to regulate commerce with foreign nations and among the several states," and "to define and punish offenses against the Law of Nations," it cannot seriously be doubted that "[t]he drafters of the [FCPA] knew that they could, consistently with international law, reach foreign officials in certain circumstances."³⁴² Congress simply chose not to do so under the FCPA.

Clearly, Congress has the power to proscribe harmful conduct, affecting interstate commerce or violating international law, which "wholly or in substantial part, takes place within [the United States]" under the well-recognized territorial principle of jurisdiction.³⁴³ Indeed, the United States has used the territoriality principle to support the prosecution of foreign officials under the Money Laundering Control Act when a foreign official's money passes through a U.S. bank, even if only briefly, such as when a U.S. dollar denominated transaction between two foreign banks passes through a correspondent bank account in the United States.³⁴⁴

Congress also has the power, equally well-recognized under international law, to proscribe such conduct where it "has or is intended to have substantial effect within [U.S.] territory" under the effects principle of jurisdiction.³⁴⁵ Under the effects principle, "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a

³⁴¹ *Id.*

³⁴² *Castle*, 925 F.2d at 835 (quoting H.R. REP. NO. 640 at 12 n.3 (1977)) (The "United States has power to reach conduct of noncitizens under international law."). Each of these bases was expressly invoked at the time the original FCPA was passed in 1977.

³⁴³ *See, e.g.*, *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 10, at 23 (Sept. 7) (recognizing that "a prosecution may also be justified from the point of view of the so-called territorial principle"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987). Under the territoriality principle, the United States could prohibit passive bribery and/or extortion by foreign officials who take any action in furtherance of passive bribery while in the territory of the United States, much as it currently does when foreign nationals and non-issuers commit an act in the United States in furtherance of active bribery. *See* 15 U.S.C. § 78dd-3 (2006).

³⁴⁴ *See, e.g.*, *United States v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009) (upholding conviction of former prime minister of Ukraine on charges stemming from corruption in that country).

³⁴⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

state in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."³⁴⁶ Accordingly, this effects principle has been used to support other federal charges against a de facto head of State for actions in a foreign country.³⁴⁷

Consistent with international law, the United States could also reasonably base its jurisdiction to prosecute a corrupt foreign official on the "passive personality" principle, whereby U.S. jurisdiction would extend to foreign officials because the victim of the foreign official's extortion plot was a U.S. national or domestic concern. Although the passive personality principle is generally not used to prosecute ordinary crimes, it is gaining acceptance in the United States and elsewhere, particularly for certain classes of transnational crimes.³⁴⁸ As one commentator has noted in the context of foreign corruption, "there is an international trend towards the inclusion of provisions in treaties encouraging the contracting States to prescribe jurisdiction on the basis of the passive personality principle."³⁴⁹

Finally, Congress could also, consistent with international law, base its prohibition of passive bribery and/or extortion by foreign officials directly on the international bribery suppression treaties to which it is a party. For example, Article 16(2) of the widely accepted³⁵⁰ U.N. Convention Against Corruption provides:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a

³⁴⁶ *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *see also, e.g., S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 10, at 23 (Sept. 7) ("[T]here is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (1987) (effects principle may apply to "activity outside the state, but having or intending to have a substantial effect within the state's territory" provided the exercise of jurisdiction is reasonable).

³⁴⁷ *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (upholding jurisdiction against de facto Panamanian leader for RICO and Travel Act violations on basis of effects principle).

³⁴⁸ *See United States v. Hill*, 279 F.3d 731, 740 (9th Cir. 2002) (finding extraterritorial jurisdiction based on the passive personality principle in prosecution for harboring and assisting a fugitive in Mexico where victims of fugitive were all U.S. citizens); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991) (upholding jurisdiction against Lebanese citizen charged with hostage taking, piracy, and hijacking of Jordanian airline, on which two Americans were passengers); *United States v. Roberts*, 1 F. Supp. 2d 601 (E.D. La. 1988) (jurisdiction held proper over foreign citizen accused of sexual activity with American minor on board ship incorporated in Panama, flying Liberian flag).

³⁴⁹ Tom Vander Beken, *The Best Place for Prosecution of International Corruption Cases. Avoiding and Solving Conflicts of Jurisdiction 7* (The 3d Global Forum on Fighting Corruption & Safeguarding Integrity, 2003), available at <http://www.ircp.org/uploaded/I-1%20Tom%20Vander%20Beken.pdf>.

³⁵⁰ The U.N. Convention currently has 160 parties, 140 signatories, with at least 98 ratifications/accessions. *United Nations Convention Against Corruption*, UNODC, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Apr. 2, 2012).

foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.³⁵¹

Adopting such legislation would permit the United States to criminalize foreign passive bribery irrespective of whether any part of the offense takes place in the United States, has effects in the United States, or harms a U.S. national. Indeed, a number of international treaties either authorize or encourage state parties to enforce the prohibition on foreign passive bribery in circumstances where the official's home country will not do so.³⁵² Article 44(11) of the U.N. Convention Against Corruption, for example, provides that:

[a] State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.³⁵³

While states cannot go onto each other's soil to enforce the prohibition against corruption,³⁵⁴ there is clearly no absence of available jurisdictional bases that would allow Congress to criminalize, and the Department of Justice to prosecute, foreign officials for passive bribery and extortion in U.S. courts, provided the United States could apprehend them.

2. *Immunity Would Pose No Obstacle in Most Cases*

Immunity does not present an insurmountable obstacle to U.S. criminalization or prosecution of corruption by foreign officials. Insofar as American law is concerned, the Supreme Court has explained that the act of state doc-

³⁵¹ G.A. Res. 58/4, art. 16 ¶ 2, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); *see also* Criminal Law Convention on Corruption, *supra* note 340, at art. 5 (requiring criminalization of passive bribery "involving a public official of any other State"); African Union, Convention on Preventing and Combating Corruption arts. 4 & 5, *opened for signature* July 11, 2003, 43 I.L.M. 5.

³⁵² The Council of Europe Criminal Law Convention on Corruption, for example, "does not exclude any criminal jurisdiction exercised by a Party in accordance with national law." Criminal Law Convention on Corruption, *supra* note 340, at art. 17(4).

³⁵³ U.N. Convention Against Corruption, *supra* note 313, at art. 44(11).

³⁵⁴ *Id.* at art. 4(2) ("Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."); *see also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 18 (Sept. 7) ("Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.").

trine poses no bar to judicial resolution of cases alleging bribery of a foreign official.³⁵⁵ The Court recognized that “the act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”³⁵⁶

Likewise, to the extent that the U.S. would not wish to run afoul of international law, immunity under existing treaties and customary international law also poses no insurmountable obstacle in most cases. As an initial matter, immunity under international law only applies to a limited set of diplomatic, consular, or very high-ranking foreign officials (e.g., Heads of State, Foreign Ministers, etc.)³⁵⁷—few of which are likely to be involved in the business transactions at issue. But, even for such classes of protected persons, immunity is unlikely to pose an obstacle. Although it is true that such persons have historically enjoyed broad immunity for their misconduct, international law has rapidly evolved over the last seventy years. Now, for a growing subset of international crimes of which corruption in international business transactions arguably should be one, most foreign officials are entitled to neither immunity *rationae personae* (personal immunity) or immunity *rationae materiae* (functional immunity), even in the courts of another country.³⁵⁸

As the International Court of Justice recognized in the 2002 *Arrest Warrant Case*, it is well established that immunity *ratione materiae* is not available for “private” or non-official action.³⁵⁹ Since the solicitation, demand and receipt of bribes is almost always designed to line the pockets of the individual foreign official, it seems reasonable to conclude that the demand of a bribe is a private, non-official act for which no functional immunity is afforded under international law.³⁶⁰

And while the *Arrest Warrant Case* seems to make clear that personal immunity under international law remains an obstacle to the prosecution of

³⁵⁵ *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 409–10 (1990).

³⁵⁶ *Id.*

³⁵⁷ *E.g.*, *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 51 (Feb. 14) [hereinafter *Arrest Warrant Case*].

³⁵⁸ For example, Article 7(5) of the African Union Convention on Preventing and Combating Corruption expressly provides that “any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials.” Convention on Preventing and Combating Corruption, *supra* note 351, at art. 7(5).

³⁵⁹ *Arrest Warrant Case*, 2002 I.C.J. at ¶ 61 (“Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior to or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.”).

³⁶⁰ *See Baoanan v. Baja*, 627 F. Supp. 2d 155, 170 (S.D.N.Y. 2009) (diplomat’s employment of plaintiff as a domestic worker for his personal benefit was a private act for which the diplomat could not avail himself of immunity against allegations including extortion and human trafficking); *cf. United States v. Brewster*, 408 U.S. 501, 528–29 (1972) (U.S. Senator indicted for accepting bribe not entitled to immunity under Speech or Debate clause).

certain sitting foreign officials in the national courts of a foreign state,³⁶¹ a strong argument can be made that States that have agreed without reservation to the prosecute-or-extradite provision in a multilateral anti-corruption treaty, such as Article 44(11) of the U.N. Convention Against Corruption, have waived any such immunity in cases where they will not prosecute.³⁶² In any event, corrupt foreign officials could be prosecuted in national courts after they leave office, or they could be prosecuted in an international tribunal established for that purpose without needing to wait until they leave office.

3. *Application of a Complementarity Principle*

Given the existence of ample jurisdictional bases, and the absence of immunity in almost all cases, the only real obstacle to addressing the demand-side of bribery by authorizing prosecutions of foreign officials appears to be the lack of political will resulting from prudential concerns about complicating the relationships between the United States and the governments of other nations. However, these geopolitical concerns can be adequately addressed in most cases by adopting a principle of complementarity.

Complementarity—a principle employed in the context of prosecutions by the International Criminal Court to reduce international friction and preserve State sovereignty—provides that a prosecution will only move forward against a foreign national if that person’s own government is “unwilling or unable genuinely to carry out the investigation or prosecution.”³⁶³ Application of this principle to certain prosecutions before national courts was also urged by three judges of the ICJ who stated in a separate opinion in the *Arrest Warrant Case* that “a State contemplating bringing criminal charges [against a foreign national] based on universal jurisdiction must first offer to the national State of the accused person the opportunity itself to act upon the charges concerned.”³⁶⁴

By implementing a practice of complementarity, the U.S. could avoid charges of imperialism, reduce tensions with friendly foreign governments, and save on prosecution costs. Indeed, some governments appear prepared to remove their own officials, particularly when another state is threatening to do it for them.³⁶⁵ Moreover, if U.S. prosecutors made efforts, as they often

³⁶¹ See *Arrest Warrant Case*, 2002 I.C.J. ¶ 78(3) (ordering Belgium to cancel arrest warrant issued for Congo’s then-incumbent foreign minister).

³⁶² See *Arrest Warrant Case*, 2002 I.C.J. ¶ 61 (acknowledging that an incumbent or former foreign minister will cease to enjoy immunity from foreign criminal or civil jurisdiction “if the State which they represent or have represented decides to waive that immunity”).

³⁶³ Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

³⁶⁴ *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 63, ¶ 59 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

³⁶⁵ See *Graft Agency Rules Against Juthamas*, BANGKOK POST, Aug. 24, 2011 (indicating that Thai officials may prosecute Juthamas Siriwan), available at Factiva, Doc. No. BKPOST0020110823e78o001jq; see also Government Sentencing Memorandum at 16–17,

do, to be judicious and strategic with the timing of their indictments (i.e., wait to obtain or unseal an indictment until after the foreign official leaves office and comes onto U.S. soil), fears of causing international incidents or encountering immunity and/or extradition obstacles could be minimized.

F. Qualified U.S. Persons Should be Provided Meaningful Ways to Recover Non-Speculative Losses Due to Extortion by Foreign Officials

The final proposal in this article relates to the current lack of an upside incentive to disclose extortion (independent from the theoretical cost savings that come from avoiding harsher penalties in the event that government regulators independently discover the bribe) stemming from the fact that persons who make payments to foreign officials in the face of extortion appear to be denied opportunities to recover their losses.³⁶⁶ To fill this gap, the federal government should augment the opportunities for qualifying U.S. nationals and domestic concerns to recover their non-speculative losses caused by extortion. Doing so would comport with Article 35 of the United Nations Convention on Corruption, ratified by the United States without reservation, which provides that:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.³⁶⁷

1. Who Should Recover?

By “qualified” U.S. persons, only U.S. natural or legal persons who meet certain criteria should be allowed to recover. In order to “qualify” for recovery, the U.S. person should satisfy three criteria:

- (1) she promptly disclosed the extortion (and the payment, if made) to the government
- (2) her payment to the foreign official was actually “unwilling,” and
- (3) her payment was made to protect an existing business in the country, rather than to secure a new business opportunity.

The first two criteria are largely consistent with the existing “co-conspirator exception” to the MVRA. They are meant to deny recovery to per-

United States v. Kay, 200 F. Supp. 2d 681 (S.D. Tex. 2002) (Criminal Case No. 4-01-914), 2005 WL 6228749 at 16–17 (explaining that defendant fled from Haitian authorities seeking to arrest him after his bribes were discovered, and noting that “Haitian authorities would not have shown him any leniency if they had been the ones to impose a sentence upon him”).

³⁶⁶ See United States v. Lazarenko, 624 F.3d 1247, 1251 (9th Cir. 2010).

³⁶⁷ G.A. Res. 58/4, *supra* note 313, at art. 35.

sons who conceal their payments or voluntarily pay bribes in the absence of coercive extortion. These people simply have no one else to blame for their losses and should not be permitted to recover for their wrongdoing. Those who make a payment “unwillingly,” however, should not be punished for doing so. Although some courts appear to have forgotten, this “in the American system, it is generally accepted that a payment that was extorted was not a ‘bribe.’”³⁶⁸ The third criterion is meant to distinguish between those who acquiesce to the payment of a bribe as the price for gaining entry into a market (such as winning a procurement bidding process) and those who acquiesce to maintain their existing investment in the country. Payers in the former case should be denied recovery because they presumably received the benefits of their bargain (i.e., they were allowed to enter into a country that they had no initial right to enter). In the latter case, recovery remains appropriate.

2. *What Should They Recover?*

Even for qualifying U.S. persons, recovery should be limited to non-speculative losses caused by the foreign officials bribery demand. Generally, an unwilling payer’s losses due to extortion will fall into two categories: (1) the cost of the bribe, if it was paid; or (2) business losses resulting from the failure to pay the bribe. Both of these types of losses should be factored in. Although it is undoubtedly easier to recover money actually paid in connection with an unwilling bribe, business losses resulting from the failure to pay a bribe should also be possible to ascertain with minimal speculation, if it involves the loss of an existing business that had demonstrable profit streams in prior years.

One objection to this proposal is that, by offering avenues for recovery to those who pay extortionate demands as well as those who refuse them, the proposal may offer little incentive for persons doing business abroad to refuse to pay. As noted above, however, this is arguably the most efficient incentive structure to establish since, by paying the demand, the company will preserve its investment, market position and employee’s jobs while nonetheless allowing the foreign official to be prosecuted.

3. *How Should They Recover?*

There are several possible ways to accomplish the goal of recovery. One way is to permit victims of extortion to obtain compensation through federal restitution statutes after a corrupt foreign official has been convicted.³⁶⁹ As noted above, due to the apparent breadth of the judicially cre-

³⁶⁸ *United States v. Kozeny*, 582 F. Supp. 2d 535, 540 n.29 (S.D.N.Y. 2008); *see also United States v. Alfisi*, 308 F.3d 144, 155 (2d Cir. 2002) (Sack, J., dissenting).

³⁶⁹ There are also other ways for persons harmed by foreign extortion to obtain redress, including by international arbitration under bilateral investment treaties and, if the U.S.

ated co-conspirator exception applied in *Lazarenko*, this avenue for recovery currently appears to be unavailable to any person who profits by making a payment to a foreign official, even when such payments are extracted by extortion and are made to protect an existing investment.

Congress should consider codifying and clarifying the co-conspirator exception to recovery to explain that the mere fact that a payer has obtained a benefit should not make her automatically ineligible to recover his loss. All those who make payments subject to extortion receive a benefit. But this simply may be the benefit of receiving the treatment to which they were otherwise entitled. The better approach might be to use other objective factors such as (1) whether the company was already invested in the country and engaged in the line of business at issue; and (2) whether the company was subject to a wrongful threat of action that would result in harm or discontinuance of the business.

Codification of this restitution standard is likely to deter bribery, as it will further incentivize bribe payers to promptly disclose any extortionate bribes that they have paid, with the confidence of knowing that they will get their money back if they do, and be precluded from recovery if they don't. The foreign official will also become aware that the person whom he is planning to extort could easily report his misconduct to U.S. authorities and sue to recover the money, even after it is paid.

V. CONCLUSION

This Article has laid out several proposals for modifying the current strategy in the battle against corruption in international business transactions. The core of the current U.S. strategy for preventing corruption involves the application of increasing amounts of punishment upon those who pay bribes, and fail to keep proper records of them, under the FCPA. While this effort to promote transparency and ethics in international business is both necessary and well-intentioned, the strategy employed to date has been ineffective, inefficient, incomplete and, in some cases, unfair. A dramatic paradigmatic shift is necessary—one whose fundamental goal is prevention, not punishment.

As argued above, Congress should decriminalize active bribery. In its place, Congress should impose a requirement, applicable to all companies subject to U.S. jurisdiction, of mandatory confidential reporting of all solicitations by foreign officials and all payments to foreign officials or intermediaries above a certain monetary threshold. All persons who truthfully and accurately disclose payments to foreign officials should be given a safe-harbor from U.S. criminal prosecution.

deemed it appropriate in a particular case, through diplomatic protection. Internationalizing such extortion claims might not only provide redress to victims of extortion, but also an opportunity to shame and/or pressure foreign governments into removing their corrupt officials.

In the interests of justice, the government should then distinguish “willing” payments from “unwilling” ones, based on the presence or absence of coercive extortion. Willing payments should be publicly disclosed so that foreign governments and business competitors (after the establishment of a private cause of action) may take appropriate action. Makers of unwilling payments to foreign officials, by contrast, should be given immunity not only from criminal prosecution, but also from civil suits. The government should then use such reports of unwilling payments to criminally prosecute the corrupt government officials who demanded such payments, if their home governments are unwilling or unable to do so.

Finally, with respect to the subset of unwilling payers who make such payments in order to protect an existing business, rather than to obtain new business, viable avenues should be provided for such extorted U.S. persons to obtain meaningful redress. Not only is this a more just approach than the status quo, but it will also further encourage extorted companies to come forward.

Through these measures, foreign governments can be pressured and shamed into removing their own corrupt government officials, and only then may corruption in international business transactions actually be prevented.

