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Article

Combating Corruption through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure

David Hess*

ABSTRACT

This article builds on the increased attention given to corruption as an issue of corporate social responsibility (CSR) and the increased enforcement of anti-bribery laws in the United States, to consider how enforcement activity can work to improve corporate transparency and support initiatives developed in the field of corporate social responsibility, such as the Global Reporting Initiative (GRI). Although the GRI requires disclosure on anti-corruption matters, currently, few companies are providing disclosure on this issue and those that are disclosing rarely provide useful information to stakeholders. This article shows how recent trends in criminal and civil law enforcement can be modified slightly to provide strong incentives for companies to disclose information required by the GRI or other social reporting standards. The article then shows how the proposal can assist current enforcement practices directly, but also indirectly by supporting CSR initiatives designed to help combat the enabling environment that allows corruption to thrive.

I. INTRODUCTION

Enforcement of anti-bribery laws under the Foreign Corrupt Practices Act (FCPA)¹ has reached a level that was unimaginable just ten years ago.² In each of the last five years the Department of Justice (DOJ)

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

2. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 494–96, 522–23 (2011) (noting radicalization of the FCPA’s enforcement and tremendous increase in enforcement activity as compared to the 1980s and 1990s); Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U.L. REV. 347, 348 (2011) (noting that between 2006 and 2009 “the DOJ has brought about sixty FCPA cases, which is more than the total number of cases

has set a record for the number of enforcement actions, with the number of enforcement actions in 2010 almost double that of the previous year.³ In the words of the Assistant Attorney General for the Criminal Division, “FCPA enforcement is stronger than it’s ever been – and getting stronger.”⁴ This level of enforcement activity has made the risk of FCPA violations a top issue for corporate legal and compliance departments.⁵ These departments are unsure how to respond because there is a significant level of uncertainty about what actually constitutes a violation of the FCPA.⁶ This makes it difficult for compliance departments to provide necessary guidance or to implement effective internal controls, especially when faced with the demands of business managers who believe their competitors are not playing by the rules.⁷

The DOJ encourages corporations to work through these challenges themselves and to self-regulate by improving their compliance programs. The DOJ does this by granting leniency to corporations that have implemented effective FCPA compliance programs, even when their employees are caught paying a bribe.⁸ There are complaints, however, that the government is not providing sufficient guidance setting out what efforts are necessary to earn this protection.⁹ The government, in turn, is wary of giving this advice for fear that it will allow corporations to create

brought in the thirty-two years between the Act’s inception in 1977 and 2005.”); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (stating that “during the past decade, enforcement agencies resurrected the FCPA from near legal extinction.”).

3. F. Joseph Warin et al., *2010 Year-End FCPA Update*, INSIGHTS: THE CORP. & SEC. L. ADVISOR, Jan. 2011, at 26, 26. In short, the Department of Justice (DOJ) is responsible for criminal enforcement of the FCPA and the Securities Exchange Commission (SEC) is responsible for civil enforcement. Koehler, *supra* note 2, at 395–396.

4. Lanny A. Breuer, Assistant Attorney Gen., Dep’t. of Justice, Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>).

5. See Jaelyn Jaeger, *Bribery Act Setting a New Standard for Compliance*, COMPLIANCE WK., Jan. 2011, at 1, 1; Melissa Klein Aguilar, *FCPA Compliance: Latest, Best Practices for Boards*, COMPLIANCE WK., Sept. 2010, at 53, 53.

6. See generally James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233 (2007) (describing Doty’s criticisms of FCPA enforcement).

7. See generally CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION — SURVEY 2006 5 (2006) (providing data on managers’ beliefs that competitors are paying bribes); ERNST & YOUNG, CORRUPTION OR COMPLIANCE — WEIGHING THE COSTS: THE 10TH GLOBAL FRAUD SURVEY 6 (2008) (providing data on managers who believe corruption is getting worse).

8. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 329 (2008).

9. See Ronald E. Berenbeim & Jeffery Kaplan, *Ethics and Compliance Enforcement Decisions – the Information Gap*, in EXECUTIVE ACTION SERIES, at 1, 2 (The Conference Board, Ser. No. 310, 2009).

the appearance of self-regulation through compliance programs which are easily evaded by employees or exist only on paper.¹⁰ This article considers how the DOJ can work toward solving these problems by using and enhancing existing transparency initiatives in the fight against corruption.

There is a strong need for the production and dissemination of new types of information related to the challenges of combating corruption. The government needs information about the value of corporate efforts made towards compliance in order to implement a more effective “credit for compliance” program.¹¹ Corporations need information that will allow them to adopt the anti-bribery best practices of other players, and information to assure them that their competitors are abiding by their commitments to combat corruption. Increasingly, other stakeholders, such as non-governmental organizations (NGOs) and social investors, are also seeking information on corporate anti-bribery efforts so that they can serve as surrogate regulators, pressuring corporations to live up to their anti-bribery commitments, as well as assisting them in those efforts.¹² In each of these ways, the development and use of new information can help to combat the environments that allow corruption to thrive.¹³

A key first step in taking advantage of these opportunities is conceptualizing anti-corruption as an issue of corporate social responsibility (CSR), and not simply as an issue of legal compliance. Just a decade ago, the topic of anti-corruption was excluded from many major CSR initiatives,¹⁴ but in the last few years it has become a central topic.¹⁵

10. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1407–1408 (1999). See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 491–92 (2003).

11. See generally Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 788–92 (2005) (discussing how the government would have to go through an enormous amount of information from a corporation to determine which compliance programs are effective and which ones are not).

12. See *infra* Part IV.C.1–C.2.

13. See *infra* Part IV.C.1–C.2.

14. Despite corruption’s link to human rights violations, see INT’L COUNCIL ON HUMAN RIGHTS & TRANSPARENCY INT’L, *CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION* 5–7 (2009), and other social and economic ills, see generally Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861 (2010) (explaining the ramifications of bribery on international economic and societal interplay), it was a forgotten component of CSR until recently. For example, two of most well-known and influential CSR initiatives did not initially include the topic of corruption, but only added that element later. First, the most well-known set of standards on sustainability reporting, published by the Global Reporting Initiative, did not include disclosure requirements on corruption in their first edition. David Hess & Thomas W. Dunfee, *Taking Responsibility for Bribery: The Multinational Corporation’s Role in Combating Corruption*, in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 260, 269 (Rory Sullivan ed., 2003). Secondly, the original version of the United Nations Global Compact only had nine principles none of which included corruption. It was only later that the 10th principle on fighting corruption

Viewing anti-corruption as an issue of CSR does not mean that combating corruption is a purely elective activity, akin to corporate philanthropy; it means that anti-corruption efforts involve acting consistent with ethical values¹⁶ and it means taking actions that simultaneously create economic value for the corporation and social value for society.¹⁷

As in other areas of CSR, government intervention may directly mandate certain behavior, but it may also use the threat of such mandates to cast a shadow over private actors, encouraging corporations to improve their behavior to avoid regulatory action.¹⁸ Governments have many ways of creating an “enabling environment” for CSR,¹⁹ such as by endorsing, facilitating, or partnering with private and civil sector entities.²⁰ This article adds to the repertoire of government intervention by exploring how the typically more adversarial approach of civil and

was added. Peter Eigen, *Removing a Roadblock to Development: Transparency International Mobilizes Coalitions Against Corruption*, INNOVATIONS, Spring 2008, at 19, 29. The explanation for these omissions is unclear, perhaps because CSR is often viewed as a corporation voluntarily going beyond compliance with the law, while a corporation fighting corruption and bribery is viewed as mere compliance with the law. In addition, corruption is often viewed as something that is forced on corporations by government officials (the demand side of corruption), as opposed to something that corporations inflict on others (e.g., human rights violations or pollution of the environment).

15. The issue of corruption is now included in leading standards on corporate social responsibility, such as the United Nations (UN) Global Compact. U.N. Global Compact, *The Ten Principles: Transparency and Anti-Corruption* (June 24, 2004), <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

16. See Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, CORP. SOC. RESP. & ENVTL. MGMT., Nov. 2006, at 1, 8 (2006) (quoting the organization Business for Social Responsibility) (“Corporate social responsibility is achieving commercial success in ways that honour ethical values and respect people, communities and the natural environment.”).

17. Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 62, 66 (“Shared value creation focuses on identifying and expanding the connections between societal and economic progress.”). See generally Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 83-84 (discussing the concept of “shared value”).

18. Aneel Karnani, “*Doing Well by Doing Good*”: *The Grand Illusion*, CAL. MGMT. REV., Winter 2011, at 69, 83 (“It is primarily the role of the government to force companies to change behavior to be congruent with the public interest.”). See generally Thomas P. Lyon, “*Green* Firms Bearing Gifts”, REGULATION, Fall 2003, at 36, 37-38 (describing how corporations use self-regulation, or at least the appearance of self-regulation, to avoid stricter regulation).

19. TOM FOX ET AL., THE WORLD BANK, *PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: A BASELINE STUDY* iii (2009).

20. *Id.* at iv; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 05-744, *GLOBALIZATION: NUMEROUS FEDERAL ACTIVITIES COMPLEMENT U.S. BUSINESS’S GLOBAL CORPORATE SOCIAL RESPONSIBILITY EFFORTS* 16-18 (2005); Reinhard Steurer, *The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe*, 43 POL’Y SCI. 49, 57 (2010).

criminal law enforcement can be used to encourage the disclosure of information, which in turn can be utilized by investors, NGOs, similar corporations and other stakeholders to further the ultimate purposes of the anti-bribery laws.

Part II of this article explains the difficulties of combating corruption. Part III discusses global initiatives to encourage corporations to provide disclosure on corruption issues, and it evaluates the effectiveness of these practices. Finally, Part IV explains how the DOJ's FCPA enforcement practices can be used to encourage this practice of disclosure and why doing so should be expected to produce significant benefits.

II. THE PROBLEM OF CORRUPTION

A. CORRUPTION CONTINUES

Preventing the use of bribes in domestic and international business is one of the most challenging problems facing regulators.²¹ Although corporations may complain about the enforcement of the FCPA,²² they have many reasons to prefer a corruption-free environment. Corporations attempting to operate in corrupt environments face unpredictable and highly frustrating difficulties that create numerous direct and indirect costs.²³ Despite the long-term benefits to a corporation of operating in a

21. The challenge is seen as a paradox in that "corruption is universally disapproved yet universally prevalent." David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 595 (2000). This paradox seemingly creates a never-ending cycle of corrupt business practices, as Gerald Caiden explains, "Attempts to combat corruption on the metaphysical level seems doomed to failure since human nature is inherently flawed. In spite of any progress that is secured, corruption spawns like a plague unless vigilantly suppressed. Even then, corruption can never be fully eradicated and forever lurks in the background, ready to undermine whatever development has been realized, threatening to destroy civilization itself." Gerald E. Caiden, *A Cautionary Tale: Ten Major Flaws in Combating Corruption*, 10 SW. J. L. & TRADE AM. 269, 271 (2004).

22. See Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010), for a thorough review of the criticisms. Violations of the FCPA can also be costly for corporations. In addition to multimillion dollar penalties, corporations can face reputational damage for violations of the FCPA that may be even more significant. PRICEWATERHOUSECOOPERS, *CONFRONTING CORRUPTION: THE BUSINESS CASE FOR AN EFFECTIVE ANTI-CORRUPTION PROGRAMME* 5 (2008).

23. The direct costs include not only the cost of the bribe, but also such costs as bureaucratic delay, attempting to avoid situations where bribes are likely to be demanded, and others. Jonathon P. Doh et al., *Coping With Corruption in Foreign Markets*, ACAD. MGMT. EXECUTIVE, Aug. 2003, at 114, 115–17. Indirect costs for corporations include having to operate in a country with distorted public expenditures, a weak infrastructure, and other socio-economic problems. *Id.* at 118. The magnitude of these costs on corporations depends on the pervasiveness of corruption and the arbitrariness of it, for example not knowing if payment of a bribe has solved a problem or created additional new problems. *Id.* at 118–19.

corruption-free business environment, short-term pressures frequently cause corporations to take actions that perpetuate the corrupt environment.²⁴ The result is what Professor Nichols describes as an assurance problem.²⁵ He states:

[A]n assurance problem exists when actors are best off if they cooperate with one another, but in the event of cheating by another actor are better off if they themselves also cheat than they would be if they continued to comply with the rules. As the actors cannot monitor one another, they face uncertainty as to which course of action will yield the best result.²⁶

In the absence of assurance that others will not resort to corruption, corporations “must choose between cooperating in hopes of accruing the greatest benefit or defecting as a defensive measure.”²⁷

This assurance problem is demonstrated by the facts of a recent criminal FCPA case. When faced with a request from a government official for an illegal payment to win a contract, a manager at Baker Hughes, Inc. told one of the company’s vice-presidents that “We are in the driving seat but if one [of] our competitors comes in with a pot of gold, it is not going to be our contract.”²⁸ Competitive pressure, combined with the perception of others’ willingness to pay bribes, provided a strong incentive for the managers to give in.²⁹ A manager at Baker Hughes stated that the bribe request was “distasteful,” but in the end the company made the requested payment.³⁰

Ordinarily, the primary solution for assurance problems is the imposition of sanctions against defectors.³¹ Thus, one would expect increased enforcement of the FCPA should help deter corrupt payments. But there is reason to be skeptical that increased enforcement will significantly reduce corruption any time soon. The general consensus of

24. See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT’L L. REV. 1307, 1326–28 (2004).

25. Philip M. Nichols, *Multiple Communities and Controlling Corruption*, 88 J. BUS. ETHICS 805, 805 (2009).

26. *Id.*

27. Nichols, *supra* note 24, at 1310.

28. Deferred Prosecution Agreement, Attachment A at 4, 7–8, *United States v. Baker Hughes Inc.*, No. 4:07-cr-00130-1 (S.D. Tex. 2007) *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/bakerhughes.pdf>; Compl. at 9–10, *SEC v. Baker Hughes Inc.*, No. 07-cv-1408 (S.D. Tex. 2007) *available at* <http://www.sec.gov/litigation/complaints/2007/comp20094.pdf>.

29. See Deferred Prosecution Agreement, Attachment A at 4, 7–8 *United States v. Baker Hughes Inc.*, No. 4:07-cr-00130-1 (S.D. Tex. 2007) *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/bakerhughes.pdf> (the company chose to make the payment after an employee expressed concern that the contract might be lost without it).

30. Compl. at 9–10, *SEC v. Baker Hughes Inc.*, No. 07-cv-1408 (S.D. Tex. 2007) *available at* <http://www.sec.gov/litigation/complaints/2007/comp20094.pdf>.

31. Nichols, *supra* note 24, at 1310 (but this response is not always effective in industries where corruption is prevalent).

business managers is that corrupt payments will continue to be a common activity.

A 2010 Transparency International survey, with over 90,000 respondents in eighty-six countries,³² found that a majority of people believed that corruption had increased over the previous three years.³³ Among respondents from the European Union and North America, over two-thirds of respondents believed there had been an increase.³⁴ In a study focused more specifically on business, Ernst and Young found that, although 23% of managers throughout the world thought regulatory enforcement had been “significantly stronger” over the last five years, over one-third also thought that the problem of corruption was getting worse.³⁵ Another recent survey found that 28% of U.S. managers thought corruption would increase in the next five years, 54% thought it would stay the same, and only 12% thought there would be a decrease.³⁶ The recent financial crisis also does not help matters. Pressures to protect the company and for managers to protect personal bonuses, may lead employees to believe that corrupt payments are necessary in the current environment.³⁷

Furthermore, the current environment in many countries is getting worse. In Pakistan, the results of a national survey suggest that corruption increased 400% from 2006 to 2009.³⁸ Similarly, a 2006 survey of

32. TRANSPARENCY INT'L, GLOBAL CORRUPTION BAROMETER 2 (2010), *available at* http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

33. *Id.* at 5.

34. *Id.*

35. ERNST & YOUNG, CORRUPTION OR COMPLIANCE – WEIGHING THE COSTS 6 (2008), *available at* http://info.worldbank.org/etools/antic/docs/Resources/Corruption_or_compliance_weighing_the_costs.pdf (survey of managers about their impressions of corruption levels). The survey data was based on telephone interviews with 1,186 managers in large corporations from 33 different countries. *Id.* at 22. The interviews were conducted between November 2007 and February 2008. *Id.*

36. CONTROL RISKS GROUP, *supra* note 7, at 21 (chart of respondents' expectations of whether corruptions would increase, stay the same, or decrease, delineated by country). The remaining six percent indicated that they “did not know.” *Id.* Similar results were obtained from managers in other countries. *Id.*

37. *See generally* ERNST & YOUNG, EUROPEAN FRAUD SURVEY 2009 5–6, 19 (2009), *available at* http://www.eycom.ch/publications/items/fraud_eu_2009/200904_EY_European_Fraud_Survey.pdf (showing that the more difficult the economic environment becomes, the more likely it is that individuals will commit fraud and cave to bribery demands). *See also* RONALD E. BERENBEIM, CONFERENCE BOARD RESEARCH REPORT: RESISTING CORRUPTION 9 (2006) (noting that many managers believe that the FCPA does not deter bribery because of the strong belief that bribery is something that has to be done in some countries to succeed).

38. Press Release, Transparency International Pakistan, Corruption in Last Three Years has Increased 400% (June 17, 2009), *available at* [http://www.transparency.org.pk/documents/NCPS%202009/PRESS%20RELEASE%20NCPS%202009%20Final%20\(English\).pdf](http://www.transparency.org.pk/documents/NCPS%202009/PRESS%20RELEASE%20NCPS%202009%20Final%20(English).pdf). These numbers come from a national survey

executives by Control Risks Group found that 23% of U.S. managers believed that their company had lost business in the last year due to a competitor paying a bribe, and 44% believed that this had occurred in the last five years.³⁹ This was an increase from 2002, when the survey found that 18% believed they had lost business due to bribes in the last year and 32% believed that this had occurred in the last five years.⁴⁰ Ernst and Young obtained similar results in a 2008 survey, in which 24% of respondents indicated that they had experienced an incident of bribery within the last two years.⁴¹

To reduce the supply of bribes, corporations must act to fill the gaps left by legal enforcement. Corporations can do this by making a commitment to anti-corruption, demonstrating that commitment to competitors and to other stakeholders, and by allowing that commitment to be monitored. By encouraging appropriate transparency, government enforcement action can play an indirect but valuable role in increasing corporate adoption of these practices. The exact nature of the required transparency and its benefits are described below,⁴² but first it is important to discuss the anti-corruption commitment that is needed from corporations.

B. COMPLIANCE CHALLENGES

To prevent the payment of bribes, corporations must adopt effective ethics and compliance programs.⁴³ These programs require corporations to conduct risk assessments to determine when potential bribe payments are most likely; to implement internal controls, with a special focus on the identified high-risk areas; to provide employees with training on ethics, anti-corruption laws, and the company's code of conduct; to implement a system for employees to report any suspected violations; and to establish punishments for rule violators.⁴⁴ In the United States, the government provides strong incentives for corporations to adopt such programs by using the quality of a corporation's compliance program in determining whether or not to prosecute the corporation for FCPA

conducted by the Pakistan chapter of Transparency International. The press release concludes by stating "The NCP survey 2009 results confirms that Pakistan has Laws, but not the Rule of Law." *Id.*

39. CONTROL RISKS GROUP, *supra* note 7, at 5.

40. *Id.*

41. ERNST & YOUNG, *supra* note 35, at 5. In addition, 18% of respondents stated that their company had lost business in the last two years to a competitor that paid a bribe. *Id.*

42. See *infra* Part III.B and Part IV.C.

43. See Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 430 (2007).

44. For an overview of FCPA compliance programs, see generally MARTIN T. BIEGELMAN & DANIEL R. BIEGELMAN, FOREIGN CORRUPT PRACTICES ACT: COMPLIANCE GUIDEBOOK 215–17 (2010) (list of factors).

violations.⁴⁵ The quality of the compliance program also plays a role in determining the severity of a corporation's sentence if it is convicted of violating the FCPA.⁴⁶

Despite the strong incentives provided by these enforcement activities, many corporations still have not implemented a program that appropriately identifies and guards against risks of corruption.⁴⁷ One survey found that "[o]nly 25% percent of respondents say their company performs proactive risk assessments or monitoring" on corrupt payments.⁴⁸ Additionally, only "40% of respondents believe their controls are effective at identifying high-risk business partners or suspicious disbursements."⁴⁹ Smaller corporations were even less confident in the implementation of their compliance programs.⁵⁰ In the summer of 2008, which began the DOJ's increased focus on FCPA enforcement, a similar survey found that although a majority of respondents had anti-bribery policies and training programs in place, less than half had developed protocols for conducting risk assessments or continuous monitoring of compliance.⁵¹ The anti-bribery policies of the surveyed companies were rarely distributed to third party representatives or suppliers, and the companies rarely provided training to those third parties.⁵² Thus, it is not surprising that, when companies operating in high risk environments for corruption were examined by an independent research organization, only 10% of those companies met the research organization's standards for a "good" or "adequate" response for preventing wrongful payments.⁵³

45. Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 166–170 (2010) (describing federal agents' considerations in deciding whether or not to prosecute).

46. *Id.* at 162–63.

47. See PRICEWATERHOUSECOOPERS, *supra* note 22, at 13. Some commentators argue that even for companies that attempt to implement a comprehensive FCPA compliance program, there will be significant challenges in designing many aspects of the program because of the government's unclear and changing enforcement practices. Westbrook, *supra* note 2, at 498–99. For example, Westbrook states: "Given the present state of confusion about what the law actually requires, it is unclear how to design an efficient and effective compliance program. As a result, FCPA compliance programs are likely to be overly expensive, and probably insufficiently effective." *Id.*

48. PRICEWATERHOUSECOOPERS, *supra* note 22, at 14. This was a survey of 390 senior level executives from companies throughout the world. *Id.* at 2.

49. *Id.* at 14.

50. See *id.* at 17 (comparing corporations over \$10 billion in annual revenue to those under that amount).

51. KPMG FORENSIC, 2008 ANTI-BRIBERY AND ANTI-CORRUPTION SURVEY 4–5 (2008).

52. *Id.* at 5–6. 29% of respondents indicated that their policies were distributed to third party representatives and 27% distributed the policies to suppliers and vendors. *Id.*

53. BOB GORDON, THE STATE OF RESPONSIBLE BUSINESS 2008, 24 (2008), available at www.eiris.org/files/research%20publications/stateofrespbusinesssep08.pdf.

These basic flaws in corporate compliance programs lead to a lack of awareness of anti-corruption laws on the part of managers. One survey found that 42% of international business development directors for U.S. corporations considered themselves to be “totally ignorant” about the FCPA.⁵⁴ A different survey found that this number increased to 56% when the pool of respondents included managers of Securities and Exchange Commission (SEC) registered companies—who are therefore subject to the FCPA—whether or not the managers are based in the United States.⁵⁵

One example of the impact of this ignorance is seen in the use of intermediaries in other countries. Intermediaries are those local individuals or organizations that a corporation hires to help it conduct business in that particular country. The use of intermediaries creates great risks of corrupt payments being made on the corporation’s behalf, thereby exposing the corporation to FCPA liability.⁵⁶ One survey found that one-third of U.S. managers believed that U.S. corporations regularly used intermediaries in an attempt to avoid violating the FCPA.⁵⁷ Many felt that it is nearly impossible to comply with the forms and procedures for getting necessary export licenses and would use an intermediary to get around those rules.⁵⁸ In a misunderstanding of the FCPA, many managers believe that it is not their company’s problem if the intermediary pays bribes, as “it comes out of their commission” or it is not the company’s place to tell the intermediary how to run their business.⁵⁹ These managers also wrongly believe that an intermediary’s use of bribes would create a legal problem only for the intermediary, and not their own company.⁶⁰

Overall, it is clear that enforcement of anti-corruption laws must be supplemented with additional regulatory approaches. These approaches

These findings were based on data collected by Experts in Responsible Investment Solutions (EIRIS). EIRIS provides independent research for investors on corporations’ environmental, social, and governance (ESG) performance. *Id.* at 13. The research was based on data collected through September 2008 on the 2,344 companies in the FTSE All-World Developed Index. *Id.* For corruption research, 649 of those companies were categorized as being at “high risk” for operating in corrupt environments or industries with a high risk of corruption. *Id.* at 13, 24.

54. CONTROL RISKS GROUP, *supra* note 7, at 10. An Ernst and Young survey conducted in late 2007 to early 2008 found that 31 percent of U.S. managers had “never heard of or knew nothing about the FCPA.” ERNST AND YOUNG, *supra* note 35, at 17.

55. ERNST & YOUNG, *supra* note 35, at 17.

56. PRICEWATERHOUSECOOPERS, *supra* note 22, at 14–15; Koehler, *supra* note 2, at 399–403.

57. CONTROL RISKS GROUP, *supra* note 7, at 13. An additional 44% believed U.S. corporations used intermediaries for this purpose occasionally. *Id.*

58. *Id.*

59. *Id.* at 18.

60. *Id.*

must deal with the problems identified above, including the assurance problem⁶¹ and poorly implemented compliance programs.⁶² Ideally, these new approaches would encourage cooperation between corporations, as well as cooperation with government agencies and other stakeholders of the organization.⁶³ Cooperation is needed in order to develop and spread best practices for implementing more effective compliance programs, and it also helps to ensure that all corporations are playing by the same rules. This is where an appropriately structured transparency program can create significant benefits.

III. THE ROLE OF TRANSPARENCY IN COMBATING CORRUPTION

A. TRANSPARENCY THROUGH CORPORATE SOCIAL REPORTING

In policy debates centered around corporate accountability for social and environmental performance, transparency is always part of the discussion, if not the default approach.⁶⁴ Often this transparency focuses on corporate social reporting—also known as sustainability reporting or non-financial reporting.⁶⁵ Corporations use social reporting to disclose the processes they use to manage CSR issues and their performance on these matters.⁶⁶ With this information, stakeholders—such as customers, shareholders, and NGOs—can seek to hold corporations accountable and pressure them to improve performance if needed.⁶⁷

Although corporations might not be expected to voluntarily disclose information that stakeholders will use to criticize their performance and force them to make greater resource commitments to CSR-related matters, in fact, corporations have rapidly adopted social reporting

61. See *supra* notes 25–31 and accompanying text.

62. See *supra* notes 48–53 and accompanying text.

63. See Thomas W. Dunfee & David Hess, *Getting From Salbu to the 'Tipping Point'*, 21 NW. J. INT'L L. & BUS. 471, 472–73 (2001).

64. See, e.g., Dominique Bessire, *Corporate Social Responsibility: From Transparency to 'Constructive Conflict'*, in THE ASHGATE RESEARCH COMPANION TO CORPORATE SOCIAL RESPONSIBILITY 65, 65 (David Crowther & Nicholas Capaldi eds., 2008) (“[In the domains of CSR and corporate governance] the necessity for transparency is taken for granted and is very seldom questioned.”).

65. See *id.* at 66–67; David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development*, 18 BUS. ETHICS Q. 447, 447 (2008) [hereinafter Hess, *Three Pillars*] (“[O]ver the past decade corporate social reporting has established itself as a key element in the movement for making corporations more socially responsible.”)

66. See generally *infra* notes 89–95 and accompanying text (providing an overview of the GRI reporting standards).

67. See Klaus Dingwerth & Margot Eichinger, *Tamed Transparency: How Information Disclosure Under the Global Reporting Initiative Fails to Empower*, 10 GLOBAL ENVIRONMENTAL POLITICS 74, 74 (2010).

practices in the past 10 years.⁶⁸ The majority of the largest corporations in the United States and the world now issue such reports.⁶⁹ This significant growth is primarily attributable to the efforts of the Global Reporting Initiative (GRI), which has produced the leading guidelines for structuring these social reports.⁷⁰ The GRI has convinced corporations that social reports can help them better manage CSR issues and demonstrate their commitment to CSR to skeptical stakeholders.⁷¹

There is a significant difference, however, between adopting social reporting practices and actually producing quality social reports. Many stakeholders complain about the incompleteness of information in the reports, the lack of consistency from year to year, the inability to compare social report data between companies, and numerous other problems.⁷² Many commentators question if anyone is even reading the reports due to these problems.⁷³ One commentator, writing on this

68. See Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer*, 2007 COLUM. BUS. L. REV. 565, 568–71 (2007).

69. Adam Sulkowski & Steven White, *Financial Performance, Pollution Measures, and the Propensity to Use Corporate Responsibility Reporting: Implications for Business and Legal Scholarship*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 491, 494 (2010) (“of the largest 250 corporations in the world (the Global Fortune 250 or “G250”), seventy-nine percent issued a stand-alone CR report in 2008 (up from 52% in 2005)”); Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary -Based Discourse*, 87 WASH. U. L. REV. 115, 127 (2009) (reporting that approximately 50% of the S&P 100 Index issued such reports in 2008).

70. Iris H-Y Chiu, *Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR?: A Path Paved with Good Intentions*, 22 FLA. J. INT'L L. 361, 366–67 (2010) (citing KPMG INT'L, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2008, at 36–38 (2008) [hereinafter KPMG 2008 REPORTING SURVEY], available at <http://www.kpmg.com/Global/en/IssuesandInsights/ArticlesPublications/Documents/International-corporate-responsibility-survey-2008.pdf>); Dingwerth & Eichinger, *supra* note 67, at 76.

71. See Sulkowski & White, *supra* note 69, at 497 (explaining survey data shows important motivations behind adopting social reporting practices include improving reputation and brand, and risk management) (citing KPMG 2008 REPORTING SURVEY, *supra* note 69, at 18).

72. See Chiu, *supra* note 70, at 364 (“as CSR reports are narrative in nature, and not susceptible to being evaluated upon objective standards such as accounting standards, they are often criticized to be incomparable, vague, and subjective.”); Siebecker, *supra* note 69, at 122 (describing a “tragedy of transparency” where a “confluence of factors that create incentives for corporations to dissemble or to embrace a kind of strategic ambiguity in their public communications.”). The “tragedy of transparency” is detailed in a summary of a study of the automobile industry. See also Dingwerth & Eichinger, *supra* note 67, at 88 (“In sum, our brief analysis of actual GRI reports suggests that even though all companies claim full coverage of the [greenhouse gas] indicators, the information they provide is of limited practical use. A look at other indicators confirms this finding. Thus, quantitative data are not always gathered systematically and reported completely, while qualitative information appears unbalanced and often fails to include a credible assessment of the sustainability impacts of various measures taken by a reporting organization.”).

73. Dingwerth & Eichinger, *supra* note 67, at 89–90 (finding that NGOs are only marginally using social reports in their activities).

“transparency tragedy,” says of CSR communications more generally that: “[p]erhaps somewhat oddly, it is not simply the lack of information that causes the tragedy. Instead, it can also be high volume and low quality of information that . . . render assessing the truth or falsity of corporate communications increasingly difficult.”⁷⁴

These quality problems create a vicious cycle. Because stakeholders do not use the existing reports, they apply less pressure on corporations to adopt social reporting practices or to improve their reports.⁷⁵ In effect, corporations are using social reports more for purposes of brand and reputation management than for the provision of useful information,⁷⁶ causing stakeholders to further reduce their demand of social reports.

Though these trends raise concerns about social reporting’s current trajectory, stakeholders have not given up on transparency for improving corporate social performance. Instead, they have focused on refining the nature of information disclosed and the incentives behind producing social reports. Investors and NGOs have pushed for disclosure of more specific types of information, as opposed to general social reports containing information based on a company’s own assessment of what issues meet the GRI standard of “materiality.”⁷⁷ The leading example of this trend toward specificity is the Carbon Disclosure Project (CDP), which requires corporations to disclose information related to greenhouse gases and climate change issues.⁷⁸ As in the early stages of social reporting in the last decade, there has been rapid growth in CDP disclosure, but there are also significant complaints about the quality of that information.⁷⁹

A second major development in the last few years has been the greater involvement of governments in mandating the production of social reports, or disclosure of information typically included in social

74. Siebecker, *supra* note 69, at 128.

75. A study suggests that “GRI is losing momentum, at least in the United States, primarily due to a failure to deliver value to various stakeholders. Investors remain unconvinced that [non- financial reporting] is valuable in the pricing of financial assets, companies are expressing doubts about the payoffs from social performance, and NGOs are not finding GRI data to be particularly useful in their campaigns.” David L. Levy et al., *The Contested Politics of Corporate Governance: The Case of the Global Reporting Initiative*, 49 *BUS. & SOCIETY* 88, 90–91 (2010).

76. *See supra* note 71.

77. Dingwerth & Eichinger, *supra* note 70, at 82–83 (describing the GRI’s concept of “materiality,” which is the standard for determining what information should be included in the sustainability report).

78. For an overview of the CDP, see Soo-Yeun Lim, *Mandatory Corporate Greenhouse Gas Emissions Disclosure to Encourage Corporate Self-Regulation of Emissions Reduction*, 17 *N.Y.U. ENVTL. L.J.* 854, 862–63 (2008).

79. Ans Kolk et al., *Corporate Responses in an Emerging Climate Regime: The Institutionalization and Commensuration of Carbon Disclosure*, 17 *EURO. ACCOUNTING REV.* 719, 741 (2008).

reports. For example, in 2008, Sweden began requiring state-owned enterprises to publish social reports in accordance with the GRI.⁸⁰ In 2009, the Danish Government expanded existing disclosure requirements on environmental matters to include disclosure on CSR issues in general.⁸¹ Also in 2009, South Africa updated its voluntary code of corporate governance⁸² to require integrated reporting, which combines environmental, social and governance (ESG) data in required financial reports.⁸³

These actions demonstrate a global trend toward governmental involvement in CSR reporting.⁸⁴ Although the question of whether social reports should be mandatory or voluntary is as old as the idea of social reports itself,⁸⁵ there are now more serious discussions centered around “how” mandatory reporting should occur.⁸⁶ For example, Lydenberg and colleagues have produced a detailed proposal for a mandatory system based on a limited set of Key Performance Indicators (KPIs) for separate industry sectors.⁸⁷

80. UNITED NATIONS ENVIRONMENT PROGRAMME, KPMG, GLOBAL REPORTING INITIATIVE & UNIT FOR CORPORATE GOVERNANCE IN AFRICA, CARROTS AND STICKS - PROMOTING TRANSPARENCY AND SUSTAINABILITY: AN UPDATE ON TRENDS IN VOLUNTARY AND MANDATORY APPROACHES TO SUSTAINABILITY REPORTING 13, 66–67 (2010), *available at* http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Advisory-Publications/Documents/Carrots_Sticks_2010.pdf.

81. *Id.* at 13, 39–40.

82. Institute of Directors in Southern Africa, King III Code of Governance Principles for South Africa 13 (2009), *available at* <http://african.ipapercms.dk/IOD/KINGIII/kingiiicode/>.

83. UNITED NATIONS ENVIRONMENT PROGRAMME, *supra* note 80, at 62–63.

84. *Id.* at 13.

85. An early argument for mandatory social reporting can be found in Meinolf Dierkes, *Whither Corporate Social Reporting: Is it Time to Legislate?*, 28 CAL. MGMT. REV. 106, 107 (1986). For an overview of the arguments surrounding the voluntary versus mandatory debate, see generally UNITED NATIONS ENVIRONMENT PROGRAMME, *supra* note 80, at 9–15.

86. See ROBERT G. ECCLES & MICHAEL P. KRZUS, ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE SOCIETY 219–22 (2010) (arguing for mandating “integrated reporting,” which combines sustainability reporting information and traditional financial information into one integrated report); STEVE LYDENBERG ET AL., FROM TRANSPARENCY TO PERFORMANCE: INDUSTRY BASED SUSTAINABILITY REPORTING ON KEY ISSUES 5–12 (2010), *available at* http://hausercenter.org/iri/wp-content/uploads/2010/05/IRI_Transparency-to-Performance.pdf (arguing for a mandatory system based on specific indicators for different industries). The debate over government intervention is not simply on whether social reports should be mandated, but also on the exploration of other types of intervention. For example, in 2009, the European Commission held workshops on how to improve the disclosure on ESG issues, and considered the pros and cons of various regulatory interventions. An overview of the conference and summary of the sessions is available at the website of the European Commission, http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/swedish-presidency/index_en.htm.

87. LYDENBERG ET AL., *supra* note 86, at 5–12.

B. CURRENT SOCIAL REPORTING PRACTICES ON CORRUPTION

1. Social Reporting Guidelines

There is no universally accepted guide for what information should be included in a social report,⁸⁸ but the leading standard for sustainability reports are produced by the non-profit organization GRI.⁸⁹

The most recent version of the GRI standards sets out both the process that corporations should use to develop the content of their reports and the exact information to be included in the reports.⁹⁰ The main body of the report consists of disclosures addressed toward a corporation's general management approach and toward its performance with respect to various specified categories of economic, environmental, and social issues.⁹¹ The "social" category is sub-divided into categories on labor practices, human rights, society, and product responsibility,⁹² and within the "society" category are three "core" required metrics related to corruption.⁹³ The reporting corporation must disclose: (1) what business units it has analyzed for corruption risks; (2) the training provided to employees on the corporation's anti-corruption policies; and (3) how the company has responded to any incidents of corruption related to its business activities.⁹⁴ In addition to these performance indicators, the GRI requires corporations to disclose their general management approach to corruption.⁹⁵ This includes disclosure of the corporation's policies on corruption, its operational responsibilities, and its monitoring procedures.⁹⁶

88. Chiu, *supra* note 70, at 366.

89. *See generally* GLOBAL REPORTING INITIATIVE, <http://www.globalreporting.org> (last visited Nov. 10, 2011) (describing the Global Reporting Initiative).

90. *See generally*, GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES (2006), *available at* http://www.globalreporting.org/NR/rdonlyres/ED9E9B36-AB54-4DE1-BFF2-5F735235CA44/0/G3_GuidelinesENU.pdf [hereinafter GRI G3] (providing sustainability reporting guidelines to corporations).

91. *Id.* at 24. In addition, the corporation is required to provide disclosures on such matters as its general strategy as related to sustainability issues, the organization's general profile, and the stakeholders it engaged in helping determine the content of the report. *Id.* at 19–24.

92. *Id.* at 24.

93. *Id.* at 34.

94. *Id.* The GRI also offers further explanations of the categories. GLOBAL REPORTING INITIATIVE, INDICATOR PROTOCOLS SET SOCIETY (2006), *available at* <http://www.globalreporting.org/NR/rdonlyres/218C2A97-69C0-4092-A3FD-0B4DFD8F9A86/0/G3IndicatorProtocolsSociety2011.pdf> (providing additional detail on what should be disclosed in these core indicators on corruption).

95. The disclosures on management approach are not specific as to corruption, but are described generally as applying to all matters falling under the "society" category. GRI G3, *supra* note 90, at 33.

96. *Id.* at 33–34.

In 2009, Transparency International and the United Nations (UN) Global Compact published *Reporting Guidance on the 10th Principle Against Corruption*.⁹⁷ This document provides corporations with more guidance than is contained in the GRI framework on producing disclosure information on corruption issues. This guidance divides reporting indicators into levels classified as “basic” or “desired.”⁹⁸ These indicators cover the categories of: (1) commitment and policy; (2) implementation; and (3) monitoring.⁹⁹ These indicators are shown in Table 1.¹⁰⁰

97. U.N. GLOBAL COMPACT & TRANSPARENCY INT’L, REPORTING GUIDANCE ON THE 10TH PRINCIPLE AGAINST CORRUPTION (2009), available at http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf [hereinafter U.N. GLOBAL COMPACT, REPORTING GUIDANCE].

98. *Id.* at 12–13.

99. *Id.* at 14.

100. This table is adapted from the U.N. Global Compact and Transparency International report. *Id.* at 14.

Table 1: UN Global Compact 10th Principle Guidance.

"B" designates "basic" indicator and "D" designates "desired" indicator.

COMMITMENT & POLICY

B1 Publicly stated commitment to work against corruption in all its forms, including bribery and extortion

B2 Commitment to be in compliance with all relevant laws, including anti-corruption laws

D1 Publicly stated formal policy of zero-tolerance of corruption

D2 Statement of support for international and regional legal frameworks, such as the UN Convention against Corruption

D3 Carrying out risk assessment of potential areas of corruption

D4 Detailed policies for high-risk areas of corruption

D5 Policy on anti-corruption regarding business partners

IMPLEMENTATION

B3 Translation of the anti-corruption commitment into actions

B4 Support by the organization's leadership for anti-corruption

B5 Communication and training on the anti-corruption commitment for all employees

B6 Internal checks and balances to ensure consistency with the anti-corruption commitment

D6 Actions taken to encourage business partners to implement anti-corruption commitments

D7 Management responsibility and accountability for implementation of the anti-corruption commitment or policy

D8 Human Resources procedures supporting the anti-corruption commitment or policy

D9 Communications (whistleblowing) channels and follow-up mechanisms for reporting concerns or seeking advice

D10 Internal accounting and auditing procedures related to anticorruption

D11 Participation in voluntary anti-corruption initiatives

MONITORING

B7 Monitoring and improvement processes

D12 Leadership review of monitoring and improvement results

D13 Dealing with incidents

D14 Public legal cases regarding corruption

D15 Use of independent external assurance of anti-corruption programs

2. Evaluation of Current Practices

Currently, few corporations are providing significant disclosure on matters related to corruption. Transparency International recently conducted a review of five hundred companies' disclosures on corruption

made in any form, including disclosures contained in annual reports, sustainability reports, and company websites.¹⁰¹ This study found that 30% of the companies did not report any information on anti-corruption practices, and 20% simply reported the existence of an anti-corruption policy and strategy.¹⁰² Only 15% of the companies made any effort to go beyond reporting on basic matters.¹⁰³ A second study found similar results. The research company Experts in Responsible Investment Solutions (EIRIS) looked at a sample of over six hundred companies¹⁰⁴ that were operating in high risk environments for corruption and found that only 1% of those companies demonstrated “good” disclosure and just 5% of companies met the organization’s standards of “intermediate” disclosure.¹⁰⁵ The EIRIS standard for intermediate disclosure required the company to “publish at least some information relating to performance against this issue.”¹⁰⁶

Finally, a study of all types of disclosures by the largest fifty companies in Australia found similar shortcomings.¹⁰⁷ Although many corporations were disclosing their policies against corrupt payments, significantly fewer provided details on how those policies were implemented or on the company’s actual performance outcomes.¹⁰⁸ The study also found that companies in sectors at high risk for corrupt payments did not perform any different on average from the entire group of fifty corporations.¹⁰⁹

Overall, the organizations discussed above are conducting significant work on developing guidelines for what information should be disclosed on a corporation’s anti-corruption efforts.¹¹⁰ Studies have shown, however, that corporations are not disclosing this information, and what information is disclosed is of poor quality.¹¹¹ Thus, it is

101. TRANSPARENCY INT’L, *TRANSPARENCY IN REPORTING ON ANTI-CORRUPTION – A REPORT OF CORPORATE PRACTICES 7-10* (2009) available at http://www.transparency.org/publications/publications/2009_06_19_final_trac_report. Of the 500 companies included in the study, 120 were from the United States. *Id.* at 10.

102. *See id.* at 17.

103. *See id.*

104. GORDON, *supra* note 53, at 13.

105. *Id.* at 24.

106. *Id.*

107. *See* ASSOCIATION OF CERTIFIED CHARTERED ACCOUNTANTS, *ANTI-BRIBERY AND CORRUPTION REPORTING DISCLOSURES 5* (2008), available at <http://www2.accaglobal.com/BandCRreport>. The report judges the Australian Securities Exchange (ASX) top 50 against five groups of criteria, providing a detailed scoring methodology. *Id.* at 7-8.

108. *See id.* at 9 (showing an ASX top 50 average score of 74% for disclosure of anti-bribery policies against an average score of 38% for disclosure of the implementation of those policies).

109. *Id.* at 11.

110. *See supra* notes 90–98 and accompanying text.

111. *See supra* notes 101–109 and accompanying text.

unlikely that this information is of use to stakeholders of the corporation. The next section focuses on how to improve disclosure and ensure that those disclosures are a valuable part of a regulatory system to combat corruption.

IV. USING ENFORCEMENT TO IMPROVE DISCLOSURE

This article proposes a system in which the enforcement of anti-corruption laws can be used to create incentives for better disclosure on corruption issues. This information can then be used to meet the needs of the potential users of social reports, as well as to further the goals of enforcement. This Part describes current FCPA enforcement practices, how disclosure requirements can fit within that process, and how those disclosures can help create a system that reduces corruption more effectively.

A. ENFORCEMENT OF ANTI-CORRUPTION LAWS

When prosecutors at the DOJ believe that agents of a corporation have engaged in bribery and are considering indicting the company itself, they begin an evaluation process.¹¹² Based on factors such as the pervasiveness of the wrongful conduct in the organization, the company's cooperation in the investigation, and the adequacy of the company's compliance and ethics program, prosecutors will decide whether to prosecute the corporation itself, agree to a settlement with the corporation, or prosecute only the individuals involved.¹¹³ The SEC uses a similar approach.¹¹⁴

In the last few years it has been increasingly common for corporations accused of violations of the FCPA to agree to settlements, in the form of deferred prosecution agreements or non-prosecution agreements.¹¹⁵ As part of such a settlement, the corporation typically

112. See, e.g., Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance*, 34 J. CORP. L. 679, 697-98 (2009) (describing the factors that regulators evaluate when deciding whether to impose monitorships on companies).

113. See, e.g., Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 78-81 (2007) (describing the factors outlined in the Thompson and McNulty Memoranda that prosecutors should take into consideration when deciding whether to prosecute the corporate entity rather than individuals within the company).

114. *Id.* at 77 n.128.

115. See Melissa Aguilar, *Prosecution Agreements Nearing Record Levels at DoJ*, COMPLIANCE WK., Feb. 2011, at 10, 10-11; GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END UPDATE ON DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 2-4 (Jan. 4, 2011), available at <http://www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf> (describing the sharp increase in usage of settlement agreements, with settlements of FCPA violations representing as many as 50% of such agreements).

admits wrongdoing and agrees to improve its compliance and ethics program in specified ways.¹¹⁶ In many cases, the corporation also agrees to hire an independent monitor to oversee the design and implementation of those improvements.¹¹⁷ The exact terms of these settlement agreements depend in part on the perceived quality of the corporation's current compliance program.¹¹⁸

A settlement agreement is a burdensome process for a corporation, but it is a significantly better alternative than a criminal indictment, which can bar a corporation from government contracts and cause it other problems.¹¹⁹ Thus, corporations have a strong incentive to take steps to maximize the likelihood that the government will agree to a settlement if the corporation is caught paying a bribe—steps which include self-disclosure. Ten years ago hopes of a settlement would not have been a significant incentive for corporations to take preventative action, since the government rarely brought charges under the FCPA, but that is no longer true, as these charges are now more common and may continue to increase.¹²⁰

For several reasons, this increased FCPA enforcement will likely continue in the next few years. First, other countries are showing signs of enforcing their anti-corruption laws, meaning that the United States may pursue enforcement in cooperation with other government agencies, since corporations paying bribes may be liable under multiple jurisdictions.¹²¹

116. Hess & Ford, *supra* note 10, at 332–333.

117. *Id.* For an overview and analysis of the settlement process and requirements (though, not limited to FCPA cases), see generally Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793 (2008) (outlining the SEC's use of "Corporate Therapeutics" as part of its settlement agreements and analyzing the various factors and levels of involvement it undertakes when addressing corporate corruption); Ford & Hess, *supra* note 112 (discussing the role of corporate monitorships in negotiated settlement agreements); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159–61 (2008) (providing an overview of how deferred prosecution and non-prosecution agreements look in practice in the context of the DOJ's new attitude toward corporate reform); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006) (discussing developments at the DOJ to give it more discretion when confronting corporate crime, including deferred prosecution and non-prosecution agreements). For a discussion of settlements in the FCPA context, see Giudice, *supra* note 2, at 366–68.

118. E.g., F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PENN. J. BUS. L. 321, 337 (2011) (describing the effect a perception of a good compliance program may have on a prosecutor's decision of whether to seek to impose a monitor requirement in a settlement agreement).

119. See Gibson, Dunn & Crutcher LLP, *supra* note 115, at 1.

120. See Warin et al., *supra* note 118, at 325 (describing the dormancy of FCPA enforcement until the past decade when the DOJ and SEC began setting records for the number of FCPA enforcement actions they brought).

121. TRANSPARENCY INT'L, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 8 (July 28, 2010), available at

Second, the SEC has recently established a new division focused on FCPA enforcement, and the DOJ is devoting more resources to this area.¹²² Third, the recently-passed financial reform bill, the Dodd-Frank Wall Street Reform and Consumer Protection Act, grants to whistleblowers who expose securities law violations, including FCPA violations, a percentage of any monetary sanctions imposed against the corporation.¹²³ Because fines in some cases can measure in the tens of millions,¹²⁴ this potentially creates a strong incentive for employees and agents of corporations to report wrongdoing.

B. USING ENFORCEMENT TO IMPROVE DISCLOSURE

The leverage provided by the government's ability to make prosecution and settlement decisions puts the United States in a strong position to improve public disclosure of anti-corruption practices by including and elevating such disclosure as a decision factor in the settlement or prosecution of FCPA violations. The government should use its leverage to improve CSR reporting by formally including corporate disclosure consistent with the anti-corruption indicators from the GRI and the UN Global Compact¹²⁵—as well as the use of independent external assurance on those disclosures¹²⁶—as additional factors to consider when making prosecution decisions. Factors such as the adequacy of the company's compliance and ethics program would continue to be important, but they would also be supported by disclosure. Disclosure can enhance the effectiveness of these factors by providing

http://www.transparency.org/publications/publications/conventions/oecd_report_2010
 (“The increase in the number of countries with active enforcement from four to seven is a very positive development [T]here is now active enforcement in countries representing about 30 per cent of world exports . . .”). The 2011 report, however, showed no further progress and expressed concerns that there may be a loss of momentum in obtaining stricter enforcement from other OECD countries. TRANSPARENCY INT’L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 5 (2011), *available at* http://www.transparency.org/publications/publications/conventions/oecd_report_2011.

122. Westbrook, *supra* note 2, at 558–59.

123. *See id.* at 525 (describing the monetary incentives as the Dodd-Frank whistleblower “bounty program”).

124. *See, e.g.*, Giudice, *supra* note 2, at 348–49 (describing combined settlements of over \$1 billion dollars in connection with Siemens A.G. Corporation’s FCPA violations); Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 676–677 (2009) (outlining the Lockheed Corp. and Vetco Int’l Ltd. settlements of \$24.8 million and \$26 million respectively).

125. Though these indicators could potentially be adapted to meet the government’s assessment needs.

126. Assurance involves auditing the information disclosed to ensure that it is complete and reliable. *See, e.g.*, Giacomo Manetti & Lucia Becatti, *Assurance Services for Sustainability Reports: Standards and Empirical Evidence*, 87 J. BUS. ETHICS 289, 290 (2009) (outlining the basic elements of external verification as required by the ISAE 3000 established by the Institute of Social and Ethical Accountability).

evidence of an appropriately implemented program, as opposed to a compliance program that exists on paper but is not meaningfully implemented in practice. Disclosure will also aid the government in determining the adequacy of the program over time. For example, if in 2010 the government becomes aware that a corporation paid bribes in 2007, disclosures will assist the government in determining if the corporation has improved its compliance program since that time, reducing the risk of paying similar bribes in the future.

Support for this proposal comes from former General Counsel of the SEC, James R. Doty.¹²⁷ Although this article's proposal arises out of a link between CSR and legal mechanisms, described more fully in the next subsection, and Doty's proposal arises out of his critical assessment of current enforcement practices,¹²⁸ the proposals have general similarity in the means to achieve their goals, which is improved information disclosure. Doty argues that out of fairness to corporations and competitiveness concerns (e.g., allowing corporations to better plan strategies when operating in corrupt countries), there needs to be greater clarity and certainty in FCPA enforcement.¹²⁹ To achieve this, Doty argues for a "Reg. FCPA" approach.¹³⁰ Under this approach, once the corporation has provided disclosures that demonstrate to the SEC that it has implemented an effective FCPA compliance program, the corporation receives a rebuttable presumption that it did not violate the FCPA if a company employee is later found to have paid a bribe.¹³¹ Doty proposes two types of disclosures: public and private.¹³² The public disclosures would contain a description of the corporation's compliance program, including its code of conduct, training policies, and monitoring practices.¹³³ Private disclosures to the government would relate to specific projects in foreign countries (e.g., budgets, joint venture partners

127. Doty, *supra* note 6, at 1233 n.*.

128. Doty places his criticisms of FCPA enforcement into three categories: "(i) trends in the imposition of civil liability on a parent issuer for acts of a subsidiary's employee or agent in the absence of active complicity of the parent, and in some cases where the actions of employees and agents contravene established, company-wide policies; (ii) prosecution on aggressive theories extending beyond traditional bribery (which underscores the need for prospective regulatory clarification of permitted activities); and, (iii) the expansive criminalization of vicarious liability under a vague statute, in some cases where there is not certainty that a bribe has been offered or paid by the corporation." *Id.* at 1235. Doty goes on to state that "[t]hese emerging characteristics of the enforcement regime are combining to threaten U.S. foreign competitiveness with a growing risk of exclusion of U.S. companies from foreign markets." *Id.* at 1239.

129. See *id.* at 1237–38, 1241 (suggesting that current levels of FCPA penalties alone merit more regulatory clarity, and suggesting the example of the SEC's rebuttable presumption rules as a way of providing some of that clarity).

130. *Id.* at 1234.

131. *Id.* at 1234, 1245.

132. Doty, *supra* note 6, at 1244–46.

133. *Id.* at 1244.

and local agent contract terms) and would afford the company the possibility of a “no-action” review by the SEC (i.e., advice from the SEC on whether a proposed course of action would be viewed by the SEC as violating the FCPA).¹³⁴ These disclosures would remain confidential, but would give the SEC a greater understanding of potentially problematic international transactions.¹³⁵

C. THE BENEFITS OF DISCLOSURE

From a regulatory perspective, transparency through non-financial reporting can be classified as a form of New Governance regulation,¹³⁶ an umbrella term used to describe models of regulation that share some basic principles¹³⁷ aimed at “decentering” the law.¹³⁸ Instead of being set by the government in a centralized fashion, standards are allowed to develop through experimentation at the local level.¹³⁹ Those at the local level—the corporation and its stakeholders—have the best information about the issues and potential solutions, and therefore need to be directly involved in setting the appropriate standards.¹⁴⁰ Any standards set by the participants are deemed provisional and are updated based on new knowledge and the demands of changing circumstances over time.¹⁴¹ The role of the government is to “orchestrate” this process, by ensuring that there is appropriate opportunity for participation, by ensuring that mechanisms exist to allow best practices at one location to be captured and made available for use at other locations, and by providing a backdrop of appropriate sanctions when necessary.¹⁴²

134. *Id.* at 1246.

135. *Id.*

136. See generally Hess, *Three Pillars*, *supra* note 65 (examining corporate social reporting as a form of New Governance); David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 BUS. ETHICS Q. 453 (2007) [hereinafter Hess, *Social Reporting*] (arguing that social reporting can be an important form of New Governance).

137. See Bradley C. Karkkainen, *Reply: “New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 472–74 (2004). See generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (providing an overview and synthesis of the work in this area).

138. 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, 232 (2007) [hereinafter Hess, *Public Pensions*].

139. *Id.*

140. Hess, *Three Pillars*, *supra* note 65, at 451 (describing the Environmental Protection Agency (EPA’s) attempt to work with corporations it regulated when setting emissions standards).

141. Hess, *Social Reporting*, *supra* note 136, at 455.

142. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 677–80 (2006) (discussing the ability of “democratic experimentalism” to promote broad participation, capture best-case-practices,

The basic pillars of transparency, as a New Governance method, are: disclosure, dialogue, and development.¹⁴³ The first pillar—disclosure—requires that corporations provide meaningful information on their policies, management practices, and the outcomes they have achieved.¹⁴⁴ Disclosure enables stakeholders to hold the corporation accountable by comparing the corporation’s stated goals to its actual performance and the performance of other corporations. It also helps to improve other corporations’ performance¹⁴⁵ because disclosure allows stakeholder groups, including other similarly-situated corporations, to examine solutions to the same problem. Due to their different areas of expertise, these groups may uncover different patterns, risks, harms, and solutions.¹⁴⁶ For example, Doty suggests that “claw back” provisions in contracts—where the local party agrees to reimburse the corporation for any FCPA liabilities—and other contractual tools may be beneficial.¹⁴⁷ Disclosure assists the spread of these provisions by increasing awareness of them as a solution, and by showing contracting parties that they are legitimate and widely used provisions.¹⁴⁸ Disclosure also allows third parties, such as interested NGOs,¹⁴⁹ to monitor the use, variation, effectiveness, and potential unintended consequences of the practices.¹⁵⁰ These stakeholders can then help critically assess, develop, and spread best practices.¹⁵¹

Disclosure leads to the second pillar—dialogue—which requires corporations to engage with their stakeholders.¹⁵² Disclosure provides the basis for dialogue with stakeholders, such as institutional investors working through the U.N. Principles for Responsible Investment, transnational NGOs such as Transparency International, or local government and special interest groups.¹⁵³ The nature of these dialogues is described below.¹⁵⁴ In addition, it encourages corporations to participate in multi-stakeholder groups (another form of dialogue) by

and ensure proper accountability).

143. See Hess, *Three Pillars*, *supra* note 65, at 453.

144. See *id.* at 457–58. See Table 1 for an overview of the types of information corporations should disclose.

145. *Id.* at 457.

146. See John T. Scholz, *Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory*, 60 *LAW & CONTEMP. PROBS.* 253, 258 (1997).

147. See Doty, *supra* note 6, at 1248.

148. See *id.*

149. See *infra* Part IV.C.2.

150. See Hess, *Three Pillars*, *supra* note 65, at 451, 457.

151. See *id.*

152. *Id.* at 459.

153. See *id.* at 458–59.

154. See *infra* Parts IV.C.1, IV.C.2.

disclosing their participation in such groups.¹⁵⁵

The third pillar—development—refers to the moral development of the corporation, which results from managing corporate culture and implementing an effective ethics and compliance program.¹⁵⁶ The corporation must commit to anti-corruption and must develop an effective compliance and ethics program that ensures employees are trained in anti-bribery laws, that employees have the appropriate incentives to resist making bribes when demanded by government officials, and that internal controls are in place to help prevent wrongful payments.¹⁵⁷ One of the advantages of New Governance regulation is its flexibility in allowing corporations to respond to their unique situations in the manner that is most effective and efficient for them.¹⁵⁸ This is especially important in the area of anti-corruption, because, while effective compliance programs may share some basic features among most corporations, the programs must also be adapted to each corporation's unique situation.¹⁵⁹

The guidance document published by Transparency International and the United Nations Global Compact¹⁶⁰ further demonstrates how these three pillars—disclosure, dialogue, and development—can work together in the area of anti-corruption.¹⁶¹ The report explains the following internal benefits for the corporation:

Formalized and consistent reporting on anti-corruption activities, integrated into already established reporting processes (e.g., accounting), ensures reliable and measurable internal operations. It shows to employees that the fight against corruption is taken very seriously (“What gets measured gets done”). This results in the following benefits:

- strengthening anti-corruption behaviour, including better risk management and compliance;
- encouraging and supporting employees in resisting corruption;
- providing management with a foundation for analysis of progress,

planning and continuous improvement; and motivating employees to be proud of the organization's integrity and reputation.¹⁶²

The report also states benefits external to the corporation:

155. See Hess, *Three Pillars*, *supra* note 65, at 457. Examples of multi-stakeholder initiatives include World Economic Forum's Partnering Against Corruption Initiative (PACI) and the Extractive Industries Transparency Initiative.

156. See *id.* at 460–462.

157. See generally Hess & Ford, *supra* note 8 (discussing the importance of employee training for the reduction of corruption and bribery).

158. See Hess, *Three Pillars*, *supra* note 65, at 460.

159. Hess & Ford, *supra* note 8, at 332.

160. See U.N. GLOBAL COMPACT, REPORTING GUIDANCE, *supra* note 97.

161. See *supra* notes 144–159 and accompanying text (describing the meanings of disclosure, dialogue, and development in this context).

162. U.N. GLOBAL COMPACT, REPORTING GUIDANCE, *supra* note 97, at 10 (emphasis omitted).

[R]eporting on anti-corruption activities based on a consistent reporting guidance enables different stakeholders to share information, raise awareness, learn from each other and improve practices. Stakeholders, as well as each individual organization, can benefit from this in multiple ways:

- sharing experience and procedures with other organizations;
- stimulating multi-stakeholder dialogues;
- increasing importance of disclosure on anti-corruption activities in overall sustainability agendas; and
- driving media coverage of good anti-corruption practices through provision of comparable progress reports.¹⁶³

All of the goals described in this section are consistent with the government's enforcement objectives. The required disclosures are mechanisms to reinforce the corporation's own anti-corruption commitment, and they assist the corporation in improving its compliance program.¹⁶⁴ In addition, the disclosures draw in other stakeholders to assist in holding corporations accountable, so that external stakeholders serve as surrogate regulators.¹⁶⁵ These stakeholders can engage in dialogues with corporations to assist and push those corporations to improve on the development pillar.¹⁶⁶ The next section describes the two most important stakeholder groups: shareholders and NGOs. It shows that there are important and powerful stakeholder groups in place that will likely act upon this disclosure proposal and assist in achieving the regulatory goals.

1. Surrogate Regulator: Shareholders

Formerly, the consideration of ESG issues was the domain only of so-called socially responsible investors.¹⁶⁷ Now, however, many institutional investors incorporate ESG issues into their investment decision making for purposes of risk management and value creation.¹⁶⁸ For example, one major initiative—the United Nations Principles for Responsible Investment (UN PRI)—states that holders of over \$22 trillion in assets have pledged to follow its investment principles, which require the incorporation of ESG issues into investment analyses.¹⁶⁹ In

163. *Id.* at 11.

164. *See supra* notes 143–162 and accompanying text.

165. On the use of stakeholders as surrogate regulators, see generally Neil Gunningham et al., *Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means*, 8 *BUS. STRATEGY & ENV'T* 211 (1999).

166. Hess, *Three Pillars*, *supra* note 65, at 460–62.

167. E. James M. Gifford, *Effective Shareholder Engagement: The Factors that Contribute to Shareholder Salience*, 92 *J. BUS. ETHICS* 79, 79 (2010).

168. Hess, *Public Pensions*, *supra* note 138, at 223.

169. U.N. PRINCIPLES FOR RESPONSIBLE INV., ANNUAL REPORT OF THE PRI INITIATIVE, 1 (2010), available at http://www.unpri.org/files/annual_report2010.pdf (stating that “around US\$ 22 trillion of assets have been signed up to the Principles for Responsible Investment (PRI). This is more than 10% of total global capital markets”) For a listing of the principles, see *Principles for Responsible Investment*, U.N.

addition to using ESG factors in investment decision making, these shareholders often engage directly with corporations to push for improvements.¹⁷⁰

Recently, in connection with the greater recognition of corruption as a CSR issue, these investors have started considering corporations' efforts to combat corruption as one of the ESG factors.¹⁷¹ For example, in 2006,¹⁷² a well-known investing index that screens corporations based on their social and environmental performance—the FTSE4Good Index—started applying a set of “countering bribery criteria” to companies deemed to be at high risk for corrupt payments due to factors such as their industry, countries of operation, and amount of public contracts.¹⁷³ The criteria include corporations' policies against corrupt payments and their management of these issues within the company.¹⁷⁴

Some of these institutional investors have already begun to demand greater information on corporations' anti-corruption practices. In 2010, a group of these investors—coordinating their efforts through the UN PRI—wrote letters to various companies demanding improved disclosure of their anti-corruption efforts.¹⁷⁵ An investment manager quoted in the press release announcing the letters stated, “bribery and corruption are incompatible with good corporate governance and harmful to the creation of value.”¹⁷⁶ The manager went on to state that the failure to implement an effective anti-corruption program “has the potential to create financial, operational and reputational risks.”¹⁷⁷ That press release also specifically mentions the work done by the International Corporate Governance

PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/principles/> (last visited Sept. 23, 2011).

170. For an overview of shareholder engagement, see generally, Gifford, *supra* note 167; Rory Sullivan & Craig Mackenzie, *Can Investor Activism Play a Meaningful Role in Addressing Market Failure?*, 31 J. CORP. CITIZENSHIP 77 (2008).

171. See Virginia Haufler, *Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World*, 10 GLOBAL ENVTL. POL. 53, 65 (2010) (discussing investors' support of the Extractive Industries Transparency Initiative, which works to reduce corruption in developing nations that have significant stores of natural resources).

172. Press Release, FTSE, FTSE Group Introduces New Anti-Bribery Criteria to its FTSE4Good Series (Feb. 22, 2006), <http://www.ftse.com/News/Archive/20060222FTSE4Goodbribery.jsp>. On the FTSE4Good index in general, see David Collison et al., *FTSE4Good: Exploring its Implications for Corporate Conduct*, 22 ACCT., AUDITING & ACCOUNTABILITY J. 35 (2009).

173. FTSE, COUNTERING BRIBERY CRITERIA, *available at* http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_Counter ing_Bribery_Criteria.pdf.

174. *Id.*

175. Media Release, U.N. Principles for Responsible Inv., Global Investors Ask Companies to Disclose Anti-Corruption Measures (Apr. 27, 2010), *available at* http://www.unpri.org/files/20100427_AnticorruptionPR_final.pdf.

176. *Id.*

177. *Id.*

Network (ICGN)—a group that consists of a significant number of major institutional investors.¹⁷⁸ In a recent report,¹⁷⁹ the ICGN identifies corruption as an activity that “destroys value, both at a macroeconomic level and at an individual company level.”¹⁸⁰

2. Surrogate Regulator: NGOs

NGOs have a long history of pushing for improved social performance from corporations.¹⁸¹ They serve many roles, including providing information to corporations and regulators, placing pressure on corporations to change their behavior, influencing consumers and other external stakeholders, and serving a watchdog role.¹⁸² In the area of corruption, the most well-known NGO is Transparency International (TI).¹⁸³ TI is involved in a wide range of activities at the international level and has numerous local chapters which deal with issues specific to particular countries.¹⁸⁴ It is also actively committed to working with corporations to improve their anti-corruption efforts. TI’s recent annual report states:

As business must play a role in fighting corruption, TI helps companies work together with stakeholders to devise voluntary codes, methods for tackling bribery and corruption, and initiatives to promote transparency, which need to be externally verified to be credible.

TI chapters also work to develop context-specific approaches to private sector corruption, especially in developing countries, enabling TI to maximise its impact in squeezing corruption out of business.¹⁸⁵

In addition to TI, there are many others. A 2009 review of developments surrounding the FCPA stated:

One of the more significant developments in the international anti-corruption movement is the growth and influence of civil society in efforts to combat

178. *Id.* The ICGN is a “not for profit body founded in 1995 which has evolved into a global membership organisation of over 500 leaders in corporate governance in 50 countries, with institutional investors representing assets under management of around US\$12 trillion.” *Facts About ICGN*, INT’L CORPORATE GOVERNANCE NETWORK <http://www.icgn.org/facts-about-icgn.php> (last visited Nov. 11, 2011).

179. INT’L CORPORATE GOVERNANCE NETWORK, ICGN STATEMENT AND GUIDANCE ON ANTI-CORRUPTION PRACTICES (Mar. 2009), *available at* [http://www.icgn.org/files/icgn_main/pdfs/best_practice/guidance_on_anti-corruption_practices/2009_anti-corruption_practices_\(march\).pdf](http://www.icgn.org/files/icgn_main/pdfs/best_practice/guidance_on_anti-corruption_practices/2009_anti-corruption_practices_(march).pdf).

180. *Id.* at 5.

181. *See* Gunningham et al., *supra* note 165, at 212.

182. *Id.* at 212–13.

183. The website of Transparency International is located at <http://www.transparency.org/>.

184. Transparency International has chapters in approximately 90 countries. *About Us*, TRANSPARENCY INT’L, http://www.transparency.org/about_us (last visited Sept. 23, 2011). The goals of these chapters are to “bring together relevant players from government, civil society, business and the media to promote transparency in elections, in public administration, in procurement and in business.” *Id.*

185. TRANSPARENCY INT’L, ANNUAL REPORT 2009 17 (2009), *available at* http://www.transparency.org/publications/annual_report.

corruption and bribery. Nongovernmental organizations and business associations including the Center for International Private Enterprises, Corner House, Global Witness, the International Chamber of Commerce Anti-Corruption Commission, and TRACE have exposed corruption issues, advocated changes in policy, and provided support to private companies.¹⁸⁶

Thus, there are numerous NGOs already seeking to serve a meaningful role as a surrogate regulator. There are several ways the government can facilitate the involvement of NGOs, but an important way is by providing “greater access to the prime currency of public interest groups: information.”¹⁸⁷ The quote above from TI¹⁸⁸ shows that NGOs are actively pushing for increased transparency from corporations.

V. CONCLUSION

In the area of anti-corruption, it is clear that government enforcement agencies can take actions that will improve their enforcement efforts and at the same time further CSR initiatives that serve the same general goals. Corporate disclosure of efforts to combat corruption can further enforcement activities, while also supporting a CSR initiative designed to hold corporations accountable for their anti-corruption efforts by opening up dialogue with stakeholders who can assess these efforts and distribute knowledge of best practices. By working with the GRI, institutional investors, NGOs, and others, the government can ensure that any encouraged disclosures are valuable to these potential users of the information, supporting a beneficial CSR initiative in the challenging fight against corruption.

186. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 697–98 (2009) (citations omitted in quotation).

187. Gunningham et al., *supra* note 165, at 213.

188. See *supra* note 185 and accompanying text.