BLINDNESS AND BIAS: A CRITICAL EXAMINATION OF THE CURRENT ANTI-CORRUPTION REGIME

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Abstract

In the United States, the Foreign Corrupt Practices Act has become the principal tool for prosecutors and regulators to combat international bribery and corruption. The past few decades of FCPA enforcement have led to a thriving and robust compliance industry focused on minimizing bribery risk exposure for companies that operate internationally. One of the primary ways to measure bribery risk is the use of perception-based surveys that seek to capture attitudes regarding whether a particular country is perceived as "corrupt" or "not corrupt." While simple to use, perception-based measures of corruption are ultimately self-reinforcing and fail to accurately capture the social harm caused by public and private corruption. This Note argues that perception-based corruption surveys are biased against developing countries by imposing an unfair corruption perception burden that may not be accurate. Furthermore, perception-based surveys divert attention away from corrupt behavior originating in developed countries. In order to build a more fair and equitable anti-corruption regime, regulators and practitioners in this space must recognize the biases attendant to perception-based surveys and utilize more accurate tools for measuring corrupt behavior and its associated business risks.

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I. Introduction

The legitimacy of financial and political systems depends on the legitimacy and effectiveness of white-collar criminal enforcement.[1] The complex nature of our economy necessarily requires public trust that someone will police and regulate the wrongdoers and bad-actors who seek to gain a financial advantage at the expense of the wider economic system.[2] In passing the U.S. Foreign Corrupt Practices Act (FCPA) in 1977, Congress took an important initial step in recognizing the destabilizing effects that international bribery has on foreign countries and created an enforcement regime to reign in the most blatant excesses of corruption.[3] Corruption does not just harm foreign countries, but also negatively impacts the foreign policy goals of the United States.[4] As Congress observed in 1977, "[corruption] tends to embarrass

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[1] *See* Eric H. Holder Jr., Att'y Gen., U.S. Dep't of Just., Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law [https://perma.cc/QP5U-5DJA] ("It's about ensuring fairness for everyone who participates in our economy—from homeowners and private investors to major business leaders. It's about preserving opportunities—and providing a level playing field—for people to innovate, to enrich themselves and our nation, and to fuel continued growth. And it's about bringing accountability to both individuals and companies who take advantage of others, who violate the public trust, and who threaten the stability of our economy for financial gain.").

[2] *Id.* ("And it's about bringing accountability to both individuals and companies who take advantage of others, who violate the public trust, and who threaten the stability of our economy for financial gain.").

[3] U.S. DEP'T OF JUST. & SEC. & EXCH. COMM., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012) [hereinafter FCPA RESOURCE GUIDE] ("Corruption impedes economic growth … undermines democratic values and public accountability and weakens the rule of law.").

[4] H.R. Rep. No. 95-640, at 2 (1977) ("Corporate bribery also creates severe foreign policy problems for the United States.").

friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents."[5] Moreover, corruption has the tendency to harm business interests through "undermining employee confidence in a company's management and fostering a permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior."[6] By creating a strong anti-bribery statute, Congress provided regulators and prosecutors with a broad mandate to restrict foreign bribery and mitigate the negative effects that corruption has abroad and domestically.[7] The broad scope and global reach of the FCPA allows American regulators and prosecutors to wield enormous influence over how foreign and domestic companies do business.[8]

One of the ways that the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) incentivize compliance with anti-bribery laws is through the dissemination of benchmarks and best practices regarding corporate compliance programs.[9] By establishing and maintaining an "effective" compliance program, companies increase the likelihood of a favorable settlement or charging decision from the SEC and the DOJ.[10] Whether a firm's compliance program is considered "effective" in the eyes of the DOJ or the SEC depends upon a number of factors, including "the degree to which [the firm] has operations in countries with a high risk of corruption."[11] Given the inherently clandestine nature of corrupt acts, and thus the difficulty in assessing what a "high risk of corruption" actually means, both

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[5] *Id.*

[6] FCPA RESOURCE GUIDE, *supra* note 3, at 3.

[7] *Id.* ("The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority and are committed to fighting foreign bribery through robust enforcement.").

[8] *See* Charles F. Smith & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience with Extraterritorial Enforcement of the FCPA*, 2012 U. CHI. LEGAL F. 237, 241 (2012) ("Indeed, according to one source, 'eleven of the twenty corporate matters brought in 2010 involved non-U.S. companies.' These companies 'were responsible for 94 percent of the penalties imposed on corporations in 2010.'").

[9] *See* FCPA RESOURCE GUIDE, *supra* note 3, at 59–60 ("DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many forms …").

[10] *Id*. at 40 ("An effective compliance program is a critical component of an issuer's internal controls.").

[11] *Id.*

companies and government enforcement agencies are left with a conundrum—how best to measure corruption in a particular area.[12] Perception-based measures of corruption (i.e., data compiled from opinion surveys in which respondents describe how "corrupt" they perceive a particular country to be) have proven to be popular among institutions in the governmental, legal, and business spheres as a way of determining corruption risk in a particular geographic area.[13] Measuring corruption by aggregated perception indices, however, can be a problematic and self-reinforcing method that fails to capture the actual social harm caused by public and private bribery.[14]

This Note argues that a perception-based anti-corruption regime is insufficient in combatting global white-collar crime in two respects: (1) by unfairly penalizing developing and post-colonial countries by imposing an arbitrary moral standard that is difficult, if not impossible, to overcome and (2) by turning a "blind eye" toward serious public and private corruption occurring in developed countries. This systemic bias against poorer countries and systemic blindness toward richer countries is further exacerbated by the symbiotic relationship between regulators/law enforcement and legal practitioners who regularly advise corporations on anti-bribery compliance, as these two institutions have immense power in the development and interpretation of global anti-corruption regimes.[15]

If the United States wishes to remain a global leader in the fight against corruption, fraud, and bribery, there must be serious reconsiderations as to how FCPA enforcement actions are brought and how the business and legal communities assess and perceive corruption. Systemic biases that pervade the entire legal compliance industry tend

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[12] *See* Stuart Campbell, *Perception Is Not Reality: The FCPA, Brazil, and the Mismeasurement of Corruption*, 22 MINN. J. INT'L L. 247, 249 (2013) ("The difficulty, or indeed impossibility, of detecting and accurately measuring corruption.").

[13] *Do Rankings Matter? Transparency International Issues Its 2010 Corruption Perceptions Index*, GIBSON DUNN (Nov. 16, 2010), https://www.gibsondunn.com/do-rankings-matter-transparency-international-issues-its-2010-corruption-perceptions-index/ [https://perma.cc/2Y7D-3DFF] ("Warranted or not, the rankings attain real significance as companies and compliance professionals alike often calibrate risk assessment to the CPI.").

[14] *See generally* Campbell, *supra* note 12.

[15] *See id.* at 272–73 ("Lawyers advise businesses subject to the FCPA to consult corruption perception data without warning them about the distinction between corruption perception and actual corruption or otherwise discussing the limitations of the data.").

to disadvantage poorer countries and mask the complicity/hypocrisy of richer ones. Similarly, the current framework tends to diminish the outsized role that private actors and multinational corporations play in driving corrupt activity. To build a more fair and equitable global financial system, these biases must be identified and mitigated before they become further entrenched in the minds of future practitioners and regulators. Common-sense reforms as to how corruption is perceived and measured are necessary to accomplish this important goal.

Part II will examine the background and historical context in which Congress passed the FCPA, as well as discuss the provisions of the FCPA that are particularly relevant to the perception-based anti-corruption regime. Part III will examine the role that perception-based measures of corruption play in determining regulator benchmarks for compliance programs. Part IV will discuss the negative ramifications associated with the use of perception-based measures of corruption in both developed and developing countries. Part V will describe various alternatives to a perception-based anti-corruption regime that will help mitigate the effects of systemic bias and blindness that plague the current system. Part VI offers a brief conclusion.

II. FCPA Background and Enforcement History

A. FCPA Background

1. FCPA Legislative History and Context

Origin stories provide a compelling analytical tool for examining why a particular concept exists; a through line can be traced from a concept's creation to its behavior and application today. In this regard, the FCPA is no different. In the wake of the Watergate scandal in the early 1970s, regulators at the SEC became interested in the revelations surrounding how American companies were funneling illicit bribes and keeping records of these bribes off of their corporate books.[16] Likewise, Congress held extensive hearings regarding the breadth of the problem of corporate misconduct.[17] In 1976, the SEC delivered a report to Congress detailing the widespread nature of improper payments made by American corporations to foreign officials, as well as the efforts

[16] Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 235 (1982) ("The Foreign Corrupt Practice Act really started with Watergate.").
[17] S. Rep. No. 95-114, at 1–2 (1977).

American corporations made to cover-up or otherwise not disclose these payments.[18] In assessing how this behavior could harm investors, regulators at the SEC developed a number of theories that would justify further regulation in this space, namely that investors have a right to know: (1) if a company is keeping tampered books and records; (2) if their investment is being used to facilitate bribes in violation of U.S. or foreign laws; (3) if the company is obtaining business through bribes and not through legitimate lines of securing contracts; and (4) whether their investment is being used to fund consultants that otherwise are unaccountable to the business.[19]

Proceeding under this framework, regulators at the SEC began to fully understand the magnitude of the problem associated with corporate bribery and falsified books and records. The amount of companies with some type of legal exposure appeared to exceed the SEC's administrative capacity to bring enforcement actions.[20] In order to mitigate this potentially enormous backlog of bribery-related cases, regulators at the SEC developed an idea for a voluntary disclosure program.[21] Companies who believed they faced bribery-related legal exposure could voluntarily disclose their potential shortcomings to the government; in return, the SEC would be more likely to make a favorable charging or settlement decision in regards to that company's actions.[22] This program "was not an immunity program, but it was a mechanism to separate the big problems from the little problems."[23] In response to the SEC's concerns, as well as the high-profile revelations

[18] *Id.* at 2 ("The committee received from the SEC an extensive 'Report on Questionable and Illegal Corporate Payments and Practices,' ('SEC report') which summarized the SEC's enforcement activities and findings to that date …").
[19] Timmeny, *supra* note 16, at 235–36.
[20] *Id.* at 237 ("It appeared to be impossible to handle all of these apparently questionable payments as enforcement cases; there was a serious question as to whether the SEC could bring enforcement cases in every instance.").
[21] *Id.* ("The commission did not want to continue exclusively along the enforcement tack, so they came up with what was called the voluntary program: if a company were to do its own investigation and come in and discuss disclosure and stop doing whatever they were doing, there might be less necessity to bring an enforcement case.").
[22] *Id.*
[23] *Id.*

of corporate misconduct, Congress ultimately passed the FCPA in 1977.[24]

2. Anti-Bribery and Accounting Provisions

The FCPA's anti-bribery provisions prohibit issuers (i.e., companies with securities registered under 15 U.S.C. § 78l) or any "officer, director, employee or agent of such issuer" from giving "anything of value" to a "foreign official" for the purpose of inducing that official to act in their official capacity, to gain an "improper advantage," or to assist the issuer "in obtaining or retaining business."[25] These anti-bribery provisions also apply to "domestic concerns," which includes citizens or residents of the United States as well as companies that have their principal place of business or are otherwise incorporated in the United States.[26] The anti-bribery provisions of the FCPA have broad jurisdictional reach; the provisions can apply to conduct taking place both inside and outside the United States.[27] In determining whether a specific payment to a foreign official is designed to obtain or retain business, prosecutors and regulators utilize a "business purpose test" that courts have generally incorporated to include a broad variety of activities designed to gain a business advantage.[28] The "anything of value" requirement of the FCPA's anti-bribery provisions is similarly broad: cash, gifts, entertainment, and charitable contributions could all

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[24] Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010); *see also* Jimmy Carter, Foreign Corrupt Practices and Investment Disclosure Bill; Statement on Signing S. 305 into Law, 2 Pub. Papers 2157 (Dec. 20, 1977), available at https://www.presidency.ucsb.edu/documents/foreign-corrupt-practices-and-investment-disclosure-bill-statement-signing-s-305-into-law [https://perma.cc/C27F-XRZR] ("Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.").

[25] 15 U.S.C. § 78dd-1(a) (2018).

[26] 15 U.S.C. § 78dd-2(a)–(h) (2018).

[27] FCPA RESOURCE GUIDE, *supra* note 3, at 11 ("The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States.").

[28] *Id.* at 12–13; *see also* United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004) (observing that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.").

qualify as an improper payment if made to a foreign official with corrupt intent.[29]

The accounting provisions of the FCPA, also known as the "books and records provisions," require issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[30] To ensure the accuracy of these books and records, the FCPA places an additional obligation on issuers to "devise and maintain a system of internal accounting controls" focused on ensuring the accuracy of business transactions.[31] Notably, the accounting provisions, while part of the FCPA, do not require any type of corrupt payment or bribe to trigger legal liability.[32] However, FCPA enforcement actions brought under the anti-bribery provisions will also typically include a violation of the accounting provisions, as corrupt payment schemes often involve some type of misrepresentation of a company's books and records.[33] More often than not, "[c]ompanies engaged in bribery may also be engaged in activity that violates the anti-fraud and reporting provisions."[34]

B. FCPA Enforcement History and Practice

Despite the alarming revelations regarding corporate corruption and misconduct which prompted the enactment of the FCPA, enforcement actions based on the FCPA's statutory provisions remained relatively dormant in the years following the FCPA's passage.[35] Prior to 2003, FCPA enforcement actions were relatively rare and typically

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[29] FCPA RESOURCE GUIDE, *supra* note 3, at 14–17. ("Congress recognized that bribes can come in many shapes and sizes—a broad range of unfair benefits—and so the statute prohibits the corrupt 'offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value …'").

[30] 15 U.S.C. § 78m(b)(2)(A) (2018).

[31] 15 U.S.C. § 78m(b)(2)(B) (2018).

[32] FCPA RESOURCE GUIDE, *supra* note 3, at 38.

[33] *See id.* at 41 (discussing protentional violations of the internal control provisions).

[34] *Id.*

[35] Koehler, *supra* note 24, at 913 ("FCPA enforcement was largely (yet not entirely) non-existent from 1977 until circa 2002 …").

brought against small or medium sized companies.[36] Over the last decade and a half, however, FCPA enforcement actions, as well as the associated fines and settlement amounts, have risen dramatically.[37] By way of example, there were eighty enforcement actions brought by the SEC/DOJ (and $125 million in associated penalties) in the first twenty-six (1977–2003) years of FCPA enforcement.[38] Since 2003, there have been over 540 enforcement actions brought by the SEC/DOJ (and over $24 billion in associated penalties).[39] There are a variety of theories as to why this is the case, such as the legislative amendments that expanded the FCPA's jurisdiction in 1988 and 1998[40], as well as greater public scrutiny of corporate misconduct following both the Enron scandal and the late 2000s financial crisis.[41] As will be discussed later in this Note, the increase in FCPA enforcement has led to a blossoming compliance industry and "anti-corruption compliance programs have been a key focus for boards of directors, audit committees and senior management of many multi-national companies."[42]

There is a general expectation that FCPA enforcement actions will continue to increase at a similar rate in the future, particularly given the economic stresses caused by the COVID-19 pandemic.[43]

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[36] Stephen S. Laudone, *The Foreign Corrupt Practices Act: Unbridled Enforcement and Flawed Culpability Standards Deter SMEs from Entering the Global Marketplace*, 106 J. CRIM. L. & CRIMINOLOGY 355, 377–79 (2016).

[37] Smith & Parling, *supra* note 8, at 240–41; *see also* Campbell, *supra* note 12, at 254–55 ("In the six years since that first enforcement action against Statoil, there has been a dramatic increase in the number of FCPA enforcement actions …").

[38] *Beyond the FCPA Resource Guide Redlines: What's New and Why It Matters*, MAYER BROWN, Aug. 4, 2020, at 2.

[39] *Id.* (summarizing the enforcement actions and associated fees from the FCPA).

[40] Cortney C. Thomas, *Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 450 (2010) ("The 1998 amendment greatly expanded the Act's substantive Scope …").

[41] Arkady L. Bukh, *Criminalizing the Second Oldest Profession: Foreign Corrupt Practices Act (FCPA)*, 30 PRAC. TAX L. 35, 36 (2015) ("[I]n the wake of the Enron scandal and Sarbanes-Oxley Act 2002 there has been a dramatic increase in the number of enforcement actions brought under the FCPA …").

[42] *Id.*

[43] George Kostolampros et al., *Bribery and Corruption Expected to Increase in Wake of COVID-19 Pandemic*, VENABLE LLP (May 4, 2020),

Specifically, businesses that are involved with customs agents may face increased bribery risks as international borders reopen and customs agents demand "bribe[s] to allow the export of PPE or other high-demand items."[44] Moreover, pandemic-related economic stresses on individuals and businesses may lead to an increased incentive to bribe in order to retain business due to declining revenues.[45]

As discussed earlier, the concept of "voluntary disclosure" was an integral part of the FCPA's enforcement framework since the very inception of the law.[46] Following a "pilot program" in 2016, the DOJ has since expanded upon and formalized this model of dealing with the bulk of FCPA enforcement matters by creating an official policy that incentivizes companies to voluntarily self-disclose potential violations of the FCPA in exchange for an up to 50% reduction off the recommended fine range.[47] FCPA enforcement is based upon a combination of "carrot and sticks" designed to incentivize companies to self-disclose potential violations of the FCPA before an indictment or civil complaint is filed.[48] Accordingly, most FCPA enforcement actions never see the inside of a courtroom, as FCPA enforcement actions are

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https://www.venable.com/insights/publications/2020/05/bribery-and-corruption-expected-to-increase [https://perma.cc/QDL5-CDDN].

[44] *Id.*

[45] *Id.* (highlighting that, due to the pressure to raise operating revenue and procure in-demand supplies, "[t]he healthcare and life sciences sectors are at particular risk for FCPA violations as government and companies scramble to quickly obtain scarce commodities like PPE cross-border").

[46] Timmeny, *supra* note 16, at 236–37 (demonstrating how the idea of companies disclosing a potential FCPA violation "became a more vigorous and refined legal concept").

[47] U.S. Dep't Of Just., U.S. Att'ys Manual Insert § 9-47.120—FCPA CORPORATE ENFORCEMENT POLICY, justice.gov/criminal-fraud/file/838416/download [https://perma.cc/V7CK-48M9]; *see also* Ryan Rohlfsen et al., *FCPA Corporate Enforcement Policy: Pilot Program Redux*, LAW360 (Mar. 1, 2018), https://www.law360.com/white collar/articles/1016279/fcpa-corporate-enforcement-policy-pilot-program-redux (stating that "the revised policy may … incentivize corporate self-disclosure" by, for example, "bind[ing] the DOJ to accord a 50 percent reduction where the criteria for a declination are met").

[48] Koehler, *supra* note 24, at 923 ("[T]he application or potential application of these 'carrots' and 'sticks' in the FCPA context routinely nudge corporate defendants and individuals to resolve FCPA matters.").

typically resolved through settlement negotiations with either the DOJ or the SEC.[49]

This arrangement is understandable, if somewhat problematic, given the incentives on both sides of the negotiation table. Defendant companies want to avoid the potentially existential threat of criminal indictment and prosecutors want to avoid collateral damage to shareholders while at the same time sending a message about what acts should be considered improper.[50] From a corporate defendant's perspective, "[t]he prospect of avoiding the stigma of criminal charges and a possible death sentence therefore makes pretrial diversion the preferable alternative … From the Justice Department's perspective, [settlements] minimize the likelihood of collateral damage while allowing the DOJ to achieve most of its desired remedies."[51] Accordingly, federal prosecutors and regulators have enormous influence over how the FCPA is applied and how liability is imputed on companies and individuals.[52] Due to the prevalence of out of court settlements of FCPA enforcement actions, "the FCPA means simply whatever the DOJ and the SEC say it means."[53]

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[49] *Id.* at 909 ("[J]udicial scrutiny is virtually non-existent in the FCPA context given the frequency with which FCPA enforcement actions are resolved through DOJ non-prosecution agreements ('NPAs'), deferred prosecution agreements ('DPAs'), pleas, or SEC settlements.").

[50] *See* Court E. Golumbic & Albert D. Lichy, *The Too Big to Jail Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L. J. 1293, 1314 (2014) (illustrating that corporations want to avoid criminal charges that could bring about their "deaths" as equally as government agencies want to send a message to the broader corporate community of the types of behavior it does not condone or finds improper).

[51] *Id.*

[52] *See* Koehler, *supra* note 24, at 909–10 (explaining how (1) uninformative allegations, (2) the use of dubious legal and enforcement theories, (3) the opaque nature of FCPA enforcement, and (4) the resolution of FCPA violations without FCPA bribery charges all façade and arbitrariness of FCPA enforcement).

[53] *Id.* at 908–09.

III. Perception-Based Measures of Corruption

A. DOJ and SEC Compliance Benchmarks

The DOJ and the SEC consider a number of factors when making a decision as to charging a corporation with violating the FCPA or negotiating a settlement agreement.[54] The DOJ's prosecutorial guidelines are derived from the U.S. Attorney's Manual and outline the relevant factors and considerations for prosecutors to focus on when investigating a corporation for violations of the FCPA.[55] The SEC considers similar factors before initiating or settling a civil suit against a corporation for FCPA-related infractions.[56] Both enforcement entities issue guidance that practitioners and companies use in assessing the effectiveness of corporate compliance programs.[57] Whether a company has developed an effective compliance program provides a twofold benefit for companies in terms of obtaining a favorable charging decision: (1) effective compliance programs make it easier for a company to detect violations and self-report to an enforcement entity; and (2) the development of an effective compliance program serves as evidence of a remedial measure in the eyes of prosecutors and regulators.[58]

By issuing this guidance, the DOJ and the SEC essentially create the threshold for FCPA liability.[59] Given the small amount of FCPA cases that ultimately end up in court, FCPA legal developments are the product of a warren of "privately-negotiated agreements, and not as in other areas of law, through transparent, adversarial proceedings in which a judge or jury, weighing the evidence and the parties' conflicting

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[54] FCPA RESOURCE GUIDE, *supra* note 3, at 52–53 (listing nine factors, in addition to non-prosecution and deferred prosecution agreements, that are to be considered when determining whether to charge a corporation or negotiating a plea or other agreements).

[55] *Id*; U.S. Dep't of Just., U.S. Att'ys' Manual § 9-28.000 *et. seq*. (2018).

[56] *See*, *e.g.*, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship and Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Release No. 1,470 (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/ET38-8XEA].

[57] *See generally* FCPA RESOURCE GUIDE, *supra* note 3.

[58] *See id.* at 54–55.

[59] *See* Koehler, *supra* note 24, at 909.

arguments, renders an impartial decision."[60] Entities subject to the FCPA, therefore, must adhere closely to guidelines put out by enforcement agencies in order to mitigate potential civil or criminal liability.[61] The DOJ and the SEC list a number of the "hallmarks of effective compliance programs," while emphasizing "there is no one-size-fits-all program" that can encapsulate and mitigate the myriad of compliance risks that any one business might face.[62] A compliance program that meets the enforcement agencies approval also "will contribute significantly to the DOJ's and the SEC's determination of an appropriate resolution, including potential declination of any enforcement action."[63]

Companies subject to the FCPA's jurisdiction are heavily encouraged to undertake a risk assessment that identifies the heightened corruption risk factors attendant to a particular business.[64] Certain ubiquitous factors, however, are highlighted by the DOJ and the SEC, including "the degree to which [the firm] has operations in countries with a high risk of corruption."[65] These recommendations further imply that businesses should adhere to the "emerging international consensus on compliance best practices" and lists Transparency International as a resource for businesses to use in establishing an effective compliance program.[66]

B. Transparency International

Transparency International (TI) is a non-governmental, not for profit organization with a mission centered around "stop[ping] corruption and promot[ing] transparency, accountability and integrity at all levels and across all sectors of society."[67] TI is highly regarded as one of the leading organizations in helping combat global corruption.[68]

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[60] *Id.* at 910.
[61] *See* FCPA RESOURCE GUIDE, *supra* note 3, at 52–63.
[62] *Id.* at 57.
[63] Bukh, *supra* note 41, at 40.
[64] *See* FCPA RESOURCE GUIDE, *supra* note 3, at 58–59.
[65] *Id.* at 40.
[66] *Id.* at 63.
[67] *About*, TRANSPARENCY INT'L, https://www.transparency.org/en/about [https://perma.cc/9W7T-E4YK].
[68] Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 159 (2009) ("The growing international grassroots campaign to combat bribery in international business transactions has been

Part of TI's activities involve collecting and publishing data surrounding attitudes toward corruption and bribery.[69] To this end, TI annually publishes a *Corruption Perceptions Index* which is used by businesses, law firms, and government enforcement agencies to assess the adequacy of corporate compliance programs by establishing corruption risk profiles associated with countries.[70] According to TI, the *Corruption Perceptions Index* is "the most widely used indicator of corruption worldwide."[71] TI's methodology of measuring corruption involves surveys of "experts and business executives" who based on how corrupt they perceive a particular country's public sector to be.[72] The results of the opinion surveys are then plotted onto a map of the world; countries with high perceptions of corruption are labeled in dark red as "highly corrupt."[73] Countries that lack this perception are labeled in light yellow as "very clean."[74]

The *Corruption Perceptions Index* for any given year is accompanied by a written report detailing that year's results.[75] In 2019, the *Corruption Perceptions Index* report ranked 180 countries on their

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spearheaded by a highly regarded non-governmental organization, Transparency International.").

[69] *Id.* at 167.

[70] *Do Rankings Matter?*, *supra* note 13 ("Yet TI's CPI remains the benchmark indicator of corruption worldwide. Warranted or not, the rankings attain real significance as companies and compliance professionals alike often calibrate risk assessment to the CPI ... To assess and rank countries from least to most corrupt, TI accumulates data from numerous assessments and opinion surveys carried out by independent institutions.").

[71] *Corruption Perceptions Index 2019: Frequently Asked Questions*, TRANSPARENCY INT'L 1 (2019), https://images.transparencycdn.org/images/2019_CPI_FAQs_EN.pdf [https://perma.cc/AA58-2WQD] ("The CPI is the most widely used indicator of corruption worldwide.").

[72] *Id.*; *See also Corruption Perceptions Index*, TRANSPARENCY INT'L (2019), https://www.transparency.org/en/cpi/2019/index/nzl [https://perma.cc/7PN5-69A5] [hereinafter *CPI 2019 Map*] ("The index ranks 180 countries and territories by their perceived levels of public sector corruption ...").

[73] *Corruption Perceptions Index 2019: Frequently Asked Questions, supra* note 71, at 2 ("[W]here 0 means that a country is perceived as highly corrupt …").

[74] *Id.* at 2 ("[A] 100 means that a country is perceived as very clean.").

[75] *See*, *e.g., Corruption Perceptions Index 2019*, Transparency Int'l (2019), https://images.transparencycdn.org/images/2019_CPI_Report_EN_2020-12-17-100307.pdf [https://perma.cc/5AS2-V45G] (highlighting the index featuring each individual country and the report that follows later in the document).

perception of corruption, provided some analysis as to why rankings changed from past years in certain regions, and recommended several general steps for policymakers to help mitigate corruption.[76] Sub-Saharan Africa ranked as the lowest scoring (i.e., most corrupt) region according to the 2019 *Corruption Perceptions Index*, while Western Europe ranked as the least corrupt region.[77] Given the prevalence of the *Corruption Perceptions Index* as a tool for evaluating corporate compliance programs and anti-corruption enforcement actions, the use of perception-based measures have the potential to greatly impact how international business is done.[78] Flaws in how people perceive corruption levels in a given country can create unfair distortions that ultimately punish developing countries and insulate richer countries from greater scrutiny.

IV. Issues Associated with Perception-Based Measures

A. Unfair Penalties on Developing Countries

While TI includes a caveat in their FAQs that the *Corruption Perceptions Index* is "not a verdict on the levels of corruption of entire nations or societies,"[79] it is functionally treated as such by the DOJ/SEC when it is held out as a tool for companies to assess their relative corruption risk.[80] This has the effect of creating negative externalities for countries that TI identifies as "very corrupt." First, corruption perception has a demonstrable effect on actual corruption levels in countries—in other words, high levels of perceived corruption can lead to high levels of actual corrupt behavior.[81] High levels of corrupt

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[76] *See generally id.* (explaining generally the general purpose, corruption indicators, and analysis included in the report).

[77] *Id.* at 8 (highlighting the corruption regional scores on the results by region map).

[78] *See generally Corruption Perceptions Index 2019: Frequently Asked Questions*, *supra* note 71 (highlighting that the Perceptions Index is a "valuable governance indicator" as it captures the perspective of experts in business and their perception of the country).

[79] *Id.* at 2.

[80] FCPA RESOURCE GUIDE, *supra* note 3, at 63 (giving examples of the different tools used by the DOJ and the SEC as it relates to best practices for compliance).

[81] *See* Natalia Melgar et al., *The Perception of Corruption*, 22 INT'L J. PUB. OP. RES. 120, 120 (2010) ("High levels of corruption perception could have more devastating effects than corruption itself …").

behavior "cause negative effects in the economy (the growth of institutional instability and the deterioration of the relationships among individuals, institutions, and states)." [82] The connection between perception and actual corruption may be due to a high perceived level of corruption generating a "culture of distrust" in a country which, in turn, can incentivize actual corrupt behavior, thereby subjecting that country to a self-fulfilling prophecy. [83] If an individual holds to the conventional wisdom (which is annually perpetuated by TI) that their country is corrupt, it is more likely that they will distrust existing public institutions. [84] This distrust, in turn, "boosts the demand for corrupt services on the part of private agents. Therefore, there is perceived uncertainty of entering into partnerships with strangers, which may impede legitimate private business activity."[85]

Moreover, when living in a society that is perceived to be corrupt, otherwise "honest" individuals might be incentivized to seek out business opportunities through bribing public officials due to the perceived increased costs of acting in a non-corrupt manner. [86] If an individual believes they live in a corrupt society, "[t]he suspicion that competitors are getting [ahead] through corrupt acts and that regulatory officials will impose predatory sanctions if not paid off may make a business strategy of keeping one's hands clean seem counter-productive."[87] Moreover, "[d]istrust and suspicion boosts the demand for corrupt services on the part of private agent ... the lack of trust and civic engagement may increase the supply of corrupt services by reducing the danger to officials of being exposed and punished."[88] This distrust in public officials, real or otherwise, engenders a culture of

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[82] *Id.* ("[H]igh levels of corruption perception are enough to cause negative effects in the economy (the growth of institutional instability and the deterioration of the relationships among individuals, institutions and states.)").
[83] *See id.* ("[I]t generates a "culture of distrust" towards some institutions and may create a cultural tradition of gift giving and hence, raise corruption.").
[84] *See* Usman Mohammed, *Corruption in Nigeria: A Challenge to Sustainable Development in the Fourth Republic*, 9 EUR. SCI. J. 118, 122 (2013) ("a culture of distrust and private-spiritedness foster high rates of venality than occur in communities where generalized trust and civic engagement are strong").
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

suspicion in which actual corruption can and does thrive, demonstrating the harmful effects corruption perception can have on a given society.[89]

The FCPA has faced criticism as a quasi-imperialist tool that allows the United States to enforce a particular value system on other countries.[90] This criticism comes in two flavors, one of which views the United States as an overzealous evangelizer that seeks to promote "American standards of ethical conduct on areas of the world that do not accept or operate by those standards."[91] Adherents of a more *realpolitik* view consider the FCPA to be a vehicle for U.S. enforcement agencies to act as "biased referees" that generally support American companies at the expense of foreign companies; moralistic attitudes around corruption serve as a mere pretense for "tilt[ing] the playing field in highly competitive industries" to benefit American businesses.[92] Regardless of the motivations driving FCPA enforcement actions, systemic bias regarding the business morality systems that forms the basis of a perception-based corruption regime can also lead to inaccuracies that perpetuate themselves over time; the more widely used the *Corruption Perceptions Index* becomes, the more the *Index* starts to influence respondents' actual perceptions about the countries they are evaluating.[93] Specifically, "[t]he construction of the index, in other words, may well become self-referential, and the measures may become endogenous to the index itself."[94] Moreover, perception can be an unreliable measure of corruption because corruption is generally conducted in a clandestine manner.[95]

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[89] *See id.* (finding that a "lack of trust and civic engagement" increases the supply of corrupt services while weakening a society's ability to monitor and protests abuses of such corruption).

[90] *See generally* Smith & Parling, *supra* note 8; Anthony S. Barkow & Anne Cortina Perry, *American Prosecutorial Imperialism?*, 41 LITIG. 28 (2014); Spahn, *supra* note 68.

[91] Smith & Parling, *supra* note 8 at 249.

[92] *Id.* at 249, 254.

[93] Miriam A. Golden & Lucio Picci, *Proposal for a New Measure of Corruption, Illustrated with Italian Data*, 17 ECON. & POL. 37, 39–40 (2005) ("As the index [Corruption Perceptions Index] has become widely publicized, there is a danger that survey respondents, rather than reporting how much 'real' corruption exists around them, are reporting what they believe based on highly publicized results of the most recent TI index.").

[94] *Id.*

[95] Nicholas M. McLean, *Cross-National Patterns in FCPA Enforcement*, 121 YALE L. J. 1970, 2005 (2012) ("[T]hose who engage in corrupt acts seek, unsurprisingly, to avoid publicizing their transactions.").

One needs to merely glance at the *Corruption Perceptions Index* for any given year to notice that corruption perception levels are generally high in the Global South (i.e., Latin America, Africa, the Middle East and parts of Asia) and generally low in North America and western Europe.[96] Corruption perceptions surveys capture the biases of those responding to the survey; if only business people from richer countries respond to a given survey, it is possible that they are imposing the values of their countries when assessing corruption levels in poorer countries.[97] Historical discrepancies may play a role in modifying these perceptions. For example, countries whose histories involve some form of British colonial administration are perceived to be significantly less corrupt than other nations with different colonial backgrounds.[98] One explanation of this phenomenon is that the colonial legacy of a common law legal system makes corruption more difficult because judicial precedent constrains the acts of officials.[99] Another explanation is that British colonizers left behind a system of checks and balances "that emphasized procedural justice over substantive issues" which could help prevent corrupt behavior.[100] While there may be something to be said about how the substantive and procedural "legal culture" in former British colonies can tamp down corrupt behavior, this type of perceptive discrepancy suggests that bias may be playing some sort of role in

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[96] *See*, *e.g., CPI 2019 Map*, *supra* note 72.

[97] Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross–National Empirical Research?*, 10 ANN. REV. POL. SCI. 211, 215 (2007) ("Ratings by international business people and experts, disproportionality drawn from developed Western Countries, might be influenced by Wester preconceptions or by the raters' greater familiarity with certain cultures. Some of the organizations that prepare corruption ratings might also have ideological axes to grind").

[98] Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 419–20 (2000) (finding that the corruption scores were remarkably lower for former British colonies after one also controls for income levels).

[99] *Id.* at 422 ("Why, then, does British colonial heritage appear to make a difference for the level of corruption today? Two possibilities were raised in Section 2. First, this might reflect the fact that most former British colonies inherited a common law tradition from their previous colonizers. In common law systems, law is made by judges on the basis of precedent, rather than on the basis of codes drawn up by scholars and promulgated by central governments.").

[100] *Id.* (proposing that the legal culture of common law which incorporates such checks and balances may have contributed to lower corruption scores).

shaping perceptions of corruption in the widely used *Corruption Perceptions Index*.[101]

An increased perception of corruption can have deleterious effects on lower income countries unrelated to actual corruption levels. The prospect of FCPA enforcement in countries with a "high risk of corruption" has the effect of significantly deterring foreign direct investment in those countries.[102] Much of this deterrence appears to stem from the high "[r]egulatory compliance costs related to the FCPA's requirement to devise and maintain a system of accounting controls capable of detecting improper payments."[103] In this respect, the FCPA functionally acts as a sanction on developing countries by deterring businesses to invest and operate in these countries.[104] This sanctioning effect is exacerbated by the flaws attendant to the perception-based anti-corruption regime; if systemic biases affect individuals' perceptions of bribery in certain countries, these countries will be penalized regardless of whether they actually have a high level of corruption.[105] In this situation, "businesses are not only deterred from investing in countries that are actually corrupt—they are also deterred from countries that are merely perceived to be corrupt."[106] Paradoxically, this may have the effect of negating the benefits attached to the FCPA when it was initially

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[101] *See id.* (noting that inherent bias plays a key role).

[102] Hans Bonde Christensen et al., *Policeman for the World: The Impact of Extraterritorial FCPA Enforcement on Foreign Investment and Internal Controls* 32–33 (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3349272 ("Consistent with investments in accounting systems being one margin firms move on to limit the risk of enforcement actions when investing in high-corruption-risk countries, firms pursuing new investments spend more time evaluating potential acquisition targets and firms with existing investments report fewer internal control weaknesses and restatements related to clerical and bookkeeping errors."); *see also* Campbell, *supra* note 12, at 274–75 ("American businesspeople in corrupt markets are forced to either violate the FCPA and face potential prosecution or behave ethically and lose business to Chinese or Russian competitors whose governments do not punish companies for acts of overseas bribery.").

[103] Christensen et al., *supra* note 102, at 34.

[104] Campbell, *supra* note 12, at 274–75 ("[T]he FCPA deters American companies from investing in developing countries, making it essentially function as an economic sanction.").

[105] *See id.*

[106] *Id.*

passed: namely that of protecting American foreign policy and business interests.[107]

By deterring American businesses and businesses otherwise subject to the FCPA's jurisdiction from investing in these countries, the sanctioning effects of the FCPA create an opening for America's geopolitical rivals, such as China and Russia, to invest in these countries.[108] For example, Chinese investment enterprises and construction companies have grown to dominate a large share of infrastructure developments in Africa since 2017, a trend that shows no sign of slowing down.[109] Certain elements of the American foreign policy establishment view this trend, which is part of China's more broad "Belt and Road" strategic initiative, as a threat to American political, military and economic interests in Africa.[110] By discouraging U.S. investment in developing marketplaces, the FCPA enforcement regime appears to directly contradict U.S. foreign policy interests,

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[107] *See* H.R. Rep. No. 95-640, *supra* note 4, at 4–5 ("In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.").

[108] Campbell, *supra* note 12, at 277 ("China and Russia are generally thought to fill any gaps left by American businesses that are too risk–averse to invest in countries perceived to be corrupt. Some Brazilian policymakers might consider it tempting to let Chinese investors fill the gap left by American businesses too afraid of FCPA liability to invest in Brazil …").

[109] Frangton Chiyemura, *Chinese Firms—and African Labor—Are Building Africa's Infrastructure*, WASH. POST (Apr. 2, 2021), https://www.washingtonpost.com/politics/2021/04/02/chinese-firms-african-labor-are-building-africas-infrastructure/ (In Africa, ''[a] 2017 McKinsey report estimated that Chinese construction enterprises won almost half of all engineering, procurement and construction contracts continent-wide—including those funded by non-Chinese sources like the World Bank.'').

[110] Natalie Herbert, *China's Belt and Road Initiative Invests in African Infrastructure—and African Military and Police Forces*, WASH. POST (Apr. 30, 2021), https://www.washingtonpost.com/politics/2021/04/30/chinas-belt-road-initiative-invests-african-infrastructure-african-military-police-forces/ ("These actions have made U.S. policymakers concerned that China's involvement in Africa represents a growing threat to U.S. interests on the continent. China's increased visibility and influence mean that African countries can request monetary and security assistance from Beijing rather than its Western partners."); Steve Holland & Lesley Wroughton, *U.S. to Counter China, Russia Influence in Africa: Bolton*, REUTERS (Dec. 13, 2018), https://www.reuters.com/article/us-usa-trump-africa/u-s-to-counter-china-russia-influence-in-africa-bolton-idUSKBN1OC1XV [https://perma.cc/4PH4-PSGM].

representing a classic case of "the left hand not knowing what the right hand is doing." Aggressive FCPA enforcement in countries with a higher perceived level of corruption may also "bifurcate" global commerce.[111] Companies that are concerned about their bribery risk exposure have the incentive to shift their operations to developed countries that are perceived to be safer or "cleaner" with regards to corruption.[112]

The proliferation of the use of perception-based corruption measures is not only due to advertisement by the DOJ and the SEC; a "cottage industry" of lawyers, accountants and others has risen to meet the need of companies concerned about their bribery risk exposure and adopted the principals supporting the perception-based anti-corruption regime.[113] These two institutions—regulation/law enforcement and compliance professionals—orbit each other closely and both inform how corruption should be perceived and managed at a global scale.[114] Given the expectations of regulators and prosecutors for companies to have a sufficiently robust compliance program, companies are significantly incentivized to retain individuals with the knowledge to develop and refine these programs—a phenomenon sometimes referred to as "FCPA, Inc."[115] Under the current FCPA enforcement regime, "an entire compliance industry has suddenly appeared on the business landscape," in which law and accounting firms are "able to market and

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[111] Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351, 398 (2010) ("The nations of the developed world will begin to invest in each other, while the less-developed economies with less-developed anti-bribery regimes will do the same. The world economy could slowly begin to bifurcate into two economies: one in which bribery is tolerated and one in which it is not.").

[112] *Id*. ("It is a regrettable irony that this may not even be the least desirable result of the present anti-bribery enforcement regime. The third conceivable outcome is that the developed nations will continue to incrementally withdraw from emerging markets …").

[113] *See* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 793 (2011).

[114] *See* Campbell, *supra* note 12, at 272–73 ("Therefore, no existing methodology for the measurement of corruption is completely satisfactory for the legal profession's anti–corruption compliance needs ... Lawyers advise businesses subject to the FCPA to consult corruption perception data without warning them about the distinction between corruption perception and actual corruption or otherwise discussing the limitations of the data.").

[115] Koehler, *supra* note 24, at 1002.

sell their FCPA compliance services to business consumers across a wide industry spectrum"[116]

Lawyers advising their clients on their FCPA liability frequently recommend perception-based corruption indices as a tool for their clients to focus and enhance their global corruption programs.[117] This advice is often not delivered with the caveat "about the distinction between corruption perception and actual corruption or otherwise discussing the limitations of the data."[118] The "endemic misuse" of corruption data is not merely limited to routine risk assessment matters, but can also apply to serious decisions about what companies should do once an FCPA violation is discovered.[119] The FCPA's voluntary disclosure enforcement structure strongly encourages companies to seek legal advice about the various factors relevant to self-disclosing a potential FCPA violation.[120]

This enforcement framework is not limited to the FCPA; sanctions regimes enforced by the Department of the Treasury's Office of Foreign Assets Control (OFAC) place substantial responsibility on compliance personnel at companies to monitor for potential violations.[121] Under OFAC's enforcement framework, "[p]rivate compliance personnel essentially become deputized antiterrorism agents."[122] The same logic can be applied to FCPA professionals who

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[116] *Id.*

[117] Campbell, *supra* note 12, at 272–74 ("It is therefore unsurprising that some lawyers overlook the intricacies of the statistical debate over measuring corruption and instead endorse the use of perception data for FCPA compliance purposes.").

[118] *Id.* at 273.

[119] *See id.* at 274.

[120] *See* Lindsey Fetzer et al., *Inconsistencies in FCPA Enforcement: Key Considerations for a Potential FCPA Voluntary Disclosure*, Corp. Compliance Insights (Nov. 11, 2019), https://www.corporatecomplianceinsights.com/considerations-fcpa-voluntary-disclosure/ [https://perma.cc/74ED-CQSR] ("In recent years, the DOJ has been updating its guidance in part to incentivize companies to make voluntary disclosures of FCPA violations.").

[121] Barkow & Perry, *supra* note 90, at 32 ("The U.S. sanctions regime thus not only restricts direct business with sanctioned countries, such as a manufacturer selling its products to Iran, but also prohibits financial institutions from facilitating those transactions. Financial institutions are required to create an OFAC "filter" that identifies transactions potentially involving a sanctioned entity or country, unless the volume is small enough the company is able to review each transaction manually.").

[122] *Id.*

essentially act as arms of the FCPA enforcement regime when counselling their clients to self-disclose FCPA violations.[123] The compliance industry's growth, however, proceeds under the same flawed assumptions that can underpin the FCPA's enforcement structure.[124] For example, enforcement agencies interpret the FCPA term "foreign official" "to include all employees of [State Owned Enterprises]," despite there being "no judicial support for the enforcement agencies' interpretation."[125] By acquiescing to a potentially flawed interpretation of the FCPA's scope and advising clients to that effect, compliance lawyers and other professionals essentially perpetuate an overly broad system of bribery enforcement.[126] Similarly, by encouraging a perception-based measure of corruption, the compliance industry tacitly accepts and perpetuates the biases underpinning these systems, ensuring that the detrimental effects of these systems will continue to persist.[127]

The use of perception-based corruption "country rankings" effectively acts as a blame-shifting measure that generally insulates the individuals and companies who are actually making corrupt payments.[128] Indeed, "such rankings … ignore the fact that the biggest

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[123] *See id.* ("As with FCPA violations, enforcement of the OFAC regulations depends to some extent on self-reporting.").

[124] Koehler, *supra* note 24, at 1002–03 ("Seemingly lost in the aggressive marketing of FCPA Inc., however, is that many of the compliance services are based merely on the enforcement agencies' untested and dubious interpretations of the FCPA.").

[125] *Id.* at 1003.

[126] *See id*. ("It is highly questionable whether Congress foresaw company lawyers being involved in the simple decision of whether to invite a particular customer to the company's golf outing or trade show. Yet because of the facade of FCPA enforcement, specifically the enforcement agencies' untested and dubious interpretation of the "foreign official" element to include SOE employees, this is exactly what has occurred even though there is no judicial support for the enforcement agencies' interpretation that such SOE employees are even "foreign officials" under the FCPA.").

[127] *See* Campbell, *supra* note 12, at 274 ("At a minimum, lawyers must understand and explain the limitations of existing corruption data before advising clients to use it for FCPA compliance purposes.").

[128] *See National Anti-Corruption Strategies: A Practical Guide for Development and Implementation*, UNITED NATIONS OFF. ON DRUGS AND CRIME 1, 17 (2015) https://www.unodc.org/documents/corruption/Publications/2015/National_Anti-Corruption_Strategies_-_A_Practical_Guide_for_Development_and_Implementation_E.pdf [https://perma.cc/L9Y6-6G65] ("While information on the perceived overall

bribe payers in the countries at the bottom of those indices are often multinational companies coming from the top ranked countries."[129] In other words, the current framework tends to cast employees or third-party contractors who make bribes as powerless victims of circumstance; they cannot help but to bribe foreign officials when doing business in "corrupt" countries like those in sub-Saharan Africa or Latin America.[130]

TI itself recognizes the long list of large, multinational corporations who have been implicated in bribery scandals over the past two decades, but fails to critically engage in how these scandals can affect the perception of the countries in which the bribery took place.[131] Bribery, ultimately, is a two-way street; one party must pay the bribe and one party must accept it.[132] By recognizing the outsized impact that multinational companies can have on foreign bribery but failing to equally allocate blame in the widely used *Corruption Perceptions Index*, TI unfairly places a penalty on developing countries whose officials accept bribes on behalf of multinational corporations.[133] If the goal is to modify the behavior of businesses when it comes to corrupt behavior, domestic enforcement agencies, such as the DOJ or the SEC, should avoid the promotion of geographic corruption indices in assessing compliance risk programs, given that the indices unfairly shift the blame to the recipient of the bribes, rather than the payor.

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level of corruption in the country can be useful for mobilizing the public behind the strategy—for example, by demonstrating that corruption is viewed as a serious problem—this sort of aggregated national-level data are of little value in formulating the content of the strategy.").

[129] *Measuring Corruption,* UNITED NATIONS OFF. ON DRUGS AND CRIME, https://www.unodc.org/e4j/en/anti-corruption/module-1/key-issues/measuring-corruption.html [https://perma.cc/MUB2-69MK].

[130] *See id.* (discussing lack of focus on multinational companies).

[131] *See The Companies That Export Corruption*, TRANSPARENCY INT'L (Oct. 13, 2020), https://www.transparency.org/en/news/the-companies-that-export-corruption [https://perma.cc/9ZAC-V6Q2] (recognizing that "the list of multi-nationals that have been caught red-handed in systematic and widespread bribery schemes is long").

[132] Adrienne Selko, *Dealing with Bribery in Emerging Markets*, INDUSTRY WEEK (Jul. 24, 2013), https://www.industryweek.com/the-economy/regulations/article/21960795/dealing-with-bribery-in-emerging-markets [https://perma.cc/D8W5-B7QT].

[133] *See The Companies That Export Corruption*, *supra* note 131.

B. Blindness Toward Public and Private Corruption in Developed Countries

Perception-based corruption regimes not only place an unfair burden on developing countries, but also divert attention away from corrupt behavior in countries that are generally perceived as less corrupt.[134] Similarly, by focusing attention on public corruption in developing countries, perception-based corruption regimes minimize the role played by large financial institutions in facilitating corrupt payments.[135] The preeminence of the FCPA as a bribery enforcement tool, which necessarily focuses on payments directed toward foreign government officials, tends to diminish the prevalence of domestic corruption in developed countries.[136] In other words, an overreliance on the "foreign" in Foreign Corrupt Practices Act leads to a situation where compliance and enforcement professionals believe that "'[t]his FCPA stuff is for other countries. We don't have to worry about bribery here.'"[137] This is demonstrably false. In the United States, for instance, there have been numerous public officials who have recently faced criminal charges involving fraud, misuse of campaign funds, and bribery.[138] In South Korea, which ranked in the top third of least corrupt

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[134] *See* Matt Kelly, *Domestic Corrupt Practices & Compliance*, RADICAL COMPLIANCE (July 24, 2020), http://www.radicalcompliance.com/2020/07/24/domestic-corrupt-practices-compliance/ [https://perma.cc/C6WP-YXGF].

[135] *See The Companies That Export Corruption*, *supra* note 131.

[136] *See* Kelly, *supra* note 134.

[137] *Id.*

[138] *See,* Zack Budryk, *Duncan Hunter Pleads Guilty After Changing Plea*, THE HILL (Dec. 3, 2019), https://thehill.com/homenews/house/472832-duncan-hunter-pleads-guilty [https://perma.cc/EAN5-3VLM] ("Rep. Duncan Hunter pleaded guilty to misuse of campaign funds."); Jerry Zremski, *Rep. Chris Collins Resigns Before Pleading Guilty to Federal Charge*, BUFF. NEWS (Sept. 30, 2019), https://buffalonews.com/news/local/rep-chris-collins-resigns-before-pleading-guilty-to-federal-charges/article_ad3f52f0-c96f-5c3c-81d1-333fa35d2bf3.html [https://perma.cc/47C7-AWK6] (stating Rep. Chris Collins resigned because he was facing insider trading charges); Dave Cook, *Former Rep. William Jefferson Sentenced to 13 Years in Prison*, CHRISTIAN SCI. MONITOR (Nov. 13, 2009), https://www.csmonitor.com/USA/Politics/2009/1113/former-rep-william-jefferson-sentenced-to-13-years-in-prison (stating Rep. William Jefferson was sentenced to thirteen years in prison for his conviction on corruption charges).

countries in the 2019 *Corruption Perceptions Index*,[139] two of the most recent former presidents have been found guilty of serious corruption charges and sentenced to lengthy prison sentences.[140]

To its credit, TI does note that "very clean" countries are not immune to corruption.[141] The most recent *Corruption Perceptions Index* includes brief discussions of relevant corporate scandals in Scandinavia and Canada.[142] Sweden, for instance, was connected to an investigation into Swedebank's role "in handling suspicious payments from high-risk non-resident clients."[143] However, these scandals have not resulted in a significant shift in these countries' ratings in the *Corruption Perceptions Index*. Canadian and Scandinavian countries still rank relatively high on the list.[144] As a result, the SEC/DOJ would likely not consider these countries to be ones with a "high risk of corruption" and would not expect companies with operations in these countries to significantly alter its behavior or compliance policies to account for corruption risk.[145]

Financial institutions that are headquartered in "very clean" countries have played major roles in recent corruption and bribery

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[139] *CPI 2019 Map*, *supra* note 72 (ranking South Korea 39th out of 180 countries).

[140] Benjamin Haas, *Former South Korean President Jailed for 15 Years for Corruption*, GUARDIAN (Oct. 5, 2018), https://www.theguardian.com/world/2018/oct/05/south-korean-president-jailed-15-years-corruption-lee-myung-bak [https://perma.cc/79CU-4B7N] (explaining that Lee Myung-bak was found guilty of accepting bribes from companies including Samsung and the country's intelligence service); Joyce Lee, *South Korean Court Raises Ex-President Park's Jail Term to 25 years*, REUTERS (Aug. 23, 2018), https://www.reuters.com/article/us-southkorea-politics-park/south-korean-court-raises-ex-president-parks-jail-term-to-25-years-idUSKCN1L905P [https://perma.cc/2XL6-K46Y] (explaining that the former president of South Korea, Park Geun-hye was found guilty of "colluding with her friend, Choi Soon-sil, to receive tens of billions of won from major conglomerates to help Choi's family and fund non-profit foundations owned by her …").

[141] *Corruption Perceptions Index 2019*, *supra* note 75, at 24 ("Top scoring countries on the CPI like Denmark, Switzerland and Iceland are not immune to corruption.").

[142] *Id.* (discussing corporate scandals in Iceland, Sweden, Canada, and Denmark).

[143] *Id.* at 25.

[144] *CPI 2019 Map*, *supra* note 72 (ranking Canada #12, Sweden #4, Iceland #11, and Denmark #1).

[145] *See* FCPA RESOURCE GUIDE, *supra* note 3, at 40.

scandals.[146] For example, in 2020, Goldman Sachs agreed to pay the Malaysian government $3.9 billion as part of a settlement agreement in response to allegations that the bank assisted in the embezzlement of Malaysia's sovereign wealth fund, 1MDB.[147] Similarly, Credit Suisse and JP Morgan have both recently been implicated in hiring schemes that violated the FCPA by giving prestigious internships to children of local government officials.[148] Money laundering on the part of financial institutions can help facilitate corruption in any country, regardless of that country's perceived risk of corruption.[149] In 2020, for example,

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[146] *See, e.g.,* Eoin McSweeney, *Goldman Sachs Agrees to a $3.9 billion 1MDB Settlement with Malaysia*, CNN BUSINESS (July 24, 2020, 11:34 AM), https://www.cnn.com/2020/07/24/investing/goldman-sachs-1mdb-malaysia/index.html [https://perma.cc/5XVN-RBWW] ("Goldman Sachs has agreed to a $3.9 billion deal with the Malaysian government to settle claims relating to the bank's role in the huge corruption scandal at 1Malaysia Development Berhad, the sovereign wealth fund."); *Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA*, U.S. DEP'T OF JUST. (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt [https://perma.cc/6RGG-FN9H] (reporting that Credit Suisse paid $47 million criminal penalty "for its role in a scheme to corruptly win banking business by awarding employment to friends and family of Chinese officials."); *JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China*, U.S. DEP'T OF JUST. (Nov. 16, 2016), https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme [https://perma.cc/FWD6-3TVX] (reporting that JPMorgan "agreed to pay a $72 million penalty for its role in a scheme to corruptly gain advantages in winning banking deals by awarding prestigious jobs to relatives and friends of Chinese government officials."); Ed Caesar, *Deutsche Bank's $10-Billion Scandal*, NEW YORKER (Aug. 22, 2016), https://www.newyorker.com/magazine/2016/08/29/deutsche-banks-10-billion-scandal (detailing the Detusche Bank "mirror trade scandal").

[147] McSweeney, *supra* note 146 ("Goldman Sachs has agreed to a $3.9 billion deal with the Malaysian government to settle claims relating to the bank's role in the huge corruption scandal at 1Malaysia Development Berhad, the sovereign wealth fund.").

[148] *Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA*, *supra* note 146; *JPMorgan's Investment Bank in Hong Kong Agrees to Pay $72 Million Penalty for Corrupt Hiring Scheme in China*, *supra* note 146.

[149] *See*, *e.g.*, *Bank Hapoalim Agrees to Pay More Than $30 Million for Its Role in FIFA Money Laundering Conspiracy*, U.S. DEP'T OF JUST. (Apr. 30, 2020),

Bank Hapoalim agreed to "pay a fine of $9,329,995 to resolve an investigation into their involvement in a money laundering conspiracy that fueled an international soccer bribery scheme."[150] These matters have generally been resolved through pre-trial settlements (typically in the form of a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA)).[151]

The increased prevalence of pre-trial settlements of FCPA enforcement matters has given rise to criticism that the DOJ is too lenient on corporate defendants—effectively adopting a "too big to jail" policy.[152] This strand of criticism arose partially out of the fallout of Arthur Andersen's collapse following an investigation into the accounting firm's involvement in the Enron scandal; a collapse that left 28,000 people "jobless and one of the nation's largest accounting firms being put out of business."[153] The economic and political effects of a corporate indictment causing Arthur Andersen to collapse led to "[i]mmense political pressure" that "forced the DOJ to take a hard look at its corporate charging policies."[154] The widespread adoption of pretrial settlement procedures, such as DPAs and NPAs, has led to an increased focus on the factors that enforcement agencies look at when making a charging decision, including:

> (1) the nature and seriousness of the offense; (2) the pervasiveness of the wrongdoing within the corporation; (3) the corporation's history of similar conduct; (4) its timely and voluntary disclosure of wrongdoing and willingness to cooperate; (5) the adequacy of its compliance program; (6) the corporation's remedial actions; (7) collateral consequences; and (8) the adequacy of non-criminal remedies.[155]

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https://www.justice.gov/opa/pr/bank-hapoalim-agrees-pay-more-30-million-its-role-fifa-money-laundering-conspiracy [https://perma.cc/82A6-PM6T].

[150] *Id.*

[151] *See* Golumbic, *supra* note 50, at 1296 (explaining that the DOJ's traditional approach is "either indicting or declining to indict corporate defendants in favor of negotiating DPAs and non-prosecution agreements").

[152] *Id.* at 1296–97 (discussing the increased prevalence of pre-trial settlements of FCPA).

[153] *Id.* at 1308 (discussing the 28,000 jobless people and the collapse of Enron).

[154] *Id.*

[155] *Id.* at 1305.

According to the DOJ and the SEC, however, compliance programs are considered "effective" if, among other actions, a company accounts for the "operational realities and risks attendant to the company's business, such as: ... the degree to which [the firm] has operations in countries with a high risk of corruption."[156] If a country does not pose a "high risk of corruption", as defined by organizations such as TI, companies may feel less inclined to establish more rigorous compliance programs when operating in that country, given the parameters established by the DOJ and the SEC guidance.[157]

TI claims that attitudes toward private sector corruption are not captured in the annual *Corruption Perceptions Index*.[158] Given the relative opacity of state-owned enterprises and public-private partnerships, however, the line between what constitutes public corruption and what constitutes private corruption may become blurrier.[159] In cases involving state-owned enterprises, "the waters get murky in determining whether employees of foreign companies owned or controlled—at least to some extent—by their respective governments are included in the ambit of the FCPAs definition of 'foreign official.'" [160] By failing to account for private corruption in the *Corruption Perceptions Index*, TI (and other publishers of perception-based corruption indices) fails to account for some of the main facilitators of corruption world-wide.[161] In turn, this may lead to a laxer attitude amongst companies in establishing business operations in countries with relatively low perceived risks of corruption, effectively serving as the extreme opposite of the sanctioning effect that the perception-based anti-corruption regime has on developing countries.[162]

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[156] FCPA RESOURCE GUIDE, *supra* note 3, at 41.
[157] *See id.* (discussing the relationship between the level of rigorousness of compliance programs and the risk of corruptions of countries).
[158] *Corruption Perceptions Index 2019*, *supra* note 75, at 24 (referring to the Danske Bank money laundering scandal in Estonia).
[159] Alex J. Brackett, *The FCPA Implications of China's Plan to Consolidate State-Owned Enterprises*, MCGUIREWOODS (Mar. 23, 2015), https://www.subjecttoinquiry.com/compliance/the-fcpa-implications-of-chinas-plan-to-consolidate-state-owned-enterprises/ [https://perma.cc/Y9LA-RCYK]; Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1254 (2008) (referring to the difficulties of distinguishing between public and private corruption).
[160] Cohen et al., *supra* note 159, at 1245.
[161] *See Corruption Perceptions Index 2019*, *supra* note 75, at 24.
[162] *See* Campbell, *supra* note 12, at 274–75.

V. Proposed Reforms

As described above, perception-based measures are an ineffective way of measuring corruption, creating unfair penalties on developing countries and encouraging lax attitudes toward corruption in developing countries. TI's methodology of collecting the opinions of "experts and business executives" to create a corruption perception index is susceptible to the introduction of biases that may influence these surveys.[163] An attempt to expand the pool of individuals that respond to the survey to be more representative would be an insufficient remedy; as noted previously, a perceived high corruption generates a "culture of distrust" that tends to perpetuate and solidify existing biases.[164] Fortunately, other measures of corruption exist that are better able to mitigate the negative effects of bias while still providing a comprehensive picture for businesses to assess corruption risk in a particular country.

An enforcement-based regime represents one way to mitigate the negative externalities caused by perception-based measures of corruption.[165] An enforcement-based measure would assess corruption risk based on statistics of enforcement actions brought by prosecutors and regulators in a particular country.[166] That being said, looking at the absolute value of enforcement actions relating to a particular locality is ineffective in measuring actual corruption risk due to the variance in how many U.S. companies operate in that locality.[167] Given this, an effective enforcement-based measure must also take into account the level of U.S. foreign investment in a particular country to give a more comprehensive picture of the pervasiveness of corruption in a particular location.[168] This is because "[a] simple comparison of the total number of enforcement actions associated with a given country would, of course, be largely unhelpful as a unit of measure because the U.S. business presence varies so greatly from country to country."[169] The logic behind using this type of enforcement-based measure is straightforward: countries with more instances of FCPA enforcement actions are more

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[163] *CPI 2019 Map*, *supra* note 72; *see also* Campbell, *supra* note 12, at 274–75.
[164] *See* Melgar, *supra* note 81, at 120.
[165] McLean, *supra* note 95, at 2007.
[166] *Id.* at 2007–08 (discussing the enforcement based measures and its effects).
[167] *Id.*
[168] *Id.*
[169] *Id.*

likely to be countries where the risk of corruption is higher.[170] Using enforcement data to measure corruption, however, is not without its downsides.

First, flawed perceptions and biases may be the very things that are driving enforcement actions.[171] If a particular country is already perceived to be "corrupt," as many countries in South America and sub-Saharan Africa are, U.S. enforcement agencies will likely continue to keep a close eye on business activity in those countries and subsequently bring more enforcement actions.[172] This is analogous to using enforcement-based data in the context of policing to determine whether criminal activity in a particular neighborhood is "high" or "low."[173] An initial flawed assumption regarding crime in a particular neighborhood often will result in a "runaway feedback loop" in which police units are continuously dispatched to that neighborhood, increasing that area's apparent crime rate.[174]

A similar criticism of an enforcement-based metric stems from flawed perceptions influencing business activity, namely that the amount of U.S. foreign direct investment might also have been influenced by perceptions of corruption.[175] Given the current perception-based enforcement regime, U.S. businesses may be less likely to do business in a country with a high perception of corruption, further obfuscating a potential enforcement-based metric.[176] Conversely, other hypotheses state that a high perceived level of corruption might actually increase American investment in a particular country due to the attractive prospect of avoiding cumbersome regulatory requirements through corrupt payments to foreign officials.[177] The presence of either of these confounding variables would demonstrate that an enforcement-based measurement of corruption is not entirely independent of

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[170] *Id.*
[171] *Id.* at 2009
[172] *See id.* at 2011–12 (stressing that consumers of corruption-perception indices must acknowledge the possibility that corruption and corruption perceptions may not have identical causes).
[173] *See generally* Danielle Ensign et al., *Runaway Feedback Loops in Predictive Policing*, Proc. Of Machine Learning Res. 81:1-12 (2018).
[174] *Id*.
[175] McLean, *supra* note 95, at 2011–12 (finding that higher levels of U.S. FDI are significantly associated with increased FCPA enforcement).
[176] *Id*. (discussing the "grasping hand" hypothesis which regards corruption as a deterrent to foreign investment).
[177] *See id.* at 2011 n.111 (noting the "helping hand" theory of corruption).

perceived levels of corruption.[178] Nevertheless, enforcement-based measures of corruption represent, at the very least, a viable supplement to perception-based measures that can better help organizations effectively calibrate their anti-bribery compliance programs.[179] Importantly, enforcement-based measures "would provide those engaged in research on the determinants and consequences of corruption with a new dataset that is both cross-national in scope and tied to the micro-foundations of corruption—bribes (allegedly) paid by firms to government officials—rather than simply based on perceptions of corruption."[180]

Another avenue to mitigate biases attendant to perception-based indices is to gather data about corruption through experienced-based surveys.[181] Experienced-based surveys are designed to capture respondents' actual experience with corruption in their own countries, rather than mere perceptions of corruption.[182] For example, "[o]ne [experienced-based] survey question asked whether the respondent or anyone in his or her household had paid a bribe in any form during the previous 12 months."[183] These surveys are typically anonymous and are framed in a way that encourages respondents to give candid answers about their experience with the payment of bribes in their personal or professional lives.[184] In addition to asking about respondents' personal experience with corruption, some experienced-based surveys will ask respondents "to estimate the proportion of annual revenues that 'firms like theirs' typically pay in bribes or unofficial payments."[185] While this practice introduces a certain amount of individual perception (and perhaps bias) into experience-based surveys, this practice, at the very least, forces respondents to ground their perception on past experience.[186] Experienced-based surveys can reveal some of the flaws of perception-based measures of corruption; people in a particular country might experience corruption at a lower level than a perception-

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[178] *Id.* at 2012.
[179] *Id.*
[180] *Id.*
[181] Treisman, *supra* note 97, at 242 (stressing that international organization would benefit from redirecting resources towards repeating and expanding country coverage of experience-based surveys).
[182] *Id.* at 214 (citing various experienced-based surveys).
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

based measure would predict.[187] Similarly, experience-based surveys avoid the previously discussed problem that large multinational corporate corruption scandals tend to play an outsized role in shaping a country's perceived corruption level.[188]

To its credit, TI publishes an additional measure, the *Global Corruption Barometer*, which includes the results of experienced-based surveys on a regional basis.[189] The *Global Corruption Barometer*, however, is not presented in an easily digestible format like the *Corruption Perceptions Index*'s map is, nor are results for every global region published on an annual basis.[190] Likewise, the DOJ and the SEC do not recommend a specific measure of corruption for determining whether a specific country has a high risk of corruption.[191] Thus, experienced-based surveys, while presenting a more accurate picture of corruption, are not sufficiently promoted by TI or enforcement entities to significantly mitigate the flawed biases attendant to the perception-based anti-corruption regime.[192]

One of the more radical approaches to reforming the current anti-corruption enforcement regime is to remove or heavily reduce the importance of geographic corruption risk as a variable in evaluating corporate anti-corruption compliance programs. This approach would essentially disregard the findings of any sort of geographic corruption index, perception-based or otherwise, given their systemic weaknesses

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[187] Campbell, *supra* note 12, at 266–67 (describing the discrepancy between Brazilian experience-based surveys and Brazil's relative ranking to other Latin American countries on perception-based indices).

[188] *See* Kelly, *supra* note 134.

[189] Campbell, *supra* note 12, at 267 ("Transparency International released a Global Corruption Barometer (GCB) that includes a section asking respondents whether they had personally been expected to or paid a bribe to a government service provider in the past year."); *Global Corruption Barometer*, TRANSPARENCY INT'L, https://www.transparency.org/en/gcb [https://perma.cc/89F4-E3LB].

[190] *See Global Corruption Barometer*, *supra* note 189.

[191] *See* FCPA RESOURCE GUIDE, *supra* note 3, at 40 ("The Act does not specify a particular set of controls that companies are required to implement. Rather the internal controls provision gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.").

[192] *See* Campbell, *supra* note 12, at 266–67 ("Studies using this approach have found little correlation between a country's corruption perception score and the experience of corruption, instead finding the relationship between perception and experience to be random.").

in assessing corruption-risk.[193] Geographic corruption indices have additional downsides that are totally unrelated to arguments previously made in this Article (i.e., their unfair bias against developing countries). For example, the content of geographic corruption indices is not a very precise way of determining corruption risk.[194] In other words, it is difficult for businesses to operationalize differences in country rankings on a corruption index; a country score of six on the *Corruption Perceptions Index* does not mean a business should doubly invest in compliance resources compared to a country that scores a three.[195] Similarly, geographic corruption indices often fail to distinguish between cross-border laws that define different types of "corrupt" activities as legal or illegal.[196] For example, political lobbying is legal (to an extent) in the United States, but whether or not individuals perceive political lobbying as corrupt can vary widely.[197] This discrepancy is especially important in the context of compliance/legal gray areas, such as "facilitation payments" whose legality and perception varies by jurisdiction.[198]

Given the widespread prevalence of geographic corruption indices, a wholesale elimination of their use is an unlikely possibility in the near

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[193] *See generally* Tina Søreide, *Is It Wrong to Rank? A Critical Assessment of Corruption Indices* (Chr. Michelsen Inst., Working Paper No. 1, 2006), http://www.cmi.no/publications/file/2120-is-it-wrong-to-rank.pdf (discussing the inherent problems associated with geographic corruption indices).

[194] *Id.* at 3 ("The content of the index continues to be unclear to many of us … The lack of a standardized approach to estimating the level of corruption makes it difficult to know whether the rankings reflect the number of transactions affected by corruption, legal or illegal activities, the level of bribes, or the cost to society.").

[195] *Id.*

[196] *Id.* at 3–4 ("The legal definitions of corruption and cross-border bribery of public officials differ somewhat from country to country. Even within countries there are doubts and discussions about the boundary between legal and illegal activities.").

[197] *Id.* at 5 ("In the USA it is legal to finance political parties … In many other countries, private influence on politics is not legalized or institutionalized in a similar manner.").

[198] *Id.* at 4 ("The justification for facilitation payments is often based on a lack of bargaining power. The question of whether the person who makes the payment commits an offence according to the cross-border legislation on corruption will depend on judicial details in his/her/its country of origin.").

term.[199] Targeted modifications to geographic indices, however, have the potential to mitigate the harmful impacts described above while, at the same time, providing businesses and enforcement agencies with a comprehensive picture on how to accurately assess corruption risk. One promising reform could be to incorporate the international nature of bribery into geographic corruption indices.[200] Corruption does not respect international borders, "[i]n a globalized world we need to evaluate governments not only by their domestic performance but also by their cross-border achievements."[201] Geographic corruption perception indices should also take into account the actions informal "representatives" of countries when they operate outside of their home country.[202] Under this system, "[g]overnments would get a poorer rating if 'their' companies were perceived to be taking part in cross-border bribery."[203] By holding multinational corporations more accountable for their actions outside of their principal jurisdiction, this reform would help mitigate the "blame-shifting" problem discussed above and help businesses measure bribery risk more accurately.[204]

VI. Conclusion

Bribery and corruption impact the ability of people and societies to thrive. A corrupt society is one that ultimately punishes its most vulnerable populations who lack the means to participate in a corrupt system. Over the past fifty years, the United States has positioned itself to be a global leader on enforcing anti-corruption laws and regulations. From an enforcement standpoint, the United States has been largely successful in punishing bad conduct on the part of individuals and businesses around the world. In a similar vein, other countries have followed the United States in passing strict anti-corruption regulations in their own jurisdictions. Given the global reach

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[199] *Id.* at 8 ("[a]lternative approaches [to corruption indices] cannot replace the information provided by an index of corruption that informs about the estimated perceptions about the level of corruption in a large number of countries.").
[200] *Id.* at 11.
[201] *Id.*
[202] *Id.* ("A corruption ranking should ideally include also estimates of the conduct of representatives of governments and countries, individuals or firms when they operate internationally.").
[203] *Id.*
[204] *See id.* ("In a globalized world we need to evaluate governments not only by their domestic performance but also by their cross-border achievements.").

and impact of the FCPA, the United States' position as an anti-corruption leader also comes with a serious responsibility to enforce anti-corruption laws in a fair and equitable way. The current system of measuring corruption and subsequently enforcing anti-corruption laws is neither fair nor equitable.

By unfairly penalizing poorer countries and giving richer countries a pass, the current perception-based anti-corruption enforcement regime exacerbates global inequalities, diminishes the harmful effects of corrupt activities of private actors, and may have the paradoxical effect of actually increasing corruption in a given region. From a normative standpoint, assigning individual countries a "corruption score" shifts the blame from the individuals making corrupt payments to the countries they are doing business in. As described above, corruption is necessarily a two-way street. Any reformed anti-corruption regime must seriously examine the role that private actors play in generating corruption risk in a given locale. Similarly, stakeholders in the perception-based anti-corruption regime, including compliance practitioners and federal regulators and prosecutors, help preserve the unfair status quo through the ever-churning "FCPA, Inc." The current system will continue to perpetuate itself until the need for reform is recognized and action is taken. More fair and useful metrics for measuring corruption risk are readily available; it is incumbent on all of the relevant stakeholders to recognize the errors of the current system and adopt metrics and practices that mitigate Western-centric biases and assess corruption risk in a fairer manner.