

Enhancing the Effectiveness of the Foreign Corrupt Practices Act Through Corporate Social Responsibility

DAVID HESS*

Over the last decade, combating corruption has taken a place alongside human rights, labor rights, and environmental protection as one of the major issues in corporate social responsibility (CSR). Major CSR initiatives and activities now play a role in helping to try to reduce the supply-side of corruption. Due to the increased enforcement of the Foreign Corrupt Practices Act (FCPA), it is important to consider how CSR and the enforcement of anti-bribery laws can support each other. This Article reviews how the major CSR initiatives seek to influence corporate behavior, with a focus on the major themes of disclosure, dialogue with stakeholders, and development of the firm's ethical culture. The Article then explores how one of the suggested reforms of the FCPA—the compliance defense—could best be implemented to ensure the reforms support and further the goals of the CSR activities related to anti-corruption.

TABLE OF CONTENTS

I.	INTRODUCTION	1122
II.	CORPORATE SOCIAL RESPONSIBILITY AND CORRUPTION.....	1123
	A. <i>Major CSR Initiatives</i>	1124
	B. <i>Multi-Stakeholder Initiatives Focused on Anti-Corruption</i>	1126
	C. <i>CSR Actors Concerned About Corruption</i>	1127
	1. <i>Social Investors</i>	1127
	2. <i>Civil Society Organizations</i>	1130
III.	UNDERSTANDING CORPORATE SOCIAL RESPONSIBILITY AS A PROCESS	1132
	A. <i>Corporate Social Responsibility in Action: Disclosure, Dialogue, Development</i>	1132
	B. <i>The Development of a Socially Responsible Corporation</i>	1133
	C. <i>Anti-Corruption from a CSR Perspective</i>	1135
IV.	CSR AND ANTI-CORRUPTION REFORMS	1137
	A. <i>Using a Compliance Defense to Support the CSR Community and Improve the Effectiveness of the FCPA</i>	1138
	B. <i>The Role of Disclosure in Meeting the Goals of a Compliance Defense</i>	1141

* Associate Professor of Business Law & Business Ethics; Stephen M. Ross School of Business at the University of Michigan.

C. <i>Increasing Commitment to Combating Corruption: Legal Influence Versus CSR Influence</i>	1142
V. CONCLUSION.....	1144

I. INTRODUCTION

Over the last decade, combating corruption has taken a place alongside human rights, labor rights, and environmental protection as one of the major issues in corporate social responsibility (CSR). Major CSR initiatives and activities now also play a role in helping to reduce the supply-side of corruption. Currently, however, most of the debate surrounding the Foreign Corrupt Practices Act (FCPA) concerns the effectiveness and fairness of the Department of Justice’s (DOJ) enforcement practices and the merits of the various calls to reform the FCPA. Generally missing is consideration of how CSR initiatives and the enforcement of anti-bribery laws can support each other.¹

The perspective of this Article is that to be truly effective in reducing the level of bribery in international business, the FCPA must work to encourage corporations to be socially responsible. Thus, to reduce corruption, corporations should be encouraged to think about not just what they should *not* do, but also what they *can* do. That is, corporations need to consider what they can do to work with other businesses, home and host country governments, local communities, and civil society organizations to reduce the levels of corruption in any particular country. To assist in this process, this Article argues that the enforcement of the FCPA should be structured to support the various actors and major initiatives in the CSR field that combat corruption.

This Article proceeds by first explaining what the term “corporate social responsibility” means. Rather than providing a single definition, this Article defines the CSR term by describing the major international initiatives focused on CSR in general.² The discussion of CSR also includes a description of the multi-stakeholder initiatives focused specifically on anti-corruption.³ This part concludes by describing the major actors in the CSR field focused on corruption: social investors and civil society organizations.⁴

Part III shows that CSR under these major multi-stakeholder initiatives can be understood as a process involving disclosure of information relevant to the corporation’s social performance, dialogue with key stakeholders based on the

¹For exceptions, see generally Indira Carr & Opi Outhwaite, *The Role of Non-Governmental Organizations (NGOs) in Combating Corruption: Theory and Practice*, 44 SUFFOLK U. L. REV. 615 (2011); David Hess, *Combating Corruption Through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure*, 21 MINN. J. INTL L. 42 (2012).

²See *infra* Part II.A.

³See *infra* Part II.B.

⁴See *infra* Part II.C.

disclosed information, and then development of the corporation into a more socially responsible company through the adoption and implementation of appropriate policies and practices.⁵ The next section describes anti-corruption from a CSR perspective, which is a broader view of corporations' responsibilities than simply implementing controls that attempt to ensure employees do not pay bribes.⁶ Part IV discusses how proposed reforms to the FCPA—with a focus on the proposed compliance defense—should take into account the potential benefits of structuring those reforms to support the CSR community and its initiatives.⁷ The final part further discusses the importance of the CSR community in the campaign against corruption in international business, and then concludes.⁸

II. CORPORATE SOCIAL RESPONSIBILITY AND CORRUPTION

Corporate social responsibility is a term that defies easy definition.⁹ Generally stated, it involves “the responsibility of enterprises for their impacts on society.”¹⁰ More broadly, it “is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the work force and their families as well as the local community and society at large.”¹¹ From these definitions, a reader may quickly see that there are numerous issues to consider. For example, when do corporations have a responsibility that goes beyond avoiding harming others, and includes actively trying to improve the conditions of stakeholders?¹² What

⁵ See *infra* Part III.A–B.

⁶ See *infra* Part III.C.

⁷ See *infra* Part IV.

⁸ *Id.*

⁹ Dow Votaw, *Genius Becomes Rare, in THE CORPORATE DILEMMA: TRADITIONAL VALUES VERSUS CONTEMPORARY PROBLEMS* 11, 11 (Dow Votaw & S. Prakash Sethi eds., 1973) (“To some it conveys the idea of legal responsibility or liability; to others it means socially responsible *behavior* in an ethical sense; to still others the meaning transmitted is that of ‘responsible for,’ in a causal mode; many simply equate it with ‘charitable contributions’ . . .”).

¹⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, at 6, COM (2011) 681 final (Oct. 25, 2011), available at http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=7010.

¹¹ Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. & ENVTL. MGMT. 1, 7 (2008) (quoting the World Business Council for Sustainable Development in 2000).

¹² See Nien-hê Hsieh, *The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance*, 14 BUS. ETHICS Q. 643, 644 (2004) (“Whereas most authors recognize that TNCs have obligations not to engage in certain harmful activities, it is taken as less clear that TNCs have positive obligations to provide benefits and services to those in developing countries, especially when those benefits are similar to those that

values or principles should a corporation follow when it is trying to “behave ethically”? When are “socially responsible” actions mandatory instead of just voluntary? In other words, if widely accepted norms of ethical behavior would require exceeding legal mandates, is action in furtherance of those norms a mandatory obligation for corporations?¹³ There are numerous other questions and rarely are these easy questions to answer.

One process for trying to answer these questions is found in several well-known initiatives that seek to assist corporations in acting in a more socially responsible manner. These initiatives include the United Nations Global Compact, ISO 26000—Social Responsibility and the Global Reporting Initiative. All of these initiatives are known as multi-stakeholder initiatives, meaning that representatives from all sectors of society (government, business, and civil society) joined together to develop the standards. Collectively, these initiatives set out general principles that corporations should follow and they establish the processes that corporations should adopt to ensure that they are meeting that initiative’s definition of CSR.

The next section sets out a basic overview of the above mentioned three major initiatives and identifies how they deal with the issue of bribery.

A. Major CSR Initiatives

The United Nations Global Compact, which was initiated in 2000, asks corporations to “embrace, support and enact, within their sphere of influence, a set of core values.”¹⁴ Originally, there were nine principles which covered the areas of human rights (corporations should respect human rights and avoid being complicit in human rights abuses), labor rights (covering issues such as discrimination and child labor), and the environment (such as developing environmentally friendly technologies and supporting a precautionary approach).¹⁵

In 2004, the Global Compact added its 10th Principle,¹⁶ which states that “[b]usinesses should work against corruption in all its forms, including

governments are held to be under an obligation to provide to their citizens.”); Florian Wettstein, *Corporate Responsibility in the Collective Age: Toward a Conception of Collaborative Responsibility*, 117 BUS. & SOC’Y REV. 155, 166–71 (2012) (arguing that corporate social responsibility should include a positive responsibility to society, and not simply negative responsibility to do no harm).

¹³JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 30 (2006).

¹⁴*The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Aug. 17, 2012).

¹⁵*See id.*

¹⁶Peter Eigen, *Removing a Roadblock to Development: Transparency International Mobilizes Coalitions Against Corruption*, 3 INNOVATIONS 19, 29 (2008).

extortion and bribery.”¹⁷ This Principle was added apparently on the realization that not only is corruption harmful and morally wrong, but that its presence can prevent any meaningful advancement of the other principles.¹⁸ Corporations that join the Global Compact commit to incorporating the principles into decision making¹⁹ and agree to submit annual, public reports (termed “Communication[s] on Progress”) that explain how they have implemented the principles in practice.²⁰ The goals of the reports are to ensure accountability, push corporations to continually improve, and create opportunities for learning (e.g., sharing of best practices).²¹

The ISO 26000 standard was published in 2010 by the International Organization for Standardization (ISO)—which publishes standards on a wide variety of topics related to business. ISO created these standards through a long consultation process involving groups from all sectors of society (business, government, labor, consumers, and others).²² The aim of the resulting standards was to “integrate international expertise on social responsibility—what it means, what issues an organization needs to address in order to operate in a socially responsible manner, and what is best practice in implementing [social responsibility].”²³ The standards first set out seven basic principles of social responsibility, which include accountability, transparency, ethical behavior, respect for stakeholder interests, respect for the rule of law, respect for international norms of behavior, and respecting human rights.²⁴ ISO 26000 then provides a list of seven core subjects of social responsibility.²⁵ Organizations are expected to apply the seven basic principles of social responsibility to each of these subjects.²⁶ The core subjects include organizational governance, human rights, labor practices, the environment, fair operating practices (e.g., bribery, fair competition, political involvement), consumer issues, and community involvement and development.²⁷ The standards also provide guidance on how to integrate social responsibility throughout the organization, such as publicly

¹⁷ UNITED NATIONS GLOBAL COMPACT, *supra* note 14.

¹⁸ *See* Eigen, *supra* note 16, at 29.

¹⁹ *Business Participation*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html (last visited Aug. 17, 2012).

²⁰ *Communicating Progress*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/COP/communicating_progress.html (last visited Aug. 17, 2012).

²¹ *Id.*

²² INT’L ORG. FOR STANDARDIZATION [ISO], ISO 26000 – SOCIAL RESPONSIBILITY: ISO 26000 PROJECT OVERVIEW (2010), *available at* http://www.iso.org/iso/iso_26000_project_overview.pdf.

²³ *Id.* at 9.

²⁴ *See* ISO, *International Standard ISO 26000: Guidance on Social Responsibility*, at iii, ISO 26000:2010(E) (Nov. 1, 2010).

²⁵ *Id.* at 19.

²⁶ *Id.* at 19–20.

²⁷ *Id.* at 19.

reporting on the organization's performance on CSR-related matters, engaging with stakeholders, and integrating social responsibility into the organization's governance.²⁸

The Global Reporting Initiative (GRI) differs from the other two initiatives in that it does not require a corporation to commit to certain ethical business practices (e.g., eliminating discrimination), but requires the corporation to provide comprehensive disclosure on its policies and practices on common CSR issues and its performance against metrics reflecting those issues.²⁹ The disclosure occurs through the publication of an annual sustainability report. According to the GRI, "[s]ustainability reporting is the practice of measuring, disclosing, and being accountable . . . for organizational performance towards the goal of sustainable development."³⁰ Thus, organizations are required to report on various performance indicators, which are organized into the categories covering the most common issues in social responsibility: economic, environmental, labor practices, human rights, society, and product responsibility.³¹ In addition, organizations are required to disclose other information such as how sustainability issues affect corporate strategy, the organization's management approach and policies related to issues in the report, and the process used to create the report (e.g., the stakeholders engaged).³² Although not included in the original GRI guidelines, the updated versions now include reporting indicators on anti-bribery practices.³³

B. *Multi-Stakeholder Initiatives Focused on Anti-Corruption*

In addition to the general CSR initiatives just described, there are also multi-stakeholder initiatives focused specifically on anti-corruption. The most well-known include the World Economic Forum's Partnering Against Corruption Initiative (PACI)³⁴ and the Extractive Industries Transparency Initiative (EITI).³⁵ PACI has published a set of principles—*Partnering Against*

²⁸ *Id.* at vii.

²⁹ GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES: VERSION 3.1, at 40 (2011) [hereinafter GRI], available at <https://www.globalreporting.org/ResourceLibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf>.

³⁰ *Id.* at 3.

³¹ *Id.* at 25–36.

³² *Id.* at 17–24.

³³ David Hess & Thomas W. Dunfee, *Taking Responsibility for Bribery: The Multinational Corporation's Role in Combating Corruption*, in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 260, 269 (Rory Sullivan ed., 2003).

³⁴ *Partnering Against Corruption Initiative*, WORLD ECON. F., <http://www.weforum.org/issues/partnering-against-corruption-initiative/index.html> (last visited Aug. 17, 2012).

³⁵ EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/> (last visited Aug. 17, 2012).

*Corruption—Principles for Countering Bribery*³⁶—and encourages corporations to publicly commit to following those principles.³⁷ PACI assists corporations in improving their anti-corruption compliance programs by organizing meetings of officials from signatory companies in order for them to share best practices and challenges.³⁸ EITI is focused on the extractive industries sector (e.g., oil, gas, and mining) and requires disclosure of corporations' payments to the host country governments.³⁹ These payments are then matched against the government's declared revenue received to ensure that funds are not being misappropriated by government officials.

C. CSR Actors Concerned About Corruption

There are many actors in the CSR field helping to develop standards, such as those described above, and seeking to encourage corporations to meaningfully implement those standards. This section provides an overview of two of those groups—social investors and civil society organizations—with a focus on their actions related to anti-bribery.

1. Social Investors

Social investors seek to incorporate so-called non-financial issues—environmental, social, and governance (ESG) issues—into their investment decisions. These investors seek to push for improved performance on these issues through their investment decisions and by directly engaging with companies. In some cases, social investors coordinate their activities through organizations such as the United Nations Principles for Responsible Investment⁴⁰ or the International Corporate Governance Network (ICGN).⁴¹ A

³⁶ WORLD ECON. F., PARTNERING AGAINST CORRUPTION—PRINCIPLES FOR COUNTERING BRIBERY, (2009), http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf.

³⁷ WORLD ECON. F., COMMITMENT TO ANTI-CORRUPTION, (2011), http://www3.weforum.org/docs/WEF_PACI_SupportStatement_Form_2011.pdf.

³⁸ Christoph Frei & Valerie Weinzierl, *Case Story: World Economic Forum Partnering Against Corruption Initiative*, in BUSINESS AGAINST CORRUPTION: CASE STORIES AND EXAMPLES 152, 155 (Birgit Errath ed., 2006), available at http://www.unglobalcompact.org/docs/issues_doc/7.7/BACbookFINAL.pdf.

³⁹ See Helmut Weidner, *Extractive Industries Transparency Initiative*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS 236, 238–39 (Thomas Hale & David Held eds., 2011).

⁴⁰ UNITED NATIONS PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org> (last visited Aug. 17, 2012). Those organizations in the investment community that join the Principles for Responsible Investment commit to the principles below, which “reflect the view that environmental, social and corporate governance (ESG) issues can affect the performance of investment portfolios and therefore must be given appropriate consideration by investors if they are to fulfill their fiduciary (or equivalent) duty.” *About Us*, UNITED

recent report by ICGN explains why investors—especially those keenly aware of ESG issues—consider anti-corruption an important issue.⁴² These reasons include:

- “At a macroeconomic level, corruption greatly reduces efficiency by distorting competition and depriving buyers of economically superior products at the most competitive prices.”⁴³
- “Corruption destabilises the political process and promotes conflict,” which “raises the cost of doing business and deters investment.”⁴⁴
- For companies that have been disadvantaged by competitors paying bribes, “this directly reduces returns, even in some cases threatening commercial survival.”⁴⁵
- For companies that pay bribes, they can suffer legal fines, damage to reputation, debarment, imprisonment for executives, and other penalties.⁴⁶
- “Companies with a reputation for weak anti-corruption controls, or which are found to have ‘skeletons in the closet’ during pre-merger due diligence, can find that deals are re-priced or even called off.”⁴⁷

NATIONS PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/about> (last visited Sept. 14, 2012). The Principles are:

1. We will incorporate ESG issues into investment analysis and decision-making processes.
2. We will be active owners and incorporate ESG issues into our ownership policies and practices.
3. We will seek appropriate disclosure on ESG issues by the entities in which we invest.
4. We will promote acceptance and implementation of the Principles within the investment industry.
5. We will work together to enhance our effectiveness in implementing the Principles.
6. We will each report on our activities and progress towards implementing the Principles.

Principles for Responsible Investment, UNITED NATIONS PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/principles> (last visited Aug. 17, 2012).

⁴¹ INT’L CORP. GOVERNANCE NETWORK, <http://www.icgn.org> (last visited Sept. 14, 2012).

⁴² INT’L CORPORATE GOVERNANCE NETWORK, ICGN STATEMENT AND GUIDANCE ON ANTI-CORRUPTION PRACTICES (2009), *available at* [http://www.icgn.org/files/icgn_main/pdfs/best_practice/guidance_on_anti-corruption_practices/2009_anti-corruption_practices_\(march\).pdf](http://www.icgn.org/files/icgn_main/pdfs/best_practice/guidance_on_anti-corruption_practices/2009_anti-corruption_practices_(march).pdf).

⁴³ *Id.* at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

- “[A] corporate culture that tolerates corrupt payments is also one that is much more likely to tolerate, or fail to prevent, financial fraud, theft of company assets and other actions that will directly harm shareholders.”⁴⁸

The social investment industry includes multiple actors, such as equity index providers, asset management companies, and research firms. Two major equity indexes focused on sustainability—the FTSE4Good⁴⁹ and the Dow Jones Sustainability Index (DJSI)⁵⁰—both consider a corporation’s handling of corruption issues when determining whether a corporation should be included or remain in the index.⁵¹ In March 2012, due to such developments as the U.K.

⁴⁸ INT’L CORPORATE GOVERNANCE NETWORK, *supra* note 42, at 5. Likewise, investment management company F&C Investments states:

By diverting capital away from its “highest and best uses” towards those that offer the richest illicit rewards, corruption not only distorts competition, but breeds corporate cultures that promote circumvention of the law, undermines the rule of law and creates the conditions for companies to mistreat shareholders just as they do other business partners. This is plainly not in the interests of long-term investors and their clients.

George Dallas, “*Two Cheers*” for the UK Bribery Act, in REO VIEWPOINT 1 (June 2011), http://www.fandc.com/FundNets_FileLibrary/file/co_gsi_reo_viewpoint_two_cheers.pdf. For a general overview of the ways in which a failure to prevent the payment of bribes can harm a corporation, see Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325 (2012).

⁴⁹ FTSE4Good Index Series, FTSE, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Aug. 17, 2012). The FTSE4Good Index includes companies in its index based on a committee’s review of whether or not the company has met its set of CSR standards. David Collison et al., *FTSE4Good: Exploring Its Implications for Corporate Conduct*, 22 ACCT., AUDITING & ACCOUNTABILITY J. 35, 39–40 (2009). The reviews are conducted bi-annually, with information provided by the research organization EIRIS. *Id.*

⁵⁰ DOW JONES SUSTAINABILITY INDEXES, <http://www.sustainability-indexes.com> (last visited Aug. 17, 2012). The DJSI uses a “best-in-class” approach. This “means that they include only companies that fulfill certain sustainability criteria better than the majority of their peers. No sectors are excluded from this process.” *Index Family Overview*, DOW JONES SUSTAINABILITY INDEXES, <http://www.sustainability-indexes.com/dow-jones-sustainability-indexes/index.jsp> (last updated Sept., 2011). DJSI cites the benefits of this approach as follows: “Thanks to the best-in-class approach, a vibrant competition among companies for inclusion in the Dow Jones Sustainability Indexes has ensued. To be included or remain in the index, companies have to continually intensify their sustainability initiatives.” *Id.* A recent review found that the DJSI World Index (as opposed to its indexes focused on a particular region, such as North America or Europe) included just 318 companies from a pool of 2,500 companies. Michael Robinson et al., *Signaling Sustainability Leadership: Empirical Evidence of the Value of DJSI Membership*, 101 J. BUS. ETHICS 493, 498 (2011). Robinson et al. find that there is a strong incentive for corporations to be included on the DJSI, as North American companies that joined the index obtained a 2.1% increase in market value that was sustained over time. *Id.* at 503.

⁵¹ DOW JONES SUSTAINABILITY INDEXES, DOW JONES SUSTAINABILITY WORLD INDEXES GUIDE BOOK 11, 15 (2011), <http://www.sustainability-indexes.com/images/djsi-world->

Bribery Act, the FTSE4Good increased the use of its countering bribery criteria in its index.⁵² Now, instead of only analyzing companies at high risk of corruption (based on region or industry), the FTSE4Good will also analyze those companies at “medium” risk.⁵³ Those companies that are analyzed and do not meet the countering bribery criteria will not be included in the index.

Asset managers active in this area include those focused on social investing, and large, global asset managers, such as F & C Investments, which engages with companies on behalf of their clients to improve corporations’ performance on anti-corruption matters.⁵⁴ Research firms provide information on companies to investors and asset managers. One provider, EIRIS, regularly monitors corporations for violations of international conventions against corruption⁵⁵ and collects data that allows investors to compare different companies’ anti-corruption performance.⁵⁶ Another research provider, GMI Ratings, states: “At GMI Ratings, we track the existence of anti-bribery policies, and analyze corruption-related events (including media controversies, investigations, fines, and other regulatory actions) at companies in our flagship database, GMI Analyst. Corruption and bribery concerns are also among the Key Metrics that form the basis of our ESG Ratings.”⁵⁷

2. Civil Society Organizations

Various civil society organizations—or Non-Governmental Organizations (NGOs)—are another significant actor in the field of CSR. As with social

guidebook_tcm1071-337244.pdf (listing corruption and bribery as assessment criteria); *Countering Bribery Criteria*, FTSE, http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_Countering_Bribery_Criteria.pdf (last visited Oct. 5, 2012).

⁵² Press Release, FTSE, Roll-Out of Countering Bribery Criteria and FTSE4Good Semi-Annual March 2012 Review (Mar. 9, 2012), http://www.ftse.com/Media_Centre/Press_Releases/index.jsp?startat=21.

⁵³ *Id.*

⁵⁴ *Programme Title: Bribery and Corruption*, F&C INVESTMENTS, http://www.fandc.com/new/us_institutional/Default.aspx?id=75955 (last visited Sept. 14, 2012) (describing the F&C Investments’ objectives when engaging with companies on bribery and corruption issues); see also *Delivering on the UN Principles for Responsible Investment*, F&C INVESTMENTS 1 (2008), <http://www.unpri.org/files/F&C%20-%20PRI%20Services.pdf> (“On average, F&C engages over 4,000 companies for its clients on ESG issues ranging from board structure and anti-corruption to climate change and human rights.”).

⁵⁵ *Applying Global Principles*, EIRIS, http://www.eiris.org/managers/cfm_ps_convention_watch.html (last visited Aug. 17, 2012).

⁵⁶ *Our Research*, EIRIS, http://www.eiris.org/companies/our_research.html (last visited Aug. 17, 2012).

⁵⁷ ROBERT A.G. MONKS & KIMBERLEY GLADMAN, WHY ESG MATTERS: THE IMPACT OF BRIBERY AND CORRUPTION ON EMERGING MARKET GROWTH, at 2 (2012), available at <http://info.gmiratings.com/why-esg-matters-the-impact-of-bribery-and-corruption-on-emerging-market-growth/>.

investors, NGOs have been pressuring companies for a long time, but their power and influence has increased significantly in the past decade and a half.⁵⁸ In addition to putting pressure on corporations from developed countries to improve their behavior in developing countries,⁵⁹ some NGOs will work directly with corporations to help find solutions to the CSR issue at hand.⁶⁰ In other words, these groups do not all function in an adversarial manner to force a change in corporations' behavior, but often provide much needed assistance in developing effective solutions.

In the area of corruption, the most well-known civil society organization is Transparency International (TI).⁶¹ TI has over 100 national chapters throughout the world,⁶² and is active in a wide variety of ways, such as drawing media attention to anti-corruption, providing policy input to governments, assisting with the multi-stakeholder initiatives described above, facilitating engagement opportunities between corporations and their stakeholders, and working directly with corporations to help them develop the most effective ways to combat corruption.⁶³ Other civil society organizations take on more limited roles. For example, Corner House⁶⁴ and Global Witness⁶⁵ seek to pressure corporations to more strongly combat corruption. TRACE International, on the other hand, works directly with corporations to help them improve their compliance

⁵⁸ David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 68, 71 (2010).

⁵⁹ *Id.* at 71 ("Civil regulation seeks to turn globalization on its head, making the global scope of business activity into a source of political vulnerability for global firms.").

⁶⁰ See generally Maria May Seitanidi & Andrew Crane, *Implementing CSR Through Partnerships: Understanding the Selection, Design and Institutionalisation of Nonprofit-Business Partnerships*, 85 J. BUS. ETHICS 413 (2009); Michael Yaziji, *Turning Gadflies into Allies*, HARV. BUS. REV., Feb. 2004, at 110. See also Carr & Outhwaite, *supra* note 1, at 622 (categorizing the activities of NGOs focused on anti-corruption as "(1) raising awareness; (2) stakeholder engagement; (3) research; and (4) advocacy and monitoring").

⁶¹ TRANSPARENCY INT'L, <http://www.transparency.org/> (last visited Aug. 11, 2012).

⁶² *Who We Are*, TRANSPARENCY INT'L, <http://www.transparency.org/whoweare/organization> (last visited Aug. 11, 2012).

⁶³ TRANSPARENCY INT'L, ANNUAL REPORT 2009, at 17 (2010), available at <http://www.transparency.org/whatwedo/publications/P70>.

⁶⁴ The Corner House states that it "addresses corruption-related issues involving the activities of UK companies overseas. Its focus has been on holding these companies to account, on politically-lax cultures in the North rather than the South, and on the grand corruption of wealthy multinationals rather than the petty corruption of low-paid civil servants." *About Us*, CORNER HOUSE, <http://www.thecornerhouse.org.uk/background/corruption> (last visited Aug. 15, 2012).

⁶⁵ Global Witness focuses its efforts on resource extraction industries, and states "[o]ur work aims to: prevent natural resource companies from acting corruptly, or enabling corruption in countries where they operate." *Corruption*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/corruption> (last visited Aug. 15, 2012).

programs and conduct due diligence on commercial intermediaries in host countries (a common source of bribery risks).⁶⁶

III. UNDERSTANDING CORPORATE SOCIAL RESPONSIBILITY AS A PROCESS

As the CSR initiatives described above show, there is agreement on the general ethical principles corporations should be seeking to uphold, such as the principle to combat corruption and bribery. That agreement, however, is at a very general level. The real challenges are in determining what those principles mean in any particular context and how to ensure that corporations are accountable for living up to those principles. As reflected in the initiatives above, the CSR community seeks to solve this problem through three processes, which can be termed disclosure, dialogue, and development.⁶⁷

A. Corporate Social Responsibility in Action: Disclosure, Dialogue, Development

Disclosure refers to the provision of information to stakeholders on a corporation's policies on ESG matters and its actual performance. A common method of doing this is through sustainability reports meeting the GRI standards. Disclosure serves two goals. First, it allows stakeholder groups to hold corporations accountable for their ESG performance by allowing those groups to compare corporations' performance against certain standards and against the performance of other corporations.⁶⁸ Second, it fosters organizational learning by allowing corporations and all stakeholders to critically assess existing practices and then help develop and spread best practices.⁶⁹

Dialogue occurs through a corporation's engagement with its stakeholders, including shareholders, consumers, local communities, and civil society organizations. This engagement can take many forms, such as a corporation simply consulting with stakeholders to understand their perspective, collaborating with stakeholders such as through a multi-stakeholder initiative, or empowering stakeholders by giving them a role in governance or decision making.⁷⁰ Overall, the goal is to move towards collaboration on "establishing

⁶⁶ About TRACE, TRACE INT'L, https://secure.traceinternational.org/Trace/about-trace/Trace_International.html (last visited Aug. 15, 2012).

⁶⁷ David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 BUS. ETHICS Q. 447, 456 (2008).

⁶⁸ *Id.* at 457–58.

⁶⁹ *Id.*

⁷⁰ ACCOUNTABILITY, AA1000 STAKEHOLDER ENGAGEMENT STANDARD 2011: FINAL EXPOSURE DRAFT, at 27 (2011), available at <http://www.accountability.org/images/content/5/4/542/AA1000SES%202010%20PRINT.pdf>.

norms and expectations, [and] also [for] ongoing monitoring of performance and updating of the norms and goals.”⁷¹

Development refers to the integration of social responsibility throughout the corporation, such as through policies, incentive systems, compliance programs, and the management of corporate culture. This is referred to as development, because it “refers to the incorporation of sustainability issues into the operating ethos of the corporation. Through self-reflection and self-criticism[,] corporations become cognizant of where the corporation’s social performance falls short of its previously held beliefs and societal expectations and then seek out new ways to improve their performance.”⁷² The idea of development is explored further in the next subsection.

Overall, CSR as a process involves a cycle where disclosure supports meaningful dialogue which leads to the development of improved practices by the corporation. This is then followed by a new round of disclosure.

B. The Development of a Socially Responsible Corporation

Based on a framework developed by Simon Zadek, a corporation moves through five stages in their development towards being a socially responsible corporation with respect to a particular social or environmental issue that is significantly affecting the corporation.⁷³ The five stages are:

1. Defensive: The corporation denies responsibility for causing the problem or having responsibility to fix the problem.⁷⁴
2. Compliance: The corporation views compliance as a cost and focuses on doing just as much as it has to in order to avoid legal liability or reputational harm.⁷⁵ As an example Zadek stated that, until recently, the “food industry has understood ‘health’ as the avoidance of legally unacceptable ‘nonhealth.’”⁷⁶ Thus, making food more healthy for consumers was viewed as a cost, and not as a moral obligation or an opportunity to create value for the corporation and society.⁷⁷
3. Managerial: Recognition that a compliance strategy is not sufficient, and that managers must assist in finding solutions and incorporating those solutions into the corporation’s value chain activities.⁷⁸

⁷¹ Hess, *supra* note 67, at 458.

⁷² *Id.* at 460.

⁷³ See Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125, 125.

⁷⁴ *Id.* at 126.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ *Id.*

4. Strategic: The corporation explores how adopting responsible business practices in this area can help give it a strategic advantage.⁷⁹
5. Civil: The corporation seeks to ensure that its entire industry addresses the problem and the corporation promotes collective action strategies. The goal is to promote long-term economic value.⁸⁰

As society becomes more aware and more knowledgeable about the problem, there is a need for corporations to move more quickly through the stages to avoid problems that impact their businesses (e.g., reputational harm, legal liability). Zadek's analysis of Nike's long-term response to labor problems in its supply chain is instructive. Nike first denied responsibility for labor problems at manufacturing plants that Nike did not own, but only contracted with (defensive stage).⁸¹ Nike then expended significant resources in an attempt to be in compliance with labor codes (compliance stage).⁸² When problems still surfaced regularly, Nike moved into the managerial stage, and looked beyond the workings of its compliance programs and took a more systematic, comprehensive view of the problem.⁸³ The company's management asked questions such as: how does our incentive program for procurement teams affect the problem?⁸⁴ Investigating this question led management to the conclusion that forecasting errors in its inventory management process that caused inventory shortages started a series of events that eventually led to significant pressures on suppliers to meet demand.⁸⁵ These pressures often resulted in suppliers violating labor codes to meet the new production schedule.⁸⁶ To prevent this series of events from continuing to happen, Nike realized that operational changes had to be made (strategic stage).⁸⁷ Eventually, Nike recognized that this was a problem that could only be solved through collective action and the entire industry needed to take action.⁸⁸ This led to Nike's involvement in various multi-stakeholder initiatives that sought to address the labor problem (civil stage).⁸⁹

With respect to corruption, the challenge is to push corporations to the civil stage, where they seek to work together to solve the problems of corruption—as opposed to staying at the compliance stage. In the anti-corruption battle, there will be leaders and there will be laggards. The leaders are already joining the multi-stakeholder initiatives described above and meaningfully implementing

⁷⁹ Zadek, *supra* note 73, at 126.

⁸⁰ *Id.* at 127.

⁸¹ *Id.* at 128.

⁸² *Id.* at 128–29.

⁸³ *Id.* at 129.

⁸⁴ *Id.* at 129–30.

⁸⁵ Zadek, *supra* note 73, at 129–30.

⁸⁶ *Id.*

⁸⁷ *Id.* at 130–31.

⁸⁸ *Id.* at 131–32.

⁸⁹ *Id.* at 132.

measures to prevent bribe payments. Strong enforcement of anti-bribery laws is needed to deter the laggards. However, can anti-bribery laws also help further the development of more socially responsible corporations, including the laggards? That is, rather than leaving a significant part of the anti-corruption battle to the CSR field, can the law play a role in supporting the CSR actors and furthering their efforts? Part III returns to these questions. First, though, it is important to set out what anti-corruption means from a CSR perspective.

C. Anti-Corruption from a CSR Perspective

As stated earlier, the U.N. Global Compact's 10th Principle states that "[b]usinesses should work against corruption in all its forms, including extortion and bribery."⁹⁰ This clearly involves companies establishing and managing effective ethics and compliance programs that prevent the payment of bribes. This itself is a significant challenge, as corporations most at risk for the payment of bribes operate in multiple countries with different norms and cultures that the compliance program must adapt to.⁹¹ But, from a CSR perspective, working against corruption means something more. From this perspective, corporations should be encouraged to try to improve the environments in which they operate.⁹² Just as the anti-sweatshop movement wanted corporations to improve local conditions and practices and not abandon developing countries where child labor and abusive working conditions were common problems, corporations should not be forced to leave a country simply because they fear FCPA liability. With respect to corruption, socially responsible corporations can be a positive influence in developing countries. There is some evidence that corporations with an appropriate anti-corruption attitude can potentially assist in combating the enabling environment that supports corruption that harms that country's citizens.⁹³

⁹⁰ UNITED NATIONS GLOBAL COMPACT & TRANSPARENCY INT'L, REPORTING GUIDANCE ON THE 10TH PRINCIPLE AGAINST CORRUPTION 5 (2009) [hereinafter REPORTING GUIDANCE], available at http://www.unglobalcompact.org/docs/issues_doc/AntiCorruption/UNGC_AntiCorruptionReporting.pdf (internal quotation marks omitted).

⁹¹ For example, on the challenges facing a corporation when adapting its compliance program to do business in China, see generally Kirk O. Hanson & Stephan Rothlin, *Taking Your Code to China*, 3 J. INT'L BUS. ETHICS, no. 1, 2010 at 69; and F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33 (2010).

⁹² See Wettstein, *supra* note 12, at 166–71.

⁹³ See Chuck CY Kwok & Solomon Tadesse, *The MNC as an Agent of Change for Host-Country Institutions: FDI and Corruption*, 37 J. INT'L BUS. STUD. 767, 781 (2006) (summarizing the results of their empirical study). The authors discuss three ways in which multinational corporations (MNCs) can reduce the level of corruption in a country. First, regulatory pressure on MNCs from their home country (e.g., FCPA enforcement pressure on U.S. companies) can prevent the payment of bribes in the host country. *Id.* at 769–70. Second, MNCs' operations can demonstrate to local companies that business can be

FCPA liability, however, reduces the likelihood of such positive investment. Recent empirical evidence shows that corporations from the United States and other OECD countries with anti-bribery laws are reducing their investments in countries where corruption is problematic.⁹⁴ That investment reduction not only further harms the country by allowing corruption to thrive, but it also prevents corporations from entering markets that may be both beneficial to the corporation (as it seeks new markets) and to the host country (that seeks foreign capital). When companies from countries that are a party to the OECD anti-corruption treaty refuse to invest in a country with high levels of corruption, those investments are made by companies from countries where anti-bribery laws are not enforced.⁹⁵ Thus, corruption continues to thrive in those countries as investments from companies that seek to avoid paying bribes are replaced by investments from companies that are more likely to conduct business corruptly.⁹⁶ The challenge, then, is how to encourage investment in corrupt countries by not threatening corporations acting in good faith to fight corruption with FCPA liability, but at the same time not weakening the anti-corruption regime. As discussed below, this is where CSR initiatives can play a role.

CSR initiatives can also further the potential benefits from investment because they encourage management to adopt a different mind-set towards anti-corruption. Rather than being stuck in the compliance stage where the corporation focuses only on what it should not do, a CSR perspective encourages corporations to seek to actively solve the problem and work with other stakeholders to find solutions. Thus, a CSR perspective pushes corporations to not just avoid harm from their actions, but to take actions viewed as positive for society.

conducted without bribery. *Id.* at 770. Those local companies that are competing to do business with the MNCs may also feel pressure to meet the MNCs' standards for anti-corruption. *Id.* Third, potential employees in the host company may seek professional business training to work for MNCs and seek higher advancement in that company. *Id.* at 770–71. This may lead to the result that “the professionalization of management practice and the socialization of the younger generation lead to changes in the host-country institutions over time.” *Id.* at 771.

⁹⁴ See Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 634 (2008); Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 808 (2006) [hereinafter Cuervo-Cazurra, *Who Cares About Corruption?*]; Anna D'Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade*, 97 J. DEV. ECON. 73, 73 (2012).

⁹⁵ Cuervo-Cazurra, *Who Cares About Corruption?*, *supra* note 94, at 808; D'Souza, *supra* note 94, at 73, 85–86.

⁹⁶ Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 396–98 (2010).

IV. CSR AND ANTI-CORRUPTION REFORMS

As noted above, there are significant ongoing debates about whether or not the FCPA should be reformed. Missing from this debate has been the CSR perspective. For example, many have argued for corporations to be afforded a compliance defense.⁹⁷ Such a defense would allow a corporation to escape liability for one of its employee's wrongful payments if the corporation could show that it had in place an effective compliance program, but that an employee was able to evade the program despite the corporation's best efforts to prevent such a payment.⁹⁸ One argument in favor of the compliance defense is that it would allow the corporation to invest in a country with known corruption problems as long as it used its best efforts to prevent one of its employees or agents from paying a bribe.⁹⁹ This is consistent with the CSR argument above.

The compliance defense proposal is controversial. From a business ethics perspective, the immediate concern is that compliance would trump ethics. Research in business ethics shows that the most effective ethics and compliance program must include considerations of the company's culture.¹⁰⁰ That is, corporations with similar compliance programs on paper may have significantly different outcomes based on culture factors such as incentives, a sense of openness to discuss ethical issues, and similar factors. In fact, recent research provides some evidence that a poorly implemented compliance program can actually enable an increase in wrongdoing in a company.¹⁰¹ A compliance program implemented solely to meet external, regulatory demands can lose legitimacy with employees within the corporation who grow to see the program as not "valued, necessary, or useful" and not in their best interests.¹⁰² Not only does the program lose legitimacy, but so do the ethical values the program is designed to further, which can lead to an institutionalization of corrupt behavior within the organization.¹⁰³

If the compliance defense debate is to move forward, those concerns must be addressed. However, what should also be added to the debate is the CSR

⁹⁷Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 651–54 (arguing for a compliance defense to the FCPA and citing former Department of Justice officials that have publicly stated support for a compliance defense).

⁹⁸*See id.* at 611.

⁹⁹*See* Spalding, *supra* note 96, at 406.

¹⁰⁰*See* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1791–95 (2007) (reviewing studies showing the importance of managing the company's culture, rather than just implementing internal controls).

¹⁰¹Tammy L. MacLean & Michael Behnam, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499, 1516–17 (2010).

¹⁰²*Id.* at 1510.

¹⁰³*See id.* at 1510–12.

perspective. That is, from this perspective, can a compliance defense be structured such that, although some corporations may be able to avoid prosecution with a “paper program,” the defense actually helps push corporations beyond Zadek’s compliance stage and towards the strategic and civil stages?¹⁰⁴ Then, by drawing in the CSR community, the potential benefits include:

- Corporations investing in high-risk countries rather than abandoning them, and potentially improving the governance environment of the host country.
- Various stakeholder groups playing a greater role in monitoring corporations’ development, implementation, and continuous improvement of their compliance programs.
- Corporations working together through multi-stakeholder initiatives to reduce the risks of corruption.

A. Using a Compliance Defense to Support the CSR Community and Improve the Effectiveness of the FCPA

This Article is not taking a position on whether or not a compliance defense should be added to the FCPA. Instead, the goal is to ensure that the debates about a compliance defense—or any FCPA reform—include consideration of CSR issues. The following shows how a compliance defense can be structured to support CSR initiatives and CSR actors and potentially have significant long-term benefits for reducing corruption in international business. These benefits should be included in the consideration of whether or not to have a compliance defense, and if so, how it should be structured.

This Article argues for a broader view of compliance that includes everything a corporation should be doing to ensure long-term success in avoiding the payment of bribes by its employees. Thus, a compliance defense should not use as its standard for an effective ethics and compliance program the guidelines found in the Organizational Sentencing Guidelines. Instead, it should use an approach developed from CSR multi-stakeholder initiatives. In particular, it should support the disclosure, dialogue, and development process of CSR described above.

Transparency International’s most recent version of its *Business Principles for Countering Bribery*¹⁰⁵ provides one example of a complete compliance program. The program sets out the basics of any anti-corruption compliance program, such as conducting due diligence on intermediaries to ensure they are not likely to pay bribes, training all employees on anti-bribery laws and

¹⁰⁴ See Zadek, *supra* note 73, at 129–32.

¹⁰⁵ TRANSPARENCY INT’L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY (2009), available at http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery.

policies, providing channels for employees to report bribery, and implementing internal controls.¹⁰⁶ In addition, the *Business Principles for Countering Bribery* require certain communications, including: “The enterprise should publicly disclose information about its Programme, including management systems employed to ensure its implementation.”¹⁰⁷

Although Transparency International had provided additional information on the requirements of its principles in a “Self-Evaluation Tool,”¹⁰⁸ it expanded on that information in 2010 in response to the United Kingdom Bribery Act. The U.K. Bribery Act contains an adequate procedures defense,¹⁰⁹ which is essentially the equivalent of the compliance defense argued for by those seeking to reform the FCPA. Under the U.K. Act, a corporation is strictly liable for a bribe paid by one of its employees, but it is a defense for the corporation to show that it had implemented “adequate procedures” to prevent the payment of bribes.¹¹⁰ The U.K. Ministry of Justice has published guidance on what constitutes adequate procedures.¹¹¹ With respect to external communication, the guidance states:

External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation’s behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.¹¹²

An “associated person” is a person or organization that provides services to the corporation, such as a supplier or intermediary.¹¹³ Overall, the Ministry of Justice recognizes that disclosure is a part of a successful compliance program,

¹⁰⁶ *Id.* at 9–13.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ TRANSPARENCY INT’L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: TRANSPARENCY INTERNATIONAL SELF-EVALUATION TOOL (2009), available at http://archive.transparency.org/publications/publications/toolkits/ti_set.

¹⁰⁹ Bribery Act, 2010, c. 23, § 7 (U.K.).

¹¹⁰ *Id.*

¹¹¹ MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (SECTION 9 OF THE BRIBERY ACT 2010) (2011), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

¹¹² *Id.* at 29–30.

¹¹³ *Id.* at 16.

but it leaves it to the company's discretion if it wants to make disclosures, whether it is to someone the company does business with, or to the public generally.

Transparency International's guidance on what should be required to establish adequate procedures¹¹⁴ is an alternative to the Ministry of Justice's guidance and is a significantly detailed explanation of its business principles. Like the Ministry of Justice's guidance, Transparency International's guidance also describes external reporting as discretionary.¹¹⁵ This Article, however, argues that any reform of the FCPA should include a provision that if a corporation wants to gain the advantage of using a compliance defense, then external communication consistent with Transparency International's description of the content should be mandatory.

The guidelines encourage corporations to publish information consistent with the Global Reporting Initiative standards¹¹⁶ or Transparency International's guidance on reporting on the U.N. Global Compact's 10th Principle.¹¹⁷ Under the GRI, the corporation must disclose its general management approach to combating corruption, the relevant policies in place, its goals, and the most senior person responsible for anti-corruption.¹¹⁸ In addition, the corporation must disclose against the following indicators: (1) "Percentage and total number of business units analyzed for risks related to corruption"; (2) "Percentage of employees trained in organization's anti-corruption policies and procedures"; and (3) "Actions taken in response to incidents of corruption."¹¹⁹

Transparency International's guidance on reporting on the U.N. Global Compact's 10th Principle provides significantly more detail. This guidance places indicators into three different categories: (1) "Commitment and Policy: how your organization has committed to a zero-tolerance of corruption;" (2) "Implementation: how your organization's commitment has been put into practice through detailed policies and systems;" and (3) "Monitoring: how your organization monitors progress and has a continuous process for improvement."¹²⁰

¹¹⁴Peter Wilkinson & Transparency Int'l UK, *The 2010 UK Bribery Act Adequate Procedures: Guidance on Good Practice Procedures Corporate Anti-bribery Programmes* (2010), available at <http://www.transparency.org.uk/our-work/publications/95-adequate-procedures---guidance-to-the-uk-bribery-act-2010>.

¹¹⁵*Id.* at 59.

¹¹⁶See generally GRI, *supra* note 29.

¹¹⁷REPORTING GUIDANCE, *supra* note 90.

¹¹⁸GRI, *supra* note 29, at 36–37.

¹¹⁹*Id.* at 38; GLOBAL REPORTING INITIATIVE, *Indicator Protocols Set Society (SO): Version 3.1*, at 8–10 (2011), available at <https://www.globalreporting.org/resourcelibrary/G3.1-Society-Indicator-Protocol.pdf>.

¹²⁰REPORTING GUIDANCE, *supra* note 90, at 12.

The report then lists indicators for corporations to report against for each category and provides detailed guidance on what information to include for each indicator, as well as the reason for including the indicator.¹²¹ In stating the reasons for why disclosure is needed, the guidance makes it clear that not only is reporting on anti-corruption indicators valuable to external parties in the CSR field, but that it is also vital to a successful compliance program.¹²² For example, the document states such benefits as, “encouraging and supporting employees in resisting corruption” and “providing management with a foundation for analysis of progress, planning and continuous improvement.”¹²³

The compliance program is part of the development of a corporation into a socially responsible organization. This process involves disclosure of relevant information to stakeholders, dialogue with those stakeholders on areas of improvement (both individual company improvement and improvement in collective action attempts), and then implementation of those changes in the corporation. To assist this process, and support the CSR community efforts at anti-corruption, a compliance program under any compliance defense should include a disclosure requirement consistent with the Transparency International guidelines for reporting under the Global Compact’s 10th Principle.

B. The Role of Disclosure in Meeting the Goals of a Compliance Defense

Anti-corruption disclosure will achieve the goals of the compliance defense. There are two basic arguments for a FCPA compliance defense. The primary argument is to encourage corporations to adopt better compliance programs, which would reduce violations of the FCPA. Disclosure supports the continuous development of compliance programs. Social investors are demanding greater disclosure on anti-corruption.¹²⁴ With better information, these investors will be able to engage more meaningfully with companies to improve their programs. Along with NGOs, these investors will have more valuable information and will be better able to aggregate data on best practices and common challenges. Even those companies that are not being directly engaged with by shareholders (such as companies not at high risk for corruption), may also improve their compliance programs due to a desire to be included in sustainability indexes. For example, one study found tentative evidence that joining the FTSE4Good Index caused companies to improve their operations.¹²⁵ The researchers could

¹²¹ *Id.* at 14–33.

¹²² *Id.* at 10–11.

¹²³ *Id.* at 10.

¹²⁴ See Press Release, U.N. Principles for Responsible Inv., Global Investors Ask Companies to Disclose Anti-Corruption Measures (Apr. 27, 2010), http://www.unpri.org/files/20100427_AnticorruptionPR_final.pdf; INT’L CORPORATE GOVERNANCE NETWORK, *supra* note 42, at 6, 9.

¹²⁵ Collison et al., *supra* note 49, at 48 (stating that some interviewees in the study “indicated that FTSE4Good had indirectly provided a benchmark against which they

not determine, though, if the changes were merely cosmetic or meaningful operational improvements.¹²⁶

Greater disclosure also allows shareholders and NGOs to step in and function as surrogate regulators and monitor corporations' efforts. Combating corruption is a collective-action problem, where corporations would benefit if they cooperated in their anti-bribery efforts, but there is always the incentive for one party to cheat.¹²⁷ With better information, these stakeholders can help ensure that all corporations are adopting and implementing the best compliance programs for their situation.

A secondary goal of an FCPA compliance defense is to help prevent the apparently common situation where corporations are avoiding otherwise profitable investments in developing countries simply due to risks of FCPA liability. From a CSR perspective, the goal is not just to prevent refusals to invest, but to ensure that the investment can actually help reduce levels of corruption in the host country. Disclosure, dialogue, and the push for corporations to reach the civil stage of development can help attain this goal. Unlike other CSR issues in developing countries, such as child labor or sweatshops, where corporations are proactive in working with stakeholders to find solutions to these problems, the movement is not as strong for corporations seeking to combat corruption. Broadening the concept of a compliance program to include CSR as described in this Article will help alleviate that problem.

C. Increasing Commitment to Combating Corruption: Legal Influence Versus CSR Influence

CSR actors need to be drawn into the enforcement discussion because they can apply pressure to corporations in ways that have beneficial impacts that government regulation typically cannot easily achieve. Research in the field of management on compliance programs and codes of ethics has shown that corporations respond to legal pressures by adopting programs that may be decoupled from the corporations' actual behavior. For example, Weaver and colleagues found that the Organizational Sentencing Guidelines—which gives firms a mitigated sentence if they had in place an effective compliance program when an employee violated a criminal law—caused corporations to adopt practices that created the appearance of an improved compliance program, but

compared themselves and acted as a source of peer group pressure for improving their CSR activities"); *id.* at 53 (stating "policy decisions and management systems were the areas which showed most influence after [nonfinancial] reporting"). The authors of the study also state that "we acknowledge that any interpretation of the reported results must inevitably be tentative." *Id.* at 52.

¹²⁶ *Id.* at 53.

¹²⁷ See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1326–28 (2004); Philip M. Nichols, *Multiple Communities and Controlling Corruption*, 88 J. BUS. ETHICS 805, 805 (2009).

the practices adopted were not ones that were likely to influence actual behavior.¹²⁸ Instead, what mattered more for adopting practices that would influence employee behavior was top management's personal commitment to ethics.¹²⁹ As another example, Stevens and colleagues found that pressure from market participants (e.g., customers, shareholders, and suppliers) made it more likely that a corporation would use its code of ethics in strategic decision making than would pressure from regulators.¹³⁰

A main reason for the findings described above is that pressures from different corporate stakeholders flow into the organization in different ways and influence different departments within the organization, which then causes different responses by the corporation.¹³¹ Delmas and Toffel, for example, studied corporations' responses to pressures to improve their environmental performance.¹³² When the pressure came from nonmarket participants (such as government regulators), those in the corporation that interacted with that stakeholder group responded by encouraging the corporation to frame environmental management practices as "unproductive and a zero-sum game in which [stakeholders] and firms compete to avoid bearing these costs."¹³³ The corporation's goal was simply to avoid sanctions.¹³⁴ On the other hand, when the pressure came from market participants (such as customers and even competitors), the environmental management issues were framed as "business drivers" and strong environmental performance practices were viewed as "indicators of superior management."¹³⁵

At a minimum, the above analysis shows that pressures from nongovernmental stakeholders on corporations to increase their commitment to combating corruption is of a different kind than government pressure, and has a positive influence that enhances the governmental pressure. Pressure from market participants may cause corporations to frame their response in a more positive manner—as a business driver of success as opposed to a compliance cost to be minimized. In addition, such pressure may make it more likely that

¹²⁸ Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices*, 42 *ACAD. MGMT. J.* 539, 547–48 (1999).

¹²⁹ *Id.* at 548.

¹³⁰ John M. Stevens et al., *Symbolic or Substantive Document? The Influence of Ethics Codes on Financial Executives' Decisions*, 26 *STRATEGIC MGMT. J.* 181, 185, 192 (2005).

¹³¹ Andrew J. Hoffman, *Linking Organizational and Field-Level Analyses: The Diffusion of Corporate Environmental Practice*, 14 *ORG. & ENV'T* 133, 142–43 (2001).

¹³² Magali A. Delmas & Michael W. Toffel, *Organizational Responses to Environmental Demands: Opening the Black Box*, 29 *STRATEGIC MGMT. J.* 1027, 1027 (2008).

¹³³ *Id.* at 1049.

¹³⁴ *Id.*

¹³⁵ *Id.*

the corporation will integrate anti-corruption practices into operations, as opposed to taking actions that are easily decoupled from actual operations.

V. CONCLUSION

Debates in the legal academy over how to best combat corruption and whether or not to reform existing anti-corruption and bribery laws need to be sure to consider the role of the CSR community and how any reforms can impact the actors in that community. The CSR community is not simply focused on establishing the ethical principles corporations should follow when conducting business, but is focused on the process of ensuring that corporations are actually living up to those principles and working with relevant stakeholders to ensure continuous improvement in a constantly changing environment.

This Article has focused on one example of how the CSR community can be drawn into the FCPA reform debates: that is, seeking to understand how the shaping of the often-proposed compliance defense could support the CSR community and, in the long run, improve corporations' compliance with the FCPA (and other countries' anti-bribery laws). This Article has argued that the type of compliance program that should qualify for a defense under any proposed reform should not be from a legal perspective of compliance—such as that found in the Organization Sentencing Guidelines—but from a broader CSR perspective. From a CSR perspective, the development and implementation of a compliance program is not a solitary exercise for corporations, and it should not be solely internally focused. An effective anti-corruption compliance program requires engagement with stakeholders—such as through multi-stakeholder initiatives—to understand the issues in context, and share successes and failures to drive improvement throughout the industry or region.

Overall, to truly be effective in the fight against corruption, the FCPA and its enforcement must support the CSR community's parallel fight. Strong FCPA enforcement provides the stick to encourage anti-corruption efforts by corporations and has given the CSR community some leverage to demand changes at corporations. For example, threat of legal liability and subsequent reputational damage has given shareholders some leverage to demand corporations to produce evidence of strong anti-corruption programs. FCPA enforcement can do more, however, to support these CSR actors.