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Francesca M. Pisano

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## **THE FOREIGN CORRUPT PRACTICES ACT AND CORPORATE CHARITY: RETHINKING THE REGULATIONS**

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

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

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

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

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

## INTRODUCTION

In 2010, a catastrophic 7.0 magnitude earthquake hit Port-au-Prince, Haiti.<sup>1</sup> The Haitian people suffered devastating losses: over 200,000 people were killed<sup>2</sup> and rebuilding costs were estimated at \$14 billion.<sup>3</sup> The corporate response was immediate,<sup>4</sup> mobilizing over \$100 million in donations in only ten days,<sup>5</sup> eventually totaling over \$146.8 million.<sup>6</sup> Beyond direct donations, corporate leaders and business experts strategized about ways to encourage investment in the rebuilding effort and to engage Haiti in the global economy.<sup>7</sup>

The generosity of the corporate response to the earthquake illustrates the unique contributions that U.S. businesses can offer to international development and disaster relief.<sup>8</sup> American corporations fund successful development projects around the world,<sup>9</sup> and in 2008 and 2009 donated an

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<sup>1</sup> 7.0 Quake Hits Haiti; 'Serious Loss of Life' Expected, CNN (Jan. 13, 2010, 9:51 AM), <http://www.cnn.com/2010/WORLD/americas/01/12/haiti.earthquake/index.html>.

<sup>2</sup> Catherine Bremer & Andrew Cawthorne, *Haiti Says 200,000 May Be Dead, Violence Breaks Out*, REUTERS, Jan. 15, 2010, available at <http://www.reuters.com/article/2010/01/15/us-quake-haiti-idUSTRE60B5IZ20100115>.

<sup>3</sup> Catherine Keller, *Funds for Haiti*, BUS. CIVIC LEADERSHIP CENTER (Mar. 16, 2010), <http://bclc.uschamber.com/blog/2010-03-16/funds-haiti>.

<sup>4</sup> The term *corporation* will be used throughout this Comment to loosely signify all U.S. business structures.

<sup>5</sup> Catherine Keller, *Friday Update: \$106 Million in Business Aid for Haiti*, BUS. CIVIC LEADERSHIP CENTER (Jan. 22, 2010), <http://bclc.uschamber.com/blog/2010-01-22/friday-update-106-million-business-aid-haiti-0>.

<sup>6</sup> Annalyn Censky, *Haiti's Top Corporate Donors*, CNN MONEY, [http://money.cnn.com/galleries/2010/news/1002/gallery.top\\_donors\\_to\\_haiti/index.html](http://money.cnn.com/galleries/2010/news/1002/gallery.top_donors_to_haiti/index.html) (last updated Feb. 26, 2010). Standouts include Teva Pharmaceuticals, which donated \$7 million in medication, and Jefferies & Company, which donated \$7.5 million. *Id.*

<sup>7</sup> WORLD ECON. FORUM, PRIVATE SECTOR DEVELOPMENT IN HAITI: OPPORTUNITIES FOR INVESTMENT, JOB CREATION AND GROWTH 6 (2011), available at [http://www3.weforum.org/docs/WEF\\_Haiti\\_PrivateSectorDevelopment\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_Haiti_PrivateSectorDevelopment_Report_2011.pdf) (discussing the role of and further opportunities for business investment in Haiti's recovery); see also Deborah Sontag, *Earthquake Relief Where Haiti Wasn't Broken*, N.Y. TIMES, July 6, 2012, at A1 ("[F]ostering economic development is as important as replacing what fell down."); *Morning Edition* (National Public Radio broadcast Mar. 10, 2010), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=124077512> (discussing the opportunity for Haiti's economic development following the earthquake).

<sup>8</sup> CTR. FOR GLOBAL PROSPERITY, INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 2011, at 9 tbl.1 (Patricia Miller ed., 2011). See generally Heidi Metcalf Little, *The Role of Private Assistance in International Development*, 42 N.Y.U. J. INT'L L. & POL. 1091 (2010) (discussing the importance of private funding in international development).

<sup>9</sup> CTR. FOR GLOBAL PROSPERITY, *supra* note 8, at 5-6; Geoffrey B. Sprinkle & Laureen A. Maines, Executive Digest, *The Benefits and Costs of Corporate Social Responsibility*, 53 BUS. HORIZONS 445, 446 (2010) (citing examples such as Merck's successful efforts to combat river blindness).

estimated \$9–\$11 billion to charitable causes each year.<sup>10</sup> Corporations engage in philanthropy for a variety of reasons; some view it as part of their responsibility to be “a good global citizen,”<sup>11</sup> while others focus on improving the company’s image<sup>12</sup> or maintaining a stable working environment.<sup>13</sup> Other corporations use charitable activities to gain an edge over competitors,<sup>14</sup> but some of these targeted donations seem more like bribery than philanthropy.<sup>15</sup> For example, in 2002 Chevron Corporation timed the announcement of a \$50 million development project to coincide with negotiations over major oil assets in Angola.<sup>16</sup> The company pledged another \$80 million when the contract was later extended,<sup>17</sup> amid accusations that the donations were being funneled through the corrupt Angolan government’s network.<sup>18</sup>

A company funneling money to government leaders to win oil contracts is exactly the type of activity that the FCPA aims to eliminate. The purpose of the FCPA is to hold U.S. companies accountable for any bribes paid to foreign government officials or for failing to keep financial records that would prevent such activity from occurring.<sup>19</sup> In the aftermath of the Haitian earthquake, however, some commentators argued that this law did more than just discourage bribery—it also discouraged corporate charity and investment in the disaster relief effort.<sup>20</sup>

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<sup>10</sup> CTR. FOR GLOBAL PROSPERITY, *supra* note 8, at 9 (\$8.9 billion); MARGARET COADY, COMM. ENCOURAGING CORPORATE PHILANTHROPY, GIVING IN NUMBERS 4 (2009) (\$11.25 billion).

<sup>11</sup> Sprinkle & Maines, *supra* note 9, at 446.

<sup>12</sup> Faith Stevelman Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 665 n.375 (1997); Veronica Besmer, Note, *The Legal Character of Private Codes of Conduct: More Than Just a Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HASTINGS BUS. L.J. 279, 304 (2006).

<sup>13</sup> Jędrzej George Frynas, *The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 INT’L AFF. 581, 584–85 (2005).

<sup>14</sup> *Id.* at 584.

<sup>15</sup> See, e.g., Matthew Futterman, *Spending Spree Marked Qatar’s World Cup Bid*, WALL ST. J. EUR. (Brussels), Jan. 13, 2011, at 1; see also Kahn, *supra* note 12, at 626–27 & n.187 (discussing similar problems on a domestic scale).

<sup>16</sup> Frynas, *supra* note 13, at 584.

<sup>17</sup> *Id.*

<sup>18</sup> See Jędrzej George Frynas & Geoffrey Wood, *Oil & War in Angola*, 28 REV. AFR. POL. ECON. 587, 598 (2001).

<sup>19</sup> See *infra* notes 46–55 and accompanying text.

<sup>20</sup> Tyler Cowen, *One of the Best Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (Mar. 15, 2010, 9:24 AM), <http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html>; Ashby Jones, *Is the FCPA Standing in the Way of Haiti’s Recovery?*, WALL ST. J. L. BLOG (Mar. 16, 2010, 4:10 PM), <http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/>. But see Mike Koehler, *No, We Don’t Need to Suspend the FCPA in Haiti or Any Other Country!*, FCPA

“One of the best ways to help Haiti,” one commentator wrote, is to “[p]ass a law stating that the [FCPA] does not apply to dealings in Haiti.”<sup>21</sup> Another author reported that fear of FCPA prosecution “preclude[d] legitimate U.S. entities” from engaging the Haitian reconstruction effort.<sup>22</sup> This was not the first time that fear of criminal prosecution delayed charitable relief. Concerns regarding criminal liability delayed funds for Indian Ocean tsunami relief in 2004<sup>23</sup> and \$50 million of State Department aid to Somalia in 2009.<sup>24</sup> Looking at the FCPA specifically, other commentators argued that the law was functioning as a de facto sanction system, discouraging business engagement in high-risk countries, such as Haiti, because of the threat of prosecution.<sup>25</sup> Despite the debate surrounding the possible unintended effects of the law, the FCPA remained in force against companies working on reconstruction and relief efforts in Haiti. However, it was not long before rampant corruption and lack of donor transparency began to plague rebuilding efforts.<sup>26</sup> The question then became whether the law was even having its *intended* anticorruption effect.

The deleterious effects of corruption on economic, social, and political systems have been well documented.<sup>27</sup> Furthermore, since profits from corruption, bribery, and transnational crime fund criminal and terrorist

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PROFESSOR (Mar. 18, 2010, 8:46 AM), <http://fcpaprofessor.blogspot.com/2010/03/no-we-dont-need-to-suspend-fcpa-in.html>.

<sup>21</sup> Cowen, *supra* note 20.

<sup>22</sup> Jones, *supra* note 20.

<sup>23</sup> Justin Fraterman, *Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?* 2 (Jan. 14, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1750963](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750963) (discussing the criminalization of supplying international terrorist groups with material aid).

<sup>24</sup> *Id.* at 41.

<sup>25</sup> See, e.g., Cowen, *supra* note 20. See generally Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 366–77 (2010).

<sup>26</sup> See, e.g., Daniel Frankel, *Wyclef Jean Squandered Haitian Relief Funds*, REUTERS, Nov. 27, 2011, available at <http://www.reuters.com/article/2011/11/27/idUS146824993020111127> (discussing one example of the lack of accountability in the relief effort); Daniel Kaufmann, *Transparent Aid for Haiti's Reconstruction: Capture Matters*, BROOKINGS (Mar. 30, 2010), [http://www.brookings.edu/opinions/2010/0330\\_haiti\\_transparency\\_kaufmann.aspx](http://www.brookings.edu/opinions/2010/0330_haiti_transparency_kaufmann.aspx) (discussing the challenges in creating a transparent Haitian recovery).

<sup>27</sup> See, e.g., Jeff Everett et al., *Accounting and the Global Fight Against Corruption*, 32 ACCT., ORGS. & SOC'Y 513, 513–14 (2007). But see Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 808 (2006).

organizations around the globe,<sup>28</sup> foreign corruption even has significant effects on U.S. security and political interests.<sup>29</sup> For some, however, arguments against corruption are less persuasive if the corruption is entwined with development aid or charity because the funds are dedicated to good works.<sup>30</sup>

However, a plethora of literature suggests that even if corrupt donations reach needy recipients, no amount of charity will have a positive effect in developing countries without accountability and transparency.<sup>31</sup> Empirical studies have found that large amounts of aid in some recipient countries actually increase government corruption.<sup>32</sup> In the worst cases, unmonitored or misappropriated donations have strengthened abusive governments,<sup>33</sup> fueled conflict,<sup>34</sup> or provided funding to terrorist organizations.<sup>35</sup> On a more basic level, corruption eats away at the narrow budget of money dedicated to good works. In 2011, for example, almost \$53 million of the Global Fund to Fight AIDS, Tuberculosis, and Malaria was lost through corruption.<sup>36</sup> Massive corruption in international aid and charity is one major reason why “more than \$2.5 trillion in total aid” has not been more successful at reducing global poverty.<sup>37</sup>

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<sup>28</sup> See generally Louise Shelley, *The Unholy Trinity: Transnational Crime, Corruption, and Terrorism*, BROWN J. WORLD AFF., Winter/Spring 2005, at 101 (discussing the links between money funneled away through corruption and international crime and terrorism).

<sup>29</sup> See Spalding, *supra* note 25, at 360.

<sup>30</sup> Luke R. Entelis, *Defending the Charity “Loophole”: How Criticism of Congressional Charities Falls Short*, 24 GEO. J. LEGAL ETHICS 535, 537 (2011).

<sup>31</sup> See, e.g., Everett et al., *supra* note 27, at 517; Dambisa Moyo, *Essay: Why Foreign Aid Is Hurting Africa*, WALL ST. J., Mar. 21, 2009, at W1.

<sup>32</sup> Katherine Erbeznik, Note, *Money Can’t Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18 IND. J. GLOBAL LEGAL STUD. 873, 884–85 (2011) (citing Stephen Knack, *Aid Dependence and the Quality of Governance: Cross-Country Empirical Tests*, 68 S. ECON. J. 310, 310–11 (2001)).

<sup>33</sup> Moyo, *supra* note 31; see also Bruce Winfield Bean, *Hyperbole, Hypocrisy, and Hubris in the Aid–Corruption Dialogue*, 41 GEO. J. INT’L L. 781, 793 (2010) (arguing that corrupt governments have an incentive to “maintain bad policies so as to continue receiving aid”).

<sup>34</sup> Bean, *supra* note 33, at 791 (noting that in Somalia “a civil war was sparked by efforts of opposition groups to control the humanitarian food aid”); Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT’L L. REV. 539, 551 (2011) (“[H]umanitarian aid is merely another resource, like so-called conflict diamonds, that triggers conflicts between contending factions.”).

<sup>35</sup> Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, 71 Fed. Reg. 63,838, 63,847 (Oct. 31, 2006) (“[T]errorist abuse also includes the exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and activities.”).

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

<sup>37</sup> Bean, *supra* note 33, at 811.

In the immediate aftermath of the Haitian earthquake, commentators and development experts were anxious to turn the tragedy into an opportunity to rebuild a stronger Haiti, one no longer dependent on foreign aid.<sup>38</sup> In the relief effort, however, U.S. anticorruption law had the paradoxical effect of both discouraging much-needed corporate engagement and failing to capture corruption. The situation in Haiti illustrates the challenge facing the FCPA to adequately meet anticorruption goals and facilitate corporate charity.

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

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

## I. THE FCPA AND CORPORATE CHARITY

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

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<sup>38</sup> See *supra* note 7 (discussing Haiti’s “charity fatigue” and opportunities for long-term economic development following the earthquake).

### A. *The Law*

The creation of the FCPA in the 1970s began the global movement against corruption.<sup>39</sup> When U.S. company Lockheed Corporation revealed it had paid millions in bribes around the world,<sup>40</sup> it became clear corporate bribery was much more than a foreign ethics problem. Rather, it was a major policy issue that strained U.S. alliances and threatened political interests around the world.<sup>41</sup> In Italy, the “sight of corrupt capitalism” strengthened the communist movement.<sup>42</sup> Japanese–U.S. relations also suffered as the scandal threatened to “drive a wedge between two close allies.”<sup>43</sup> The fallout from the Lockheed scandal helped to provide impetus for the creation of the FCPA.<sup>44</sup>

The FCPA consists of two main provisions. The first is an accounting requirement to help prevent corruption, and the second is an enforcement mechanism to punish companies that have already engaged in bribery.<sup>45</sup> The accounting requirement, known as the books-and-records provision, requires corporations to maintain sufficient internal controls and accounting standards to prevent violations of the FCPA enforcement mechanism.<sup>46</sup> The enforcement mechanism, in turn, prohibits corruptly giving anything of value to a foreign official for the purpose of obtaining or retaining business.<sup>47</sup> The elements have been interpreted expansively by prosecutors and courts and are set out briefly below.

<sup>39</sup> See DAVID KENNEDY & DAN DANIELSEN, *BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 20–21* (2011) (noting the effect that the FCPA had on the global anticorruption movement, creating momentum for agreements such as the OECD Anti-Bribery Convention, the Council of Europe Convention on Corruption, and the UN Convention against Corruption).

<sup>40</sup> Spalding, *supra* note 25, at 360.

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

<sup>42</sup> *Id.* at 385 (quoting *Unlawful Corporate Payments Act of 1977: Hearing on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 95th Cong. 173 (1977) (statement of Rep. Stephen S. Solarz)) (internal quotation marks omitted).

<sup>43</sup> *Id.* (quoting *Foreign Payments Disclosure: Hearing Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Commerce*, 94th Cong. 141 (1976) (statement of Rep. Stephen S. Solarz)) (internal quotation marks omitted).

<sup>44</sup> See *id.* at 359–60 (discussing how the Lockheed scandal produced congressional hearings “almost immediately” and alerted Congress to the “foreign policy problem” of U.S. bribery).

<sup>45</sup> See 15 U.S.C. § 78dd-1 (2006).

<sup>46</sup> See 15 U.S.C. § 78m(b)(2)(A) (2006).

<sup>47</sup> Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389–90 (2010); see 15 U.S.C. § 78dd-1. An affirmative defense to an FCPA charge is available if the payment is: 1) explicitly legal under the host country’s laws, or 2) a reasonable business expenditure made without corrupt intent. 15 U.S.C. § 78dd-1(c)(1)–(2). There is also an exception for grease payments to speed up routine, clerical government actions. 15 U.S.C. § 78dd-1(b).



- “*Corruptly giving*”: The FCPA is aimed at payments that are made corruptly with “evil motive or purpose.”<sup>48</sup>
- “*Anything of value*”: In other criminal statutes, this phrase has been interpreted broadly by courts; the FCPA is no exception.<sup>49</sup> It can be extended to gifts, travel expenses, scholarships, and even charitable donations made in the name of an individual or to a cause that an individual values.<sup>50</sup>
- “*To a foreign official*”: A foreign official is defined in the FCPA as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”<sup>51</sup> The term *instrumentality* was the source of a great deal of confusion,<sup>52</sup> but several recent court decisions have offered multifactor definitions for the term.<sup>53</sup> The factors include considerations such as the foreign state’s characterization of the entity, the purpose of the entity’s activities, and whether the entity derives support from grants or a special tax status.<sup>54</sup>
- “*For the purpose of obtaining or retaining business*”: This term has also been interpreted expansively and covers any activities that assist a

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<sup>48</sup> Stichting Ter Behartiging Van De Belangen Van Oudaandehouders In Het Kapitaal Van Saybolt Int’l B.V. v. S.E. Schreiber, 327 F.3d 173, 182 (2d Cir. 2003); see also United States v. Kay, 513 F.3d 432, 447–49 (5th Cir. 2007) (noting that “corruptly” was a fact-based question and that a jury did not need to find specific intent to find that a defendant acted corruptly).

<sup>49</sup> William Alan Nelson II, No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act 9–10 (July 1, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884283](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884283); see also *NFTC Criticizes Broadening FCPA Enforcement, Lawyers Disagree*, INSIDE U.S. TRADE, Oct. 24, 2008, at 1, 22 [hereinafter *NFTC Criticizes*] (“[T]he company’s contribution to the charity bestowed a benefit to the official because it enhanced his reputation . . .”).

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

<sup>51</sup> 15 U.S.C. § 78dd-1(f).

<sup>52</sup> See generally Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243 (2008) (suggesting the DOJ and SEC provide more guidance regarding who qualifies as a foreign official under the FCPA).

<sup>53</sup> Thomas R. Fox, *Reading a Crystal Ball? Guidance on Instrumentality Under the FCPA—Part I*, FCPA COMPLIANCE & ETHICS BLOG (Aug. 17, 2011, 7:14 AM), <http://tfoxlaw.wordpress.com/2011/08/17/reading-a-crystal-ball-guidance-on-instrumentality-under-the-fcpa-part-i/>.

<sup>54</sup> *Id.* Other factors cited include: the extent of the foreign state’s ownership or control over the entity or its officers; the entity’s financing structure and whether support is derived from government appropriations or fees; the circumstances surrounding the entity’s creation; and if the entity is widely perceived to be performing government functions. *Id.*

company in obtaining business directly (such as winning contracts) or indirectly (such as gaining lower taxes or import duties).<sup>55</sup>

The DOJ and SEC both have enforcement power over FCPA violations.<sup>56</sup>

### B. Application to Corporate Philanthropy: Desirable Ambiguities?

This section discusses the shortcomings of U.S. anticorruption laws with regard to charitable giving and demonstrates that the FCPA is both over- and under-inclusive in the realm of corporate charity.

The FCPA has often been criticized for a lack of clarity,<sup>57</sup> yet the DOJ and SEC have declined to issue formal rules or guidelines until very recently.<sup>58</sup> Some scholars have suggested that this lack of guidance stemmed from an unwillingness to provide a “blueprint” for companies to circumvent the law.<sup>59</sup> Many support this reasoning and believe that the inherent ambiguities in the FCPA make it an effective law.<sup>60</sup>

<sup>55</sup> United States v. Kay, 513 F.3d 432, 439–40 (5th Cir. 2007) (avoiding taxes); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025 (6th Cir. 1990) (gaining changes in pricing controls and assurances regarding the tax rate).

<sup>56</sup> Koehler, *supra* note 47, at 395.

<sup>57</sup> See, e.g., Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 497 (2011).

<sup>58</sup> CRIMINAL DIV. OF THE DEP’T OF JUSTICE & ENFORCEMENT DIV. OF THE SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012). This guidance did not add any new regulations or rules, however, and was intended to be “non-binding, informal, and summary in nature.” *Id.*

<sup>59</sup> Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT’L L. 431, 461–62 (1987); see also Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. INT’L L. & POL. 645, 654 & n.67 (1981) (discussing how, at the FCPA’s inception, the SEC asked why they should “issue guidelines on how to violate the law” and DOJ officials likewise refused to tell businesses “who they can bribe and who they can’t”). *But see* Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It’s Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT’L & COMP. L. REV. 379, 400–01 (2005) (arguing that the DOJ did not issue guidelines because the nature of the FCPA made it impossible to write effective guidance).

<sup>60</sup> See Letter from Civil Society Organizations to Members of the U.S. House of Representatives (Jan. 12, 2012), available at <http://www.globalwitness.org/sites/default/files/FCPA%20Letter.pdf> (“We believe that any amendments to more narrowly define key terms of the FCPA would . . . significantly undermine the statute as a tool to curb corruption.”). *But see* Westbrook, *supra* note 57, at 498 (arguing that the FCPA’s ambiguities “frustrate its purpose”). There has been a recent push, spearheaded by the Chamber of Commerce, to amend the FCPA in a variety of ways. See ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010). These efforts have largely been suspended following a well-publicized bribery scandal of one of the Chamber’s major donors, Wal-Mart. Peter J. Henning, *Taking Aim at the Foreign Corrupt Practices Act*, N.Y. TIMES DEALBOOK (Apr. 30, 2012, 1:55 PM), <http://dealbook.nytimes.com/2012/04/30/taking-aim-at-the-foreign-corrupt-practices-act/>.

While formal rules are lacking, the DOJ does have an “opinion release procedure” to provide guidance.<sup>61</sup> Through this process, companies submit details of their business situations or contracts—hypotheticals are not permitted—and the DOJ publishes its opinion regarding any possible FCPA issues.<sup>62</sup> If the company follows the DOJ’s advice, the activity is presumed to be FCPA compliant.<sup>63</sup> This opinion release procedure, however, has been used only a few times each year since its inception.<sup>64</sup>

Five of the last thirty FCPA opinion releases focus on charitable activity, demonstrating corporations’ concerns about how the FCPA applies to philanthropy.<sup>65</sup> Although the DOJ may believe that ambiguity is a desirable trait in the FCPA, there is evidence that it is willing to offer extra guidance for philanthropic activities. In an effort to provide clarity to the area, the DOJ included a best practices guide for international charity in a 2010 opinion.<sup>66</sup> This guide instructs donors to:

- 1) obtain certification from the recipient regarding an understanding of the FCPA;
- 2) perform due diligence to confirm that none of the recipient’s officers are affiliated with the foreign government;
- 3) obtain audited financial statements from the recipient;
- 4) ensure the funds are transferred to a valid bank account;
- 5) confirm that the activities planned occur prior to disbursement of funds; and
- 6) continue to monitor the program.<sup>67</sup>

Despite the DOJ publications, confusion remains regarding the scope of the FCPA and charitable giving.<sup>68</sup>

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<sup>61</sup> See Longobardi, *supra* note 59, at 461–65, for a detailed discussion of the opinion release procedure.

<sup>62</sup> See *id.* at 462–63. In the publications, all identifiers or specific details about the company, contract, or operating country are removed. *Id.*

<sup>63</sup> 28 C.F.R. § 80.10 (2012).

<sup>64</sup> Longobardi, *supra* note 59, at 465. See generally *Opinion Procedure Releases*, U.S. DEP’T JUST., <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Jan. 12, 2013).

<sup>65</sup> See U.S. DEP’T OF JUSTICE, NO. 10-02, OPINION PROCEDURE RELEASE (2010); U.S. DEP’T OF JUSTICE, NO. 09-01, OPINION PROCEDURE RELEASE (2009); U.S. DEP’T OF JUSTICE, NO. 06-01, OPINION PROCEDURE RELEASE (2006); U.S. DEP’T OF JUSTICE, NO. 97-02, OPINION PROCEDURE RELEASE (2002); U.S. DEP’T OF JUSTICE, NO. 95-01, OPINION PROCEDURE RELEASE (1995). For an in-depth analysis of these opinions, see Nelson, *supra* note 49, at 22–32.

<sup>66</sup> U.S. DEP’T OF JUSTICE, NO. 10-02, OPINION PROCEDURE RELEASE 6 (2010).

<sup>67</sup> *Id.*

<sup>68</sup> Westbrook, *supra* note 57, at 539.

Compounding this confusion is a lack of relevant caselaw.<sup>69</sup> There has been only one instance of a successful FCPA investigation and settlement regarding illicit charitable donations.<sup>70</sup> In 2004, the SEC settled with U.S.-based pharmaceutical company Schering-Plough (SP) for violations of the books-and-records provision.<sup>71</sup> SP paid \$500,000 in fines<sup>72</sup> for the improper recording of about \$75,000 in donations made by SP's Polish subsidiary to a Polish non-profit.<sup>73</sup>

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

- 1) SP's corporate charity focus was on healthcare issues, but the Polish non-profit was dedicated to the restoration of castles;
- 2) the donations to the charity represented an unusually high percentage of the total charitable gifts made by SP Poland during the time period;
- 3) most of the payments were carefully structured so the dollar amount did not exceed the local manager's authorization level; and

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<sup>69</sup> *Id.* at 497, 539. This complaint regarding the FCPA is not unique to the area of corporate charity. The wide majority of FCPA cases settle without going to trial, and the resulting deferred- or non-prosecution agreements are not subject to judicial scrutiny and are not considered binding precedent. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 998–1001 (2010) (discussing "[t]he [a]bsurdity of FCPA '[c]ase [l]aw'"). Despite the paucity of FCPA actions actually brought, potential penalty costs are dwarfed by the amount that a company must expend to investigate possible abuses. Russell G. Ryan & Laura K. Bennett, *Seven Common False Comforts and Misconceptions About FCPA Risk*, 26 Corp. Couns. Wkly. (BNA) 389 (Dec. 21, 2011) (noting that a company that ultimately paid a \$300,000 FCPA penalty also expended \$2.5 million to investigate the violations); see also Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, FORBES, May 24, 2010, at 70 (noting that Siemens is reported to have spent nearly \$1 billion on legal and accounting analysis to review its transactions before and during the major FCPA prosecution).

<sup>70</sup> *In re Schering-Plough Corp.*, Exchange Act Release No. 49,838, 82 SEC Docket 3644 (June 9, 2004); see also John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 147–54 (2005). One FCPA case focused on charitable giving did reach the court system, but it was dismissed because the court found that the FCPA did not allow for a private right of action. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027–30 (6th Cir. 1990). In this case, a U.S. tobacco company's foreign subsidiary entered into a contract with the Children's Foundation of Caracas. *Id.* at 1025. This agreement, signed on behalf of the foundation by the wife of the President of Venezuela, set forth that in exchange for a \$12.5 million donation, the company would gain price controls and tax assurances in Venezuela's tobacco market. *Id.*

<sup>71</sup> See *In re Schering-Plough*, 82 SEC Docket at 3644–45.

<sup>72</sup> *Id.* at 3644 n.1.

<sup>73</sup> *Id.* at 3645.

- 4) the director and founder of the charity was also a Polish government official responsible for purchasing healthcare products for his region of Poland.<sup>74</sup>

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

Ultimately, SP only faced fines for violations of the books-and-records requirement, not for violations of the substantive antibribery enforcement mechanism.<sup>76</sup> This is possibly because the element of the crime requiring a knowing or willful violation failed to transfer from the Polish SP subsidiary to U.S.-based SP.<sup>77</sup>

The SP investigation and settlement came as a surprise to many,<sup>78</sup> despite the historical precedent of considering charitable contributions to be something of “value.”<sup>79</sup> The settlement created confusion in companies’ compliance programs because SP’s donations were made to a recognized Polish charity and the Polish foreign official enjoyed no personal financial gain.<sup>80</sup> This seemed to contradict a 2009 DOJ opinion release stating that a corporation was allowed to donate medical devices to foreign, state-run hospitals because the gifts were not directed to foreign officials, but rather to foreign instrumentalities, the hospitals.<sup>81</sup> Despite the confusion, commentators did

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<sup>74</sup> Complaint at 5, *SEC v. Schering-Plough Corp.*, No. 1:04CV00945 (D.D.C. June 9, 2004).

<sup>75</sup> *Id.* at 4. This is similar to the recent exposé regarding Wal-Mart’s Mexican subsidiary’s FCPA violations. In that case, Wal-Mart de Mexico was revealed to have paid almost \$16 million directly to local governments in Mexico to obtain licenses or building permits—many of these payments were labeled as “donations” in the company records. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1.

<sup>76</sup> Giraudo, *supra* note 70, at 150–51.

<sup>77</sup> *Id.* Currently, the SEC is investigating donations made by Wynn Resorts Limited, which may implicate FCPA issues. *Wynn Resorts \$135 Million University of Macau Donation the Subject of SEC Scrutiny*, FCPA PROFESSOR (Feb. 14, 2012), <http://www.fcprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny>.

<sup>78</sup> See, e.g., Giraudo, *supra* note 70, at 154; Martin J. Weinstein & Robert J. Meyer, *SEC Finds Donations to Bona Fide Charity to Be in Violation of the FCPA*, in CORPORATE AND SECURITIES LAW UPDATE 579, 580 (PLI N.Y. Practice Skills, Course Handbook Ser. No. 3377, 2004).

<sup>79</sup> See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027 (6th Cir. 1990) (quoting 15 U.S.C. § 78dd-1(a), -2(a)); accord *Brown*, *supra* note 50, at 273–75.

<sup>80</sup> Giraudo, *supra* note 70, at 151 (noting the donations were made directly to the charity); see also Weinstein & Meyer, *supra* note 78, at 580 (noting that the “expansive” new enforcement actions of the SEC could “render promotional charitable donations a criminal violation of the FCPA, even though such payments traditionally have withstood scrutiny”).

<sup>81</sup> U.S. DEP’T OF JUSTICE, NO. 09-01, OPINION PROCEDURE RELEASE (2009); see also U.S. DEP’T OF JUSTICE, NO. 97-02, OPINION PROCEDURE RELEASE (1997) (declining to prosecute a company that was

agree that the SEC investigation indicated that corporate charity was fair game for FCPA investigations.<sup>82</sup> Some commentators have even predicted that the DOJ and SEC might affirmatively target charity programs for potential FCPA abuses.<sup>83</sup>

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

### *1. Over-Inclusivity*

Compliance advice—released by the DOJ or designed by commentators—tends to envision a much broader interpretation of the FCPA than the language of the statute suggests.<sup>84</sup> These opinions recommend a total prohibition against any charitable gifts to any organization with connections to foreign officials or their families.<sup>85</sup> The FCPA, however, does not criminalize giving *anything* to foreign officials, but rather giving gifts to foreign officials *corruptly* (with the ill-intent expectation of quid pro quo).<sup>86</sup> This guidance suggests that corporations may be exposing themselves to liability if they make donations to organizations connected to foreign officials. For a prudent, philanthropic company following these guidelines, the pool of possible charity recipients would seem to be limited to organizations that are 1) private, and 2) lacking in any connection to a government official.<sup>87</sup> Furthermore, identifying “foreign officials” is considerably more difficult in the charitable realm than in traditional business decisions. Many factors used in recent judicial decisions to define “government entities” might apply de facto to non-profit organizations, such as “the purpose of the entity’s activities,” or if the entity is granted

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planning donations to a local school, because the donations were going to a government entity (the school) rather than foreign officials); Nelson, *supra* note 49, at 35–36.

<sup>82</sup> Giraud, *supra* note 70, at 152; Weinstein & Meyer, *supra* note 78, at 580.

<sup>83</sup> See, e.g., Helmer & Deming, *supra* note 36, at 623–24 (predicting that internationally focused NGOs and aid organizations, especially “NGOs that are not fundamentally of a charitable nature, and that compete with more traditional business organizations,” might become the focus of FCPA scrutiny).

<sup>84</sup> See Koehler, *supra* note 69, at 1001 (“[B]usinesses . . . model FCPA compliance policies . . . not on what the law actually says, but rather on what the enforcement agencies say the law says . . .”); Nelson, *supra* note 49, at 48–58. See generally *supra* note 65.

<sup>85</sup> See, e.g., U.S. DEP’T OF JUSTICE, NO. 10-02, OPINION PROCEDURE RELEASE (2010).

<sup>86</sup> 15 U.S.C. § 78dd-1(a) (2006); see *supra* text accompanying note 48.

<sup>87</sup> However, this may be difficult because, as Nelson notes, “many foreign aid organizations have ties to foreign governments.” Nelson, *supra* note 49, at 40.

“special tax treatment.”<sup>88</sup> Such an expansive, ambiguous application of the FCPA runs the serious risk of chilling even honest corporate charity programs.<sup>89</sup>

Commentators have long argued that the FCPA has a negative impact on U.S. business abroad, although empirical evidence of such claims is inconclusive.<sup>90</sup> However, it is possible that any chilling impact the FCPA might have on business may be exacerbated in the realm of corporate charity: in for-profit business arrangements, the corporation might count on its profit to offset FCPA risks.<sup>91</sup> Such a profit offset is unlikely to exist in a charity project, at least to the extent necessary to offset the potential costs of an FCPA investigation. Corporations may try to minimize their risk by directing corporate aid away from “high-risk,” corrupt countries.<sup>92</sup> This could cause unintended collateral damage by creating de facto sanctions that isolate the least developed, neediest communities from corporate charity.<sup>93</sup> By discouraging corporate aid, the United States risks not only exacerbating poverty, but also squandering the opportunity for global leadership.<sup>94</sup>

## 2. *Under-Inclusivity*

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

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<sup>88</sup> See Fox, *supra* note 53.

<sup>89</sup> *NFTC Criticizes*, *supra* note 49. See generally Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1044–72 (2008) (arguing that the enforcement of many corporate criminal statutes causes companies to “overpay” for compliance programs and avoid otherwise lucrative investments or other opportunities).

<sup>90</sup> See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 90–91 (2007) (discussing the contradictory reports on the effect that the FCPA has on U.S. business). Compare WEISSMANN & SMITH, *supra* note 60, at 5 (arguing that the FCPA has had a negative effect on U.S. business interests), with Susan Rose-Ackerman & Sinéad Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433, 433 (2012) (arguing that the negative impact of the FCPA and other anticorruption laws has been overstated).

<sup>91</sup> Brandon L. Garrett, *Don’t Believe the Hype on Corporate Bribery*, HUFFINGTON POST (May 2, 2012, 8:52 AM), [http://www.huffingtonpost.com/brandon-l-garrett/dont-believe-the-hype-on-\\_b\\_1470363.html](http://www.huffingtonpost.com/brandon-l-garrett/dont-believe-the-hype-on-_b_1470363.html) (suggesting that FCPA fines and costs “may be fairly trivial in comparison to the corporate profits”).

<sup>92</sup> Nelson, *supra* note 49, at 39 (“The amount of corruption in a country can affect a company’s willingness to make charitable contributions in that country.”).

<sup>93</sup> See Spalding, *supra* note 25, at 398.

<sup>94</sup> Margulies, *supra* note 34, at 543 (discussing counterterrorism policy and its chilling effect on U.S. donations abroad).

For example, some corporate donations appear to be attempts to “buy off” host communities to create a favorable working environment.<sup>95</sup> Consider Shell Oil Company in Nigeria, which has been criticized for creating development projects only in communities adjacent to pipeline construction, and then abandoning the projects immediately when the pipelines are complete and the villagers’ goodwill is no longer needed.<sup>96</sup> As another example, Shell “built three town halls in one Niger Delta community as three community chiefs wanted to benefit personally from contracts for their construction.”<sup>97</sup> From the facts available, it appears Shell’s actions would not implicate any FCPA issues: no government official benefited from the donations even though such activities seem corrupt.

Furthermore, it may be possible for unscrupulous corporations to escape FCPA liability if they funnel donations through charities that are independent from foreign officials. It is easy to imagine a scenario in which a corporation seeks business opportunities from a foreign official in exchange for development projects that increase the official’s popularity in a key electoral area.<sup>98</sup> Even though such an exchange “undermine[s] . . . inherent fairness”<sup>99</sup> and provides a foreign official with something of value—here, increased prestige in an electoral district—because the funds are dedicated to a town or area rather than a government official, it is possible no FCPA violations would occur.<sup>100</sup>

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

This Part explores solutions that will allow anticorruption laws to operate more effectively in the realm of corporate philanthropy. It introduces the safe harbor option, a modification to the FCPA that gives corporations the option of “buying” a rebuttable presumption of legitimacy for their donations in return for full disclosure of these payments.

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<sup>95</sup> Frynas, *supra* note 13, at 584–85; Sprinkle & Maines, *supra* note 9, at 446–48.

<sup>96</sup> Frynas, *supra* note 13, at 584–85.

<sup>97</sup> *Id.* at 585.

<sup>98</sup> See Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 26–29 (2006).

<sup>99</sup> *Id.* at 29.

<sup>100</sup> *Id.* at 26–29; Nelson, *supra* note 49, at 35 (discussing the DOJ opinion releases and noting that the opinions “are troublesome in that they seem to give companies room to circumvent the FCPA” through scenarios such as the one discussed here); Rose-Ackerman & Hunt, *supra* note 90, at 444 n.64.



To ameliorate the over- and under-inclusive nature of the FCPA's treatment of corporate charity, an optional disclosure-based program should be enacted. The safe harbor option proposed by this Comment will incentivize transparency and decrease corruption by allowing for public shaming of companies engaging in corrupt philanthropy. The rebuttable presumption of legitimacy, awarded to corporations participating in the safe harbor option, will ease some of the concerns corporations may have regarding the scope of the FCPA and potential liability stemming from charitable donations.<sup>101</sup>

Although the SEC and DOJ seem to view self-disclosure of FCPA violations favorably in the process of investigation and potential prosecution,<sup>102</sup> such disclosures provide little assurance to companies because any prosecutorial mercy is purely discretionary.<sup>103</sup> The safe harbor option will function very differently as an optional program that requires disclosure of all corporate charity, not merely donations a company later discovers to be FCPA violations.

If a company participates in the safe harbor option, they would be required to file annual reports disclosing charitable donations. These disclosures would be made to a neutral organization or government agency.<sup>104</sup> A new commission or board within the agency would be created to monitor the corporate philanthropy disclosures.<sup>105</sup> The amount of the donation, the project, purpose,

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<sup>101</sup> For a similar recommendation for charitable and non-profit organizations regarding the application of the laws against providing funding to a terrorist organization, see Margulies, *supra* note 34, at 545, which recommended a solution that combines a "safe harbor" and an "expanded waiver" that produces a "dual approach [that] encourage[s] due diligence on the part of aid groups, while avoiding an undue burden on humanitarian efforts."

<sup>102</sup> See KENNEDY & DANIELSEN, *supra* note 39, at 29 (arguing that a statutory defense for "compliance" is unnecessary since the DOJ and SEC already take the presence of compliance programs and efforts into account when bringing a case).

<sup>103</sup> Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 650 (discussing the "opaque, inconsistent, and unpredictable world of DOJ decisionmaking"). This is further complicated by the fact that disclosure of some FCPA violations to the SEC may open the company up to prosecution by other government agencies, such as the DOJ or the IRS. George Clarke & Lina Braude, *More Sticky Strands in the FCPA Web: Tax Rules and Financial Reporting May Drive Disclosure*, 42 INT'L LAW. 1095, 1095-96 (2008).

<sup>104</sup> Possible organizations include the Export-Import Bank or Overseas Private Investment Corporation. Cf. Daniel M. Firger, Note, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1043, 1093 (2010).

<sup>105</sup> Other authors have suggested similar commissions or federal agencies to monitor charitable activity within the United States. See Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL'Y 1, 8 (2009) (advocating "the creation of a federal quasi-public agency to serve as the principal regulator of the charitable sector"); Lloyd

beneficiaries, and any affiliated organizations would be disclosed.<sup>106</sup> Such a disclosure and tracking system should not be too difficult or expensive to provide.<sup>107</sup> The system should be Internet-based, fully searchable,<sup>108</sup> and, most importantly, easy to use and accessible to readers.<sup>109</sup> The disclosure system should make information easily and readily available to NGOs, watchdog groups, and interested citizens.<sup>110</sup>

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

With the FCPA safe harbor option, corporations would have a much greater incentive to provide accurate and complete information: a rebuttable presumption of legitimacy for their donations. This presumption would be awarded to companies that accurately disclose their charitable contributions

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Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 498–501 (2010) (citing a variety of proposals recommending the creation of a federal commission to monitor domestic non-profits).

<sup>106</sup> For an example of a possible disclosure form for corporate social responsibility, see Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1299–300, app. at 1307–11 (1999).

<sup>107</sup> Michael Wiehen, *Needs Assessment, Contracting, and Execution, in CURBING CORRUPTION IN TSUNAMI RELIEF OPERATIONS* 49, 49 (2005) [hereinafter TSUNAMI RELIEF OPERATIONS]. *But see* William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 54–55 (2006) (discussing the difficulties that the Senate and House had in creating a glitch-free and functioning Internet-based program to publicize disclosures).

<sup>108</sup> Luneburg & Susman, *supra* note 107, at 55 (recommending the use of a system that allowed for “immediate posting on the Internet and full-text searches as well as searches by category”); Elisabeth Bassett, Comment, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1082 (2008).

<sup>109</sup> See Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, on Disclosure and Simplification as Regulatory Tools 7 (June 18, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure\\_principles.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf).

<sup>110</sup> See TSUNAMI RELIEF OPERATIONS, *supra* note 107, at 4. For further discussion of the potential role of NGOs and watchdog groups, see *infra* text accompanying notes 159–63.

<sup>111</sup> Jak Jabes, *Improving the Transparency of Aid Flows, in TSUNAMI RELIEF OPERATIONS, supra* note 107, at 13, 14.

<sup>112</sup> *See id.*

<sup>113</sup> RHODA MARGESSON, CONG. RESEARCH SERV., RL32715, INDIAN OCEAN EARTHQUAKE AND TSUNAMI: HUMANITARIAN ASSISTANCE AND RELIEF OPERATIONS 21 n.41 (2005).

through the online tracking system,<sup>114</sup> subject only to minimal monitoring by the newly created board or commission.<sup>115</sup> The legitimacy presumption should be considered rebutted if the new board finds clear and convincing evidence, whether from an outside watchdog report or through its own monitoring process, that the information disclosed was not accurate or aid given was not actually intended as a charitable donation.

Drawing examples from the scenarios discussed above, the facts of the Schering-Plough settlement<sup>116</sup> would rebut this presumption because the “donations” were actually considered “dues” paid to gain cooperation of a foreign official.<sup>117</sup> Alternatively, Chevron’s donations in Angola might not rebut the presumption of legitimacy because it appears, at least from the information available, that the payments were made as donations, not as dues to the government.<sup>118</sup>

If the new monitoring board finds clear and convincing evidence to rebut the presumption of legitimacy, it would then pass the case on to the DOJ or to the SEC for traditional investigation or enforcement.<sup>119</sup> If corporations choose not to disclose their payments, their payments would remain open to traditional FCPA investigation and enforcement action.

### III. REGULATING BY DISCLOSURE

This Part explores the benefits of creating a safe harbor option within the FCPA enforcement regime that would incentivize disclosure by granting corporate philanthropy a rebuttable presumption of legitimacy. This Part discusses the specific regulatory benefits of the safe harbor option and how it

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<sup>114</sup> This is similar to how the DOJ currently views situations that have been sanctioned through the opinion release procedure. *See supra* note 63. If a company follows advice and guidance given by the DOJ in response to the corporation’s opinion request, the activity is presumed to be in compliance with the FCPA. If the information provided to the DOJ is not accurate or complete, the presumption will be rebutted. 28 C.F.R. § 80.10 (2012).

<sup>115</sup> The creation of commissions or boards to monitor charitable activity has been suggested by a number of commentators. *See supra* note 105 and accompanying text.

<sup>116</sup> For a discussion of the Schering-Plough case, see *supra* notes 71–77 and accompanying text.

<sup>117</sup> Complaint at 4, *SEC v. Schering-Plough Corp.*, No. 1:04CV00945 (D.D.C. June 9, 2004).

<sup>118</sup> *See supra* notes 16–18 and accompanying text. The Angola payments, however, may still deserve public scrutiny or criticism, which will be facilitated if Chevron properly discloses the details of these transactions. *See infra* Part III.B.

<sup>119</sup> *Cf.* James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 273 (2003) (suggesting that, in this situation, a commission should pass the case on to the Assistant Attorney General).

would ameliorate both the over- and under-inclusive aspects of the FCPA's treatment of corporate charity.<sup>120</sup>

This Part discusses why the safe harbor option proposed by this Comment is an important addition to how the FCPA is enforced against corruption in corporate charity. It shows how the safe harbor option would ameliorate the over-inclusive effects of the FCPA by offering the presumption of legitimacy and by relying on disclosure rather than strict prohibition. The safe harbor option would also ameliorate the under-inclusive nature of the FCPA by encouraging disclosure and allowing for public monitoring of both legal and illegal corporate charity.

#### A. *Ameliorate FCPA's Over-Inclusivity*

The safe harbor option would offer corporations the opportunity to gain a rebuttable presumption of legitimacy for their charitable donations. This presumption would ease FCPA liability concerns that might otherwise discourage charity. Unlike current FCPA compliance, which focuses on strict prohibition (i.e., “confirm that none of the recipient's officers [are] affiliated with the foreign government”),<sup>121</sup> the safe harbor option would encourage regulation of charity through disclosure.

The traditional, prohibition-based enforcement of the FCPA should be updated because such systems are “limited in their ability to regulate corporations' sustainable economic development.”<sup>122</sup> A disclosure-based (or “information-based”) system is often seen as a “second generation” regulatory strategy that is useful for updating older, prohibition-based systems.<sup>123</sup> The FCPA, like many major regulations, was created in the 1970s and relies on “command-and-control,” or a prohibitive system of regulation.<sup>124</sup> Such systems

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<sup>120</sup> For a general introduction to regulatory systems that rely on disclosure, see Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618–29 (1999).

<sup>121</sup> See U.S. DEP'T OF JUSTICE, NO. 10-02, OPINION PROCEDURE RELEASE 6 (2010); *supra* text accompanying note 66.

<sup>122</sup> See David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 263 (2007).

<sup>123</sup> Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 21–23 (2001); accord Katherine Renshaw, Student Article, *Sounding Alarms: Does Informational Regulation Help or Hinder Environmentalism?*, 14 N.Y.U. ENVTL. L.J. 654, 663 (2006).

<sup>124</sup> See Stewart, *supra* note 123, at 21–23.

can have a chilling effect on the activity regulated,<sup>125</sup> just as the FCPA has caused corporations to hesitate before donating abroad.<sup>126</sup> Disclosure-based regulations are more flexible than strict prohibitions and “incorporate . . . basic economic and social changes” with greater ease than prohibitive systems.<sup>127</sup> Such flexibility and inclusiveness is especially desirable for charitable programs, which may need to change quickly based on a company’s evolving social goals or in response to a sudden humanitarian disaster.<sup>128</sup>

The safe harbor option grants corporations the ability to choose the regulatory program that makes the best economic sense for their company.<sup>129</sup> The current cost of FCPA compliance causes considerable dismay in the business community<sup>130</sup>: even “relatively small” FCPA penalties are in the hundreds of thousands of dollars<sup>131</sup> and may be accompanied by millions of dollars in investigation and compliance fees.<sup>132</sup> However, an alternative, disclosure-based system has also been criticized for its cost: at the creation of the FCPA, Congress rejected a form of the law based on disclosure because of concerns regarding the high costs and paperwork requirements.<sup>133</sup> Within the narrow realm of corporate charity, however, costs of disclosure are likely to be much lower, perhaps in part because many corporations already disclose charitable information directly to shareholders or to the “popular media . . . where public relations benefits are anticipated.”<sup>134</sup>

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<sup>125</sup> This phenomenon has been observed in the enforcement of many corporate criminal statutes that cause companies to “overpay” for compliance and avoid other opportunities. Baer, *supra* note 89. Disclosure-based systems, on the other hand, reduce the cost of potential deviation and provide more producer flexibility. Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 580 (1979).

<sup>126</sup> See *supra* notes 21–26 and accompanying text.

<sup>127</sup> Stewart, *supra* note 123, at 130 (discussing how environmental regulations that are based on disclosure or information are more flexible than traditional control-style laws).

<sup>128</sup> This will be discussed further in Part IV.B. See *infra* text accompanying note 201.

<sup>129</sup> The factors and considerations that already go into a company’s decision to voluntarily disclose FCPA matters are numerous. Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures* 9–11 (Mar. 27, 2007) (unpublished manuscript), available at <http://apps.americanbar.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf>.

<sup>130</sup> See generally WEISSMANN & SMITH, *supra* note 60.

<sup>131</sup> Ryan & Bennett, *supra* note 69, at 2.

<sup>132</sup> WEISSMANN & SMITH, *supra* note 60, at 5 (discussing the impact of current FCPA costs on U.S. companies).

<sup>133</sup> Koehler, *supra* note 47, at 419–20.

<sup>134</sup> Kahn, *supra* note 12, at 583; see also Comments from Nat’l Mining Ass’n to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n, Proposed Rule Implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 10 (Mar. 2, 2011), available at <http://www.sec.gov/comments/s7-42-10/s74210-45.pdf> (“Such payments typically will be covered by the voluntary sustainable development reports

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

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

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

Putting a greater emphasis on disclosure through the safe harbor option would also help punish corrupt activity that the current FCPA fails to criminalize or capture. The presumption of legitimacy would encourage and reward disclosure, which would in turn allow civil society to monitor corporate donations, even if the payments are not illegal under the FCPA.<sup>139</sup>

As a second-generation regulatory structure, disclosure-based systems allow civil society to participate in the regulatory process to a greater extent

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in any event."); Low et al., *supra* note 129, at 6–8 (discussing a variety of other laws, besides the FCPA, which might mandate disclosure).

<sup>135</sup> ANNA PETERS & DANIELA RÖB, *THE ROLE OF GOVERNMENTS IN PROMOTING CORPORATE RESPONSIBILITY AND PRIVATE SECTOR ENGAGEMENT IN DEVELOPMENT* 17 (2010) (discussing the benefits of "soft law" and the "importance of voluntarism in the [corporate responsibility] agenda").

<sup>136</sup> See Marianne M. Jennings & Jon Entine, *Business with a Soul: A Reexamination of What Counts in Business Ethics*, 20 *HAMLIN J. PUB. L. & POL'Y* 1, 35 (1998); Rene Lynch, *Susan G. Komen's Reversal: What Does It Really Mean?*, *L.A. TIMES* (Feb. 3, 2012, 10:22 AM), <http://latimesblogs.latimes.com/nationnow/2012/02/susan-g-komen-planned-parenthood-reversal.html>.

<sup>137</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or . . . to preserve . . . privacy . . .").

<sup>138</sup> Fishman, *supra* note 119, at 271.

<sup>139</sup> Sunstein, *supra* note 120, at 625 (discussing how informational regulation encourages citizens to engage in oversight and promotes "[a] well-functioning system of deliberative democracy").

than a centrally controlled prohibitive system of regulation.<sup>140</sup> Accordingly, the safe harbor option would empower NGOs, watchdog groups, and journalists to monitor corporate donations, legal or illegal.<sup>141</sup> Disclosure-based systems rely upon the weight of public opinion to judge corporate action,<sup>142</sup> and, because “[c]orporations depend on goodwill of clients and customers,” reputational harm can have far greater repercussions for businesses than government-imposed fines.<sup>143</sup> However, these programs are only successful if a company’s transgressions provoke sufficient public outrage.<sup>144</sup> For example, public backlash against corporate misbehavior can sometimes be less robust if a corporation has harmed an unrelated third party, as opposed to a customer or business partner.<sup>145</sup> Commentators question whether customers buying a Siemens kitchen appliance, for example, would actually be “troubled by the payment of bribes in a third world development project.”<sup>146</sup>

The strength of consumer interest in ethical business belies these concerns. The amount of consumer spending dedicated to supporting ethical and sustainable businesses is estimated at close to \$300 billion per year.<sup>147</sup> Furthermore, corporations are certainly sensitive to how the public perceives their company ethics—this is the very reason why some corporations engage in

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<sup>140</sup> See *supra* note 123 and accompanying text (discussing second-generation regulations). Not only will the disclosure system allow civil society to monitor corporate donations, as this section discusses, but it may also allow the public to monitor how the government itself chooses to enforce the FCPA. Current DOJ and SEC interpretations of the FCPA and enforcement actions have been roundly criticized by many commentators. *E.g.*, Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 117 (2011). Furthermore, the majority of FCPA cases are resolved through deferred- (DPA) or non-prosecution agreements (NPA), both of which can be characterized as a series of “privately negotiated agreements.” Koehler, *supra* note 69, at 934. This may be of special public interest given the tendency of companies that agree to a DPA or an NPA to still be awarded lucrative government contracts. Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 804 (2011).

<sup>141</sup> Cf. Luneburg & Susman, *supra* note 107, at 34 (discussing how disclosure-based lobbying laws have had a similar impact); Sunstein, *supra* note 120, at 625.

<sup>142</sup> David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1821–22 (2001); Sunstein, *supra* note 120, at 625.

<sup>143</sup> Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1851 (2011).

<sup>144</sup> See Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 489 (1999).

<sup>145</sup> *Id.* at 490.

<sup>146</sup> Garrett, *supra* note 143, at 1790. The Siemens FCPA enforcement investigation uncovered more than \$1.4 billion in bribes paid around the world, and the company paid \$800 million in fines in the United States alone. *Id.* at 1785–86.

<sup>147</sup> Maurie J. Cohen, *Consumer Credit, Household Financial Management, and Sustainable Consumption*, 31 INT’L J. CONSUMER STUD. 57, 63 (2007); see Larry Dossey, *LOHAS Market Size*, LOHAS J., Spring 2010, at 16, 16, available at <http://www.lohas.com/sites/default/files/lohasmarketsize.pdf>.

philanthropy in the first place.<sup>148</sup> Corporations often advertise their contributions “where public relations benefits are anticipated,” but are unlikely to advertise “gifts that might appear self-serving or prove controversial.”<sup>149</sup> If reports of a company bribing or hiding corruption in charity came to light, the ethical reputation of that company would certainly be negatively impacted. Alternatively, a greater accounting of a corporation’s social engagement would no doubt benefit the company.<sup>150</sup> And the company’s willingness to disclose in the first place would tell the public “that the company has nothing to hide” and “speak[] loudly of the firm’s integrity.”<sup>151</sup>

This focus on ethical, sustainable business is not only of interest to consumers. Socially responsible investment groups, which evaluate investment opportunities based on criteria such as corporate governance and community engagement, will no doubt be interested in greater information regarding corporate activity and philanthropy abroad.<sup>152</sup> Investment portfolios that focus on socially responsible investing have grown from \$639 billion in 1995 to over \$3 trillion in 2010.<sup>153</sup> Even investors who do not focus specifically on ethical concerns are likely to be interested in the disclosures, especially since “today’s social issue is tomorrow’s financial issue.”<sup>154</sup> This connection is especially clear in FCPA matters because FCPA enforcement actions against companies are often followed by shareholder derivative suits and securities litigation.<sup>155</sup> Thus, even though the companies might be acting—and bribing—in a foreign country, the effects of the corporate activities and any subsequent public backlash will be felt by investors within the United States, demonstrating the

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<sup>148</sup> See *supra* note 12 and accompanying text.

<sup>149</sup> Kahn, *supra* note 12, at 583.

<sup>150</sup> Sprinkle & Maines, *supra* note 9, at 449–52 (enumerating the various benefits of a company’s social responsibility activities).

<sup>151</sup> Jane Heath, Comment, *Who’s Minding the Nonprofit Store: Does Sarbanes-Oxley Have Anything to Offer Nonprofits?*, 38 U.S.F. L. REV. 781, 806 (2004).

<sup>152</sup> For a general discussion of socially responsible investing, see Williams, *supra* note 106, at 1273–300.

<sup>153</sup> SOC. INV. FORUM FOUND., 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 8 (2010), available at <http://ussif.org/resources/research/documents/2010TrendsES.pdf>. But see Maura O’Neill, *The Hunt for Impact Investments: Are Philanthropists Key?*, U.S. DEPARTMENT ST. DIPNOTE (Apr. 26, 2012), [http://blogs.state.gov/index.php/site/entry/are\\_philanthropists\\_key](http://blogs.state.gov/index.php/site/entry/are_philanthropists_key) (citing a figure from JP Morgan that “estimated that the potential capital market for impact investing—putting dollars into enterprises that would deliver positive social impact—was between \$400 billion and \$1 trillion”). Twenty trillion dollars in worldwide assets are managed by companies that have signed the UN’s *Principles for Responsible Investment*. PETERS & RÖB, *supra* note 135, at 18. But see Firger, *supra* note 104, at 1078 (arguing that social investments are of no concern to investors).

<sup>154</sup> Williams, *supra* note 106, at 1284.

<sup>155</sup> RAYMUND WONG & PATRICK CONROY, FCPA SETTLEMENTS: IT’S A SMALL WORLD AFTER ALL 7–9 (2009) (discussing the variety of lawsuits that have grown out of FCPA violations).



interest that even purely economic investors might have in a corporation's philanthropy disclosures.<sup>156</sup>

This interest in socially responsible investing also counters another common criticism of disclosure-based monitoring: that monitoring efforts will be lax due to non-profit funding constraints or a selective monitoring focus on exposé-type corruption stories.<sup>157</sup> However, even cash-starved non-profits can expand the reach and scope of their missions and publications through social media programs or viral videos.<sup>158</sup> Furthermore, non-profit organizations are not the only groups interested in corporate charity disclosures. Socially responsible investment firms will be likely to evaluate improper payments disclosed by companies without focusing solely on the sensational. In addition, for-profit newspapers often use disclosures as sources of news stories.<sup>159</sup> Corporate governance issues are also often favorite topics of business-focused publications, which often cover recent scandals and reach a highly educated community of potential investors and business partners.<sup>160</sup>

Journalists and watchdog groups play another important role in a disclosure-based system by digesting and distilling the released information.<sup>161</sup> These groups can help the public understand what the released information means. Disclosure-based systems often run the risk of ineffectiveness because the information released is “data-rich but information-poor,” confusing, and

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<sup>156</sup> See *id.* at 8–11. As another example, when the *New York Times* published an exposé on Wal-Mart's Mexican subsidiary's FCPA violations, Wal-Mart stocks experienced a market cap loss of \$16 billion. Thomas Kase, *Walmart, Mexico, FCPA and Cultural Sensitivity (No, Not the Politically Correct Sort)*, SPEND MATTERS (Apr. 27, 2012, 3:34 AM), <http://www.spendmatters.com/index.cfm/2012/4/27/Walmart-Mexico-FCPA-and-Cultural-Sensitivity-No-Not-the-Politically-Correct-Sort>. The report also spurred a variety of other setbacks for the company, including delays on U.S. building permits, delayed land deals, and formal audits. Stephanie Clifford & Steven Greenhouse, *Wal-Mart's U.S. Expansion Plans Complicated by Bribery Scandal*, N.Y. TIMES, Apr. 30, 2012, at B1.

<sup>157</sup> Skeel, *supra* note 142, at 1840–41; Firger, *supra* note 104, at 1086–87.

<sup>158</sup> Allison Fine, *It's Time to Get Serious About Using Social Media*, CHRON. PHILANTHROPY, Aug. 25, 2011, at 32.

<sup>159</sup> See Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450, 467 (2008) (noting that state attorneys general, for example, often do not investigate domestic charitable trusts unless newspapers have first reported wrongdoings); Luneburg & Susman, *supra* note 107, at 34.

<sup>160</sup> See Skeel, *supra* note 142, at 1844 (discussing the impact and investor criticism resulting from investigative reports and exposés published in *Business Week* and *Fortune*).

<sup>161</sup> Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 119 (2010) (listing several NGOs that “serve as watchdogs to report corruption”); Luneburg & Susman, *supra* note 107, at 34 (discussing how a civil society organization captured the disclosed information and “published that information in an Internet-accessible database, allowing searches that easily reveal important aspects of federal lobbying activity”).

ultimately useless to consumers.<sup>162</sup> However, this phenomenon is likely most prominent in the disclosure of scientific or “highly technical” information,<sup>163</sup> and released data about corporate charity projects are not likely to implicate the same issues as complex scientific data.

Finally, including civil society in the monitoring of disclosed corporate donations will alleviate many of the burdens that current FCPA monitoring places on government investigators.<sup>164</sup> The discussion above mentioned the costs of FCPA compliance on corporations, but the high cost of FCPA enforcement is also a significant problem for government agencies.<sup>165</sup> As a general matter, regulatory systems based on disclosure and shame can be cheaper than prohibition and punishment<sup>166</sup> because they rely on the weight of public opinion to pressure bad actors, rather than on an investigation or prosecution.<sup>167</sup> Even further, the disclosures originally made by the corporation are likely to assist prosecutors in building their case if a presumption of legitimacy happens to be rebutted.<sup>168</sup>

The safe harbor option should not function as a way for corporations to hide corrupt activity, despite the need to assuage corporate concerns regarding the FCPA’s ambiguous application to charity. It is vital that the safe harbor’s presumption of legitimacy can be rebutted in cases of truly egregious bribery or a total failure to maintain an accounting system that prevents bribery. As one commentator noted: “[I]t is a fallacy to believe that the public outcry over the economic and human consequences of corporate scandals is itself sufficient

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<sup>162</sup> See, e.g., Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 285 (2001) (internal quotation marks omitted). See generally Alexander Volokh, *The Pitfalls of the Environmental Right-to-Know*, 2002 UTAH L. REV. 805 (discussing the problems associated with disclosure-based regulation in the area of environmental law).

<sup>163</sup> See Volokh, *supra* note 162, at 807; see also Williams, *supra* note 106, at 1290 (“Environmental data can be one of the hardest types of information to obtain in usable form.”).

<sup>164</sup> See Bixby, *supra* note 161, at 119 (“[NGOs may] also help business firms design and implement compliance policies to detect bribery before it becomes public.”).

<sup>165</sup> Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT’L L. 169, 175 (2006) (concluding that the FCPA is under-enforced due to enforcement costs).

<sup>166</sup> Cf. *id.* at 199 (comparing shaming favorably with the “limits of prosecution-heavy anti-corruption strategies”).

<sup>167</sup> Cf. Skeel, *supra* note 142, at 1816 (“Added to the expressive virtues of shaming is its low cost.”).

<sup>168</sup> See William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 110 (2009).

to cause corporations to change their for-profit nature . . . unilaterally.”<sup>169</sup> With the presumption of legitimacy of the safe harbor option fully rebuttable, the FCPA would still remain a strong anticorruption tool.

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

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

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

The United States has attempted to further combat international corruption through Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>170</sup> However, this disclosure-based law appears to have many of the same defects as the FCPA when applied to corporate charity. Although Section 1504 represents an excellent example of regulation by disclosure, many of its defects might be ameliorated by offering the FCPA safe harbor option.

Section 1504 requires all public companies operating in the extractive industries (such as mining or drilling for oil or natural gas)<sup>171</sup> to disclose all payments that are made to foreign governments.<sup>172</sup> The extractive sector was singled out by this law because of the industry’s reputation for widespread corruption and role in the “resource curse.”<sup>173</sup> The resource curse refers to how some countries with great natural resources remain underdeveloped and

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<sup>169</sup> Besmer, *supra* note 12, at 304; accord PETERS & RÖB, *supra* note 135, at 9 (“[V]oluntary business activity should never be treated as a substitute for effective regulation . . .”).

<sup>170</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–22 (2010) (codified at 15 U.S.C. § 78m(q) (2006 & Supp. IV 2010)).

<sup>171</sup> See *id.*; David M. Lynn, *The Dodd-Frank Act’s Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 345 (2011).

<sup>172</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504.

<sup>173</sup> Firger, *supra* note 104, at 1050.

plagued by corruption.<sup>174</sup> In these nations, the financial benefits of natural resources never reach the general population because corrupt leaders embezzle the money away from their destitute citizens.<sup>175</sup>

Section 1504 attempts to increase transparency in the extractive industries to allow citizens in developing nations to hold their leaders accountable for the profits gained from their country's natural resources.<sup>176</sup> Section 1504 does not replace the FCPA. Instead, the two laws work together to increase transparency and decrease corruption in the resource-rich countries where the extractive industry is prevalent.<sup>177</sup>

Unfortunately, the SEC's recently released rules for Section 1504,<sup>178</sup> specifically the definition of *payments* which must be disclosed, create many of the same problems with corporate charity that exist within the FCPA.

For example, the SEC's rules specifically exclude "social payments" from mandatory disclosure.<sup>179</sup> The SEC defines social payments as the kind a corporation might make to build a school or hospital abroad.<sup>180</sup> With this definition, the SEC has created a loophole that will allow significant amounts of money to be transferred to foreign governments undisclosed. As an example, a payment like the \$130,000 that Chevron donated in Angola<sup>181</sup> might avoid disclosure as a social payment despite its clear connection to Chevron's oil negotiations in the country.<sup>182</sup> At the urging of corrupt foreign leaders, companies could simply label their payments as social development

<sup>174</sup> *Id.* at 1048.

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

<sup>176</sup> Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,366 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240, 249). Another important policy aim of Section 1504 is to provide investors and shareholders greater access to information. Letter from Benjamin L. Cardin, Senator, U.S. Senate, to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n (Dec. 1, 2010), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf>.

<sup>177</sup> See GRANT D. ALDONAS, SPLIT ROCK INT'L, INC., ANALYSIS OF SECTION 1504 OF THE WALL STREET REFORM AND CONSUMER PROTECTION ACT 2-4 (2011), available at [http://www.api.org/policy/upload/Analysis\\_Section\\_1504\\_paper.pdf](http://www.api.org/policy/upload/Analysis_Section_1504_paper.pdf). The FCPA targets the "supply" side of corruption by seeking to prevent corporations from paying bribes to foreign officials. Spalding, *supra* note 25, at 360-61. By empowering foreign citizens to hold their governments accountable for money received by extractive corporations, see Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,367, Section 1504 attempts to control the "demand" side of bribery in the extractive industry. See generally Everett et al., *supra* note 27, at 518 (discussing the general division between the "supply" and "demand" sides of bribery).

<sup>178</sup> Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,365.

<sup>179</sup> *Id.* at 56,379.

<sup>180</sup> *Id.* at 56,378-79.

<sup>181</sup> See *supra* notes 16-18 and accompanying text.

<sup>182</sup> See Frynas, *supra* note 13, at 584.

projects. Then the payments would not need to be disclosed and corrupt foreign leaders could continue to embezzle money from their countries with impunity, frustrating the goals of Section 1504.<sup>183</sup>

Additionally, the lines that the SEC draws between “infrastructure improvements” and “social payments” create ambiguity that might chill corporate giving abroad. The SEC gives examples of infrastructure improvements, such as building a road to reach oil or minerals in a country, as compared to a social payment, such as building a hospital or school.<sup>184</sup> However, it is easy to imagine potential corporate gifts that might fit both definitions. If a company pursues a new mining operation in a region where there is no accessible emergency care for its workers, would building a hospital still be considered a social payment if it was used predominantly (but not exclusively) by mine employees? Would building a school still be considered a social payment if it was required by the host country—or if it was considered by the host country as a factor in awarding business contracts?<sup>185</sup> If a company builds a road to access its mine (an infrastructure improvement) but then continues the road to access the nearest local school (a social payment), must it disclose the entire cost of the road or would it bifurcate the cost of the road to the mine from the cost of the same road to the school?

Many commentators have suggested that Section 1504 might have a negative effect on U.S. extractive business abroad.<sup>186</sup> The new law may also have a chilling effect on corporate charity. If a company is unsure about whether its community project is an infrastructure improvement or a social payment, it may hesitate to engage charitably in the host community, especially if an infrastructure improvement might cause backlash.<sup>187</sup> Furthermore, it is possible that the Section 1504 disclosures might increase the risk of FCPA prosecutions. Commentators have already noticed that many

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<sup>183</sup> Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,366–67.

<sup>184</sup> *Id.* at 56,378–79.

<sup>185</sup> Kazakhstan, for example, considers mining companies’ social payments when awarding contracts and reported \$314.4 million in social and local infrastructure contributions from the extractive industry in 2009 alone. Letter from Publish What You Pay Coalition, to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n, 25 n.104 (Feb. 25, 2010) [hereinafter PWYP Letter], available at <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

<sup>186</sup> See ALDONAS, *supra* note 177; Branden Carl Berns, Note, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not to?*, 2011 COLUM. BUS. L. REV. 758, 783–86.

<sup>187</sup> *Cf.* Frynas, *supra* note 13, at 593 (discussing conflict that arose in an attempt to redistribute the benefits of an oil company’s charitable engagement). See generally *supra* notes 136–38 and accompanying text.

FCPA actions grow out of other corporate disclosures rather than independent government investigations.<sup>188</sup>

The creation of the safe harbor option for FCPA enforcement ought to ameliorate many of these concerns. First, it would provide the extractive industry with the rebuttable presumption of legitimacy for FCPA enforcement, an additional benefit for disclosing—or in some cases over-disclosing if the line between infrastructure improvement and social payment is unclear. This rebuttable presumption of legitimacy could also help assuage some of the concerns of an FCPA enforcement action following from Section 1504 disclosures, as well as provide companies additional benefit to offset the costs of making the disclosures. It may be that if the charity-focused system is successful, regulators might find that it should be expanded, offering a rebuttable presumption of FCPA legitimacy for all payments disclosed under Section 1504.<sup>189</sup>

### *B. Improving Development*

Greater disclosure and transparency in corporate philanthropy will have beneficial effects on international charity and development in general. The FCPA safe harbor option would incentivize disclosure of charitable contributions. Likewise, Dodd-Frank Section 1504, assuming it is applied appropriately to corporate charity, should also provide vital insights into corporate philanthropy. This transparency will make development and aid programs more effective on a global scale by maintaining accounting standards, increasing accountability, and allowing for greater cooperation.

Furthermore, although this Comment deals with corporate charity and corporate social responsibility programs, NGOs and international charitable organizations often face similar problems with regard to how the FCPA might impact their work abroad.<sup>190</sup> Greater disclosure would incentivize corporations to improve their accounting of charitable programs, something that has been a major problem with international corporate giving in the past.<sup>191</sup> Although some costs may increase for companies, higher accounting standards will

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<sup>188</sup> Cf. Low et al., *supra* note 129, at 1 (discussing the increased reporting and certification requirements that make it more likely that an FCPA violation would be brought against a company without the DOJ or SEC independently discovering the violation).

<sup>189</sup> The wisdom of such an expansion (offering the rebuttable presumption of legitimacy for all payments disclosed under Section 1504, not merely charitable or social payments) is beyond the scope of this Comment.

<sup>190</sup> See Helmer & Deming, *supra* note 36, at 599.

<sup>191</sup> COADY, *supra* note 10, at 12, 41.

enable corporations to accurately take credit for their donations and the benefits that come along with such generosity.<sup>192</sup> For consumers or investors who wish to judge corporations by their charitable impact,<sup>193</sup> disclosure will assist in distinguishing companies that are truly dedicated to philanthropy from those that merely have snazzy advertising campaigns.<sup>194</sup> Some well-known companies considered to be “ethical leaders” do not live up to their advertising claims.<sup>195</sup> For example, Ben & Jerry’s advertised its Rainforest Crunch ice-cream as a partnership with indigenous communities, but the company did not actually buy nuts from any indigenous communities for years.<sup>196</sup> On the other hand, greater accounting and transparency may help rehabilitate multinational corporations that have undeserved negative reputations despite a strong commitment to development abroad.<sup>197</sup>

Improved transparency will also increase the effectiveness and accountability of corporate development programs, often criticized by development experts, by allowing civil society to monitor the effectiveness of corporate charity.<sup>198</sup> Commentators suggest that corporate philanthropy often falls short of its intended goals because many companies lack staff with social development experience.<sup>199</sup> With greater transparency, the NGO and development community would be able to offer feedback and advice for the corporate programs.<sup>200</sup> Finally, disclosure of projects and partners may lower

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<sup>192</sup> Jennings & Entine, *supra* note 136, at 14–15 (identifying benefits such as more favorable placement on consumers’ “ethical barometer[s]” or inclusion in mutual funds that screen for “good” companies).

<sup>193</sup> See *supra* notes 147–54 and accompanying text.

<sup>194</sup> Other authors have commented on this dearth of information regarding a corporation’s actual ethical engagement in the community because, “[i]n a global economy, information about the social effects of a company’s actions . . . is increasingly relevant to at least some investors in the United States, and yet that information is much less available in the market than is financial information.” Williams, *supra* note 106, at 1201.

<sup>195</sup> See generally Jennings & Entine, *supra* note 136.

<sup>196</sup> See *id.* at 42–46. The Body Shop is another company whose actual business activities have failed to live up to its ethical reputation, but it has “escaped serious scrutiny of [its] corporate performance.” *Id.* at 52–55; see also Kahn, *supra* note 12, at 584 (describing corporate giving as a form of advertisement).

<sup>197</sup> Jennings & Entine, *supra* note 136, at 49 (“Despite regular appearances on ‘dishonorable’ lists, controversial multinationals such as natural resource and chemical companies . . . actively engage their community responsibilities [and] give millions of dollars to charity . . .”).

<sup>198</sup> See Frynas, *supra* note 13, at 581 (“However, the effectiveness of CSR initiatives . . . has been increasingly questioned, and there is mounting evidence of a gap between the stated intentions of business leaders and their actual . . . impact in the real world.”).

<sup>199</sup> *Id.* at 591. The 2009 *Giving in Numbers* report calculated that in a third of companies polled, more than 100 grants were handled by each full-time philanthropy-focused employee (defined as an employee who devoted a minimum of 20% of his or her time to philanthropic activities). COADY, *supra* note 10, at 45.

<sup>200</sup> See Frynas, *supra* note 13, at 591. Encouraging greater transparency will enable recipient communities to create “people’s audits” and demand greater accountability in their communities. TSUNAMI RELIEF

costs incurred by corporations seeking local partner NGOs. For companies that are expanding development projects into new markets or responding rapidly to a natural disaster, vetting NGO partner organizations can be extremely time-consuming.<sup>201</sup> A recent study by Deloitte found that the biggest challenge identified by company executives in building an anticorruption program was “managing third-party relationships.”<sup>202</sup> Providing information about other corporate–NGO partnerships will help companies create new corporate charity programs with greater ease.

Greater disclosure of corporate programs would also have a substantial impact on international giving and development as a whole. With so many diverse actors in the development sphere, it can be difficult to coordinate activity and “approach large-scale, complex problems in a top-down and scalable way.”<sup>203</sup> With greater disclosure, NGOs, government programs, and corporations would be able to coordinate their efforts. It would be less likely that duplicative projects in developing nations would receive funding,<sup>204</sup> while at the same time holes in development schemes or aid flows could be identified and remedied.

## CONCLUSION

Two years after the devastating earthquake, Haiti continues to rebuild. Despite considerable challenges, reports are tentatively positive.<sup>205</sup> The response to the Haitian earthquake highlighted the generosity of U.S.

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OPERATIONS, *supra* note 107, at 4; accord Todung Mulya Lubis, *Country Ownership and Participatory Decision-Making as Means to Enhance Transparency*, in TSUNAMI RELIEF OPERATIONS, *supra* note 107, at 10.

<sup>201</sup> See Helmer & Deming, *supra* note 36, at 620 (“[I]n an emergency response, such as when a major disaster strikes a country, NGOs delivering humanitarian aid must hire local staff very quickly. In these circumstances, they have no time to do any sort of background or reputational check and no chance to get to know the people involved . . .”).

<sup>202</sup> Victoria Makarova, *Anti-Corruption Practices Survey 2011—Cloudy with a Chance of Prosecution?*, in CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2012, at 559, 569 (PLI Corporate Law & Practice, Course Handbook Ser. No. 35502, 2012).

<sup>203</sup> Little, *supra* note 8, at 1106–07; see also Frynas, *supra* note 13, at 592–93; Gopakumar Krishnan Thampi, *Exploring the Role of Community Feedback Mechanisms*, in TSUNAMI RELIEF OPERATIONS, *supra* note 107, at 61, 61.

<sup>204</sup> See Frynas, *supra* note 13, at 592 (“[A]n oil company in Nigeria built a road which ran parallel to another road built by the Niger Delta Development Commission . . .”).

<sup>205</sup> Laurent Dubois & Deborah Jenson, Op-Ed., *Haiti Can Be Rich Again*, N.Y. TIMES, Jan. 9, 2012, at A19.



corporations.<sup>206</sup> At the same time, however, it revealed the discouraging effect corruption can have on development efforts.<sup>207</sup>

This paradox was further illustrated by the effects of the FCPA on Haitian disaster relief. The FCPA discouraged bona fide corporate charity and investment, but at the same time it failed to capture the rampant corruption in the rebuilding effort.<sup>208</sup>

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

The newly enacted Section 1504 employs a similar focus on disclosure rather than prohibition. Although this law shows great promise, the SEC's rules leave significant loopholes that unscrupulous companies or foreign leaders could use to funnel corrupt donations around the disclosure requirements.

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

FRANCESCA M. PISANO\*

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<sup>206</sup> See *supra* notes 4–7 and accompanying text.

<sup>207</sup> Cf. Margulies, *supra* note 34, at 566 (“Humanitarian aid poses a paradox . . . [I]t furnishes a prime example of human benevolence . . . [H]owever, [it] can also fuel the very conflicts it seeks to ease.”).

<sup>208</sup> See *supra* text accompanying notes 20–26; see also Jones, *supra* note 20; Donovan Webster, *Haiti Earthquake: Two Years Later, Where Did the Money Go?*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/01/11/haiti-earthquake-funds\\_n\\_1200229.html](http://www.huffingtonpost.com/2012/01/11/haiti-earthquake-funds_n_1200229.html) (last updated Jan. 22, 2012, 5:43 PM).

\* Notes & Comments Editor, *Emory Law Journal*; J.D. Candidate, Emory University School of Law (2013); B.A., George Washington University (2009). I am grateful to Professor Alexander Volokh for his patience and guidance as my advisor. I am also indebted to the staff of the *Emory Law Journal*, especially Amanda M. Baker, Jared Buszin, and Bonnie Scott for their thoughtful recommendations and meticulous editing. Finally, I would like to thank my family for their constant support and encouragement.