

NONPROFIT ORGANIZATIONS AND ANTI-CORRUPTION STATUTES: INCENTIVES FOR COMPLIANCE

ELIZABETH BARNES COBURN*

INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) is the bane of many companies' existences.¹ It is a 'big ticket' offense; if found in violation of the FCPA, companies and individual officers could face millions of dollars in fines or jail time.² While it is clear that for-profit corporations are subject to (and frequently penalized for violating)³ the FCPA, it is less clear where nonprofit organizations stand. The Department of Justice has issued non-binding opinions asserting that nonprofits are not exempt from the FCPA's anti-bribery provision by their mere status as a nonprofit,⁴ despite the fact that a necessary element of the FCPA is that the prosecuted entity engaged in corrupt practices did so for the purpose of "obtaining or retaining business." Somewhat paradoxically, however, the federal government has never prosecuted a nonprofit for an FCPA violation.⁵

This Note argues that while nonprofit organizations have little incentive to comply strictly with the FCPA and the federal government has little incentive to prosecute nonprofits for violations, nonprofits should be incentivized to

* Candidate for Juris Doctor, Notre Dame Law School, 2020; Bachelor of Arts in Arabic, Armenian, Persian, Turkish, and Islamic Studies (AAPTIS), University of Michigan, 2013. I would like to thank Professor Lloyd Mayer for his continuous mentorship and support throughout the writing process, as well as Professor Kathleen Mosier for her guidance as I navigated the complexities of the FCPA. I would also like to thank my family and friends for their love and encouragement. All errors are my own.

1. See *Latest FCPA Opinion Procedure Release Reflects a High Level of Anxiety*, FCPA PROFESSOR (Oct. 30, 2012), <http://fcpaprofessor.com/latest-fcpa-opinion-procedure-release-reflects-a-high-level-of-anxiety>.

2. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(g) (2018).

3. See Travis Albea, *The Foreign Corrupt Practices Act: The Evolution of Enforcement*, CAMPBELL L. OBSERVER (Jan. 15, 2015), <http://campbelllawobserver.com/the-foreign-corrupt-practices-act-the-evolution-of-enforcement>.

4. See *FCPA: No Carve Out for NGOs or Non-Profits*, DEMING PLLC (June 24, 2012), <http://deminggroup.com/2012/06/24/fcpa-no-carve-out-for-ngos-or-non-profits>.

5. See Melissa Maleske, *Why Nonprofits Need FCPA Compliance Plans*, LAW 360 (Jan. 11, 2016, 9:11 PM), <https://www.law360.com/articles/743788/why-nonprofits-need-fcpa-compliance-plans>.

develop anti-bribery compliance programs to avoid reputational harm and the withdrawal of monetary support from funders. Part I briefly describes the history and purpose of the FCPA and highlights the exponential uptick in prosecutions since 1977. Part II begins by explaining the role of nonprofits and non-governmental organizations (NGOs) in international civil society and the corruption risks that U.S.-based nonprofits face when operating overseas. Part II, then, describes the challenges nonprofits face when attempting to mitigate corruption risks and compares these challenges to those faced by for-profit corporations. Part III argues that while nonprofits may be de jure subject to the FCPA's anti-bribery provisions, they are de facto exempt because the federal government has little incentive to prosecute nonprofits for FCPA violations. Part IV argues that while the federal government is unlikely to prosecute a nonprofit under the FCPA, nonprofits should be motivated to develop anti-bribery compliance plans due to the devastating financial and reputational effects that internal investigations can have on grant-funded nonprofits.⁶

I. HISTORY AND PURPOSE OF THE FOREIGN CORRUPT PRACTICES ACT

A. History and Purpose

According to the U.S. Department of Justice, the Foreign Corrupt Practices Act of 1977 was “enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”⁷ The United States was the first country to outlaw the bribery of foreign officials.⁸ The FCPA was passed after the Watergate scandal investigation “revealed that 400 American companies had spent hundreds of millions of dollars bribing everyone from prime ministers to police overseas.”⁹ Government officials and administrators contended that the revelations of slush funds and secret payments by American corporations had “affected adversely American foreign policy, damaged abroad the image of American democracy, and impaired public confidence in the financial integrity of American corporations.”¹⁰ Prior to the FCPA's passage, it was not illegal to bribe foreign officials to obtain or retain business.

Passing the FCPA was not an easy feat. Critics argued that the Act would have “a chilling effect upon United States export trade” and that companies would “[cease] foreign operations rather than face the uncertainties and the

6. For the purposes of this Note, the terms “nonprofit” and “NGO” are functionally interchangeable.

7. *Foreign Corrupt Practice Act: An Overview*, U.S. DOJ, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last updated Feb. 3, 2017).

8. See *Spotlight: History of the FCPA*, PBS (Feb. 13, 2009), <https://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html>.

9. *Id.*

10. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT, IN BRIEF 1 (2016).

burdens” of the FCPA.¹¹ Furthermore, opponents criticized the anti-bribery provisions in particular for excessive vagueness. In 1981, the General Accounting Office (GAO) conducted a “questionnaire survey of 250 companies randomly selected from the Fortune 1000 list of the largest U.S. industrial firms” to assess the impact of the FCPA on these organizations.¹² The GAO survey revealed that “more than 30 percent of . . . respondents engaged in foreign business reported they had lost overseas business as a result of the act.”¹³ Furthermore, “seventy percent of the respondents who reported that the FCPA caused a decrease in their overseas business rated the clarity of at least one of the anti-bribery provisions as ‘inadequate’ or ‘very inadequate.’”¹⁴ This survey demonstrated that even large corporations—businesses that presumably had resources to enact robust internal compliance programs—had fears about FCPA enforcement. In one instance from the early days of the FCPA, “a company spent \$30,000 investigating a \$20 payment to a customs official.”¹⁵

B. The FCPA’s Two Prongs: Accounting and Anti-Bribery

The FCPA has two prongs: the accounting provisions and the anti-bribery provisions.¹⁶ The provisions are designed to operate in tandem as applicable, but are legally independent from one another.¹⁷ The accounting provisions include two sub-components: the “books and records” provision and the “internal controls” provision. While the accounting provisions are certainly important aspects of FCPA enforcement, they only apply to “issuers”¹⁸—that is, organizations registered to engage in transactions on a national securities exchange in the United States.¹⁹ Because nonprofits are, by definition, not issuers, an in-depth discussion concerning the FCPA’s accounting provisions is beyond the scope of this Note.²⁰ A brief overview of the accounting provisions follows.

11. *Id.* at 2.

12. U.S. GOV’T ACCOUNTABILITY OFF., AMFD-81-34, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981).

13. *Id.*

14. John W. Duncan, Comment, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT’L L. & BUS. 203, 207 (1982). Note that this survey was conducted before a number of FCPA amendments were passed in 1988 and 1998.

15. *Id.* at 208.

16. See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff, (2018).

17. See *id.*

18. See *id.* § 78m.

19. See Securities Exchange Act of 1934, 15 U.S.C. § 78l (2018).

20. See generally U.S. DOJ & U.S. SEC., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2015) [hereinafter FCPA RESOURCE GUIDE], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>. Although the FCPA accounting provisions do not apply directly to nonprofit organizations, the provision does apply to “subsidiaries of issuers.” *Id.* at 43. Thus, even if an organization is not itself an issuer, it is important to take note of the entire business structure before determining whether or not the accounting provisions apply to a certain entity.

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.”²¹ This prong exists because “[b]ribes, both foreign and domestic, are often mischaracterized in companies’ books and records.”²² These mischaracterizations can include bribes disguised as commissions, royalties, travel expenses, vendor payments, or rebates.²³ The internal controls provision requires companies to enact “effective compliance programs” that “provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements.”²⁴ These internal controls “must take into account the operational realities and risks attendant to the company’s business,” including the nature of its business, the degree to which the business operates in high-risk countries, the degree of regulation, and the extent of government involvement in the company’s operations.²⁵ This provision exists because “[t]he payment of bribes often occurs in companies that have weak internal control environments.”²⁶

The anti-bribery provisions generally prohibit “offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.”²⁷ Unlike the accounting provisions, the anti-bribery provisions are not limited to “issuers”—they apply more generally to “domestic concerns.” The definition of “domestic concern” includes “any individual who is a citizen, national, or resident of the United States”²⁸—thus, even U.S. citizens working as agents of a nonprofit could qualify as a domestic concern.²⁹

The anti-bribery provisions of the FCPA prohibit payments made to foreign officials for the purpose of obtaining or retaining business; this element is known as the “business purpose test.”³⁰ For years, it was assumed that the FCPA prohibited only “those [actions] that directly influence the acquisition or retention of government contracts.”³¹ However, in *United States v. Kay*, the Fifth Circuit clarified that Congress intended for the FCPA’s business purpose test to be interpreted much more broadly: the bribery could simply be intended to improve business opportunities, and the desired benefits could be direct or

21. 15 U.S.C. § 78m(b)(2)(A).

22. FCPA RESOURCE GUIDE, *supra* note 20, at 39.

23. *See id.*

24. *Id.* at 40.

25. *Id.*

26. *Id.*

27. *Id.* at 10.

28. *Id.* at 11.

29. *See Non-Profits and the FCPA*, FCPA PROFESSOR (Mar. 31, 2015), <http://fcpaprofessor.com/non-profits-and-the-fcpa>.

30. FCPA RESOURCE GUIDE, *supra* note 20, at 12.

31. *Id.* at 13 (quoting *United States v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004)).

indirect.³² For a corporation to be found in violation of the FCPA, the offer, promise, or authorization of a payment must be made “corruptly,” and generally considered to be made with “an evil motive or purpose, an intent to wrongfully influence the recipient.”³³ For an individual to be found *criminally* liable under the FCPA, he or she must have acted “willfully.”³⁴ Willful behavior “has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose.”³⁵ Potentially important to nonprofits, whose officers and directors may not think the FCPA applies to them, “both the Second Circuit and Fifth Circuit Courts of Appeals have found[] the FCPA does not require the government to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated the FCPA.”³⁶

The FCPA also specifies that the “payment” corruptly made to a foreign official includes “anything of value.”³⁷ This is not limited to monetary payments—Congress has noted that “bribes can come in many shapes and sizes—a broad range of unfair benefits.”³⁸ While gifts or payments of any size can be found in violation of the FCPA, “it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent.”³⁹ In the rare instances when the government’s anti-bribery enforcement actions have focused on small gifts and payments, they have been part of “a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.”⁴⁰ While the FCPA does not prohibit gift-giving, charitable contributions, and reasonable expenses of nominal value, these payments become problematic when they are intended as or designed to disguise bribes.⁴¹

Lastly—and this may go without saying—the conduct must be “corrupt” for the FCPA to apply. When Congress adopted the FCPA, it noted that “corruptly” means “that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position.”⁴² It is important to note that the FCPA “does not require that the act he [sic] fully consummated or succeed in producing the desired outcome” to be prosecuted.⁴³

32. See *Kay*, 359 F.3d 738. In *Kay*, the U.S. Court of Appeals for the Fifth Circuit held that bribes paid to obtain favorable tax treatment could be considered payments made “to obtain or retain” business.

33. S. REP. NO. 95-114, at 10 (1977).

34. FCPA RESOURCE GUIDE, *supra* note 20, at 14.

35. *Id.*

36. *Id.*; see generally *Kay*, 359 F.3d 738; *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber*, 407 F.3d 34 (2d Cir. 2005).

37. Foreign Corrupt Practices Act, 15 U.S.C. § 78-dd1(a) (2018).

38. FCPA RESOURCE GUIDE, *supra* note 20, at 14.

39. *Id.* at 15.

40. *Id.*

41. See *id.* at 15–16.

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

43. *Id.*

C. Dual Enforcement of the FCPA: SEC and DOJ

Both the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) are charged with enforcing the FCPA.⁴⁴ The SEC is largely responsible for levying *civil* penalties on certain entities that violate the *accounting* provisions of the FCPA, and the DOJ is largely responsible for *criminal* prosecution of entities that violate the *anti-bribery* provisions of the FCPA.⁴⁵ While the SEC may be involved in an investigation giving rise to criminal charges, the SEC is never involved with levying criminal penalties on organizations—criminal prosecution is always under the purview of the DOJ.⁴⁶ However, both the DOJ and the SEC have civil enforcement authority under the FCPA.⁴⁷

Generally, entities that violate the accounting provisions are subject to civil penalties, but “[c]riminal liability can be imposed on companies and individuals for *knowingly* failing to comply with the FCPA’s books and records or internal controls provisions.”⁴⁸ For violating the accounting provisions, the SEC may obtain a civil penalty based on a specific dollar amount determined by the egregiousness of the violation, or “the gross amount of the pecuniary gain to the defendant as a result of the violations,” (whichever is greater).⁴⁹ Entities found in violation of the anti-bribery provisions are subject to both civil and criminal enforcement actions. For violating the anti-bribery provisions, “corporations and other business entities are subject to a civil penalty of up to \$16,000 per violation,” and individuals “are similarly subject to a civil penalty of up to \$16,000 per violation, which may not be paid by their employer or principal.”⁵⁰ Additionally, “corporations and other business entities are [criminally] subject to a fine of up to \$2 million” and “[i]ndividuals . . . are subject to a fine of up to \$250,000 and imprisonment for up to five years” for violating the anti-bribery provisions.⁵¹

Furthermore—and possibly of great importance to potential future prosecution of nonprofit organizations—the government may seek or impose “collateral consequences” in addition to criminal and civil penalties. These include “suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.”⁵² Debarment or suspension may occur for a variety of reasons, including “[c]ommission of any . . . offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government

44. See generally FCPA RESOURCE GUIDE, *supra* note 20.

45. See *id.* at 4–5.

46. See *id.*

47. See *id.*

48. *Id.* at 44 (emphasis added).

49. *Id.* at 69.

50. *Id.* (footnote omitted).

51. *Id.* at 68.

52. *Id.* at 69–70.

contractor or subcontractor.”⁵³ Notably, these sanctions are not intended to be punitive.⁵⁴

When deciding whether to debar or suspend a government contractor, agencies analyze a number of factors, including whether the contractor has implemented effective internal control systems, reported the activity to the appropriate government agency in a timely manner, cooperated fully with government agencies, taken disciplinary action against the individuals responsible for the activity, and taken remedial measures.⁵⁵ Multilateral Development Banks (MDBs) “also have the ability to debar companies and individuals for corrupt practices.”⁵⁶ The DOJ and the SEC will, on occasion, work with MDBs to “share evidence and refer cases.”⁵⁷ In fiscal year 2018 alone, “the World Bank debarred 78 firms and individuals, recognized 73 cross-debarments from other multilateral development banks, and referred 43 matters to national authorities.”⁵⁸

D. Application of the Anti-Bribery Provision to Nonprofit Organizations

From a legislative intent perspective, it is unclear whether the FCPA was designed to apply to nonprofits. As noted above, the impetus for implementing the FCPA was the revelation of widespread foreign bribe payments and slush fund utilization by large American companies. Small business and nonprofits were not the focus when the FCPA was implemented. However, the FCPA was also enacted for the purpose of bolstering the image of American democracy and promoting U.S. foreign policy interests⁵⁹—goals that seem intimately intertwined with the work of nonprofits operating abroad.

In line with its broad interpretation under *Kay*, the Department of Justice has issued several non-binding opinions clarifying that U.S. nonprofits are subject to prosecution under the FCPA’s anti-bribery provision.⁶⁰ Despite these

53. 48 C.F.R. § 9.406-2 (2019).

54. *See id.* § 9.402.

55. *See id.* § 9.406-1.

56. FCPA RESOURCE GUIDE, *supra* note 20, at 70.

57. *See id.* at 70–71; *see also* Agreement for Mutual Enforcement of Debarment Decisions, Apr. 9, 2010, <https://www.adb.org/sites/default/files/institutional-document/32774/files/cross-debarment-agreement.pdf> (The African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group agreed that entities debarred by one MDB will be sanctioned for the same misconduct by the other signatory MDBs.).

58. 2018 Year-End FCPA Update, GIBSON DUNN (Jan. 7, 2019), <https://www.gibsondunn.com/2018-year-end-fcpa-update/>.

59. *See* Seitzinger, *supra* note 10, at 1.

60. The Department of Justice offers an opinion procedure through which domestic concerns can ask the Department of Justice to certify their activities as FCPA-compliant. *See* 28 C.F.R. § 80.1. The opinion procedure is “a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by DOJ under the FCPA.” *See* FCPA RESOURCE GUIDE, *supra* note 20, at 86. The DOJ makes versions of its opinions publicly available online to provide “non-binding guidance to the business community.” *See id.* at 87. For opinions clarifying

opinion releases, neither the DOJ nor the SEC has ever prosecuted a nonprofit for violating the FCPA.⁶¹ Additionally, despite the broad interpretation of the business purpose test under *Kay*, there has been no binding clarification on whether nonprofit entities are capable of having a business purpose in general.

The Department of Justice provides policy information regarding FCPA investigations and prosecutions under title 9 of the Justice Manual.⁶² The policy is called the “FCPA Corporate Enforcement Policy,” and is “aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct.”⁶³ In particular, the DOJ gives limited credit to companies that voluntarily disclose potential misconduct, fully cooperate with the Department throughout the investigation process, demonstrate a “culture of compliance,” have risk management policies in place, and appropriately discipline those employees identified by the company as responsible for the misconduct.⁶⁴ Since a nonprofit has never been prosecuted under the FCPA, it is unclear whether these remediation measures would apply to nonprofit entities—although, from the policy’s title, it appears to apply broadly to corporations, which likely does include nonprofit corporations.

E. The FCPA in Recent Years: Increase in Prosecutions

After the FCPA was adopted in 1977, the statute experienced a slow start regarding enforcement actions. Between 1977 and 2006, only thirty-five entities and seventy-one individuals were charged under the FCPA.⁶⁵ The relatively low number of prosecutions can be attributed to two main factors: first, “the difficulties involved in gathering evidence overseas at the time,” and second, “policy concerns that prevented the agencies from vigorously enforcing the law.”⁶⁶ In the statute’s infancy, the United States worried that FCPA enforcement would alienate allies, so “the DOJ required its prosecutors to receive permission from Washington before pursuing any bribery charges under the FCPA.”⁶⁷ Because of this fear, enforcement efforts were extremely conservative and focused only “on cases involving obvious violations.”⁶⁸

that nonprofit organizations are subject to prosecution under the FCPA, see FCPA Rev. Op. Proc. Release, No. 12-02 (U.S. DOJ Oct. 18, 2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/10/25/1202.pdf>; FCPA Rev. Op. Proc. Release, No. 10-02 (U.S. DOJ July 16, 2010), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/07/22/1002.pdf>.

61. See Maleske, *supra* note 5.

62. See U.S. DOJ, JUSTICE MANUAL § 9-47.120 (2019), <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.100>.

63. *Id.*

64. See *id.*

65. See *Entity Groups and Individuals Charged per Year (FCPA Claims Only)*, FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html> (last visited Mar. 23, 2019).

66. See Albea, *supra* note 3.

67. *Id.*

68. *Id.*

Beginning in the mid-2000s, FCPA enforcement activity increased exponentially. Between 2007 and 2017, 100 entities and 150 individuals were charged under the FCPA—over two times as many enforcement actions than the previous three decades combined.⁶⁹ Not only did the raw number of prosecutions increase, but the penalties increased as well. Between 1977 and 2006, the U.S. sanctions for entity groups totaled approximately \$265 million.⁷⁰ Between 2007 and 2017, U.S. sanctions for entity groups totaled a staggering \$10.1 billion—forty-six times the amount levied throughout the first three decades of the FCPA’s existence.⁷¹

The start of 2018 marked the fifth decade of the FCPA’s existence. Some practitioners believed the Trump Administration would usher in a new era of FCPA leniency⁷²—after all, the President’s anti-regulation rhetoric seems to suggest a less-than-favorable outlook on any laws that put a leash on business’s freedoms. President Trump even called the FCPA a “ridiculous” and “horrible” law for making it more difficult for companies to compete overseas.⁷³

However, data from the past two years of the Trump Administration show that the FCPA “remains a key part of U.S. efforts to combat global corruption” and “administration officials say they’re committed to enforcing it.”⁷⁴ In fact, the Trump administration “has continued to enforce it at rates comparable to the Obama administration.”⁷⁵ In 2016, there were fifty-three combined FCPA enforcement actions, and in 2017, there were thirty-nine.⁷⁶ These figures are up

69. *Entity Groups and Individuals Charged per Year (FCPA Claims Only)*, *supra* note 65.

70. *See Total and Average Sanctions Imposed on Entity Groups per Year*, FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html?tab=2> (last visited Mar. 23, 2019).

71. *See id.*; *see also* Albea, *supra* note 3 (highlighting six potential explanations for the increase in FCPA enforcement beginning in the mid-2000s: (1) the 2004 Fifth Circuit opinion in *United States v. Kay*, which expanded the scope of the FCPA; (2) the emergence of anti-corruption laws in other countries; (3) the Sarbanes-Oxley Act, which “helped expand the amount of information to which FCPA enforcers have access”; (4) the UN Oil-for-Food Program, which led to a significant number of FCPA prosecutions when it was revealed that over \$1.75 billion in corrupt payments were made to Saddam Hussein’s government; (5) general global business growth, which led to “many smaller American companies [beginning] to participate in the globalized market” and an “enormous amount of capital . . . pumped into international economies”; and (6) the financial crisis of 2008, which led to “a dramatic decline in compliance with the FCPA” as companies faced pressure to maintain viability).

72. *See* Jim Zarroli, *Trump Used to Disparage an Anti-Bribery Law; Will He Enforce It Now?*, NPR (Nov. 8, 2017, 5:03 AM), <https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now>.

73. *Id.*

74. *Id.*

75. Shawn M. Wright, *FCPA Enforcement Under the Trump Administration: No “Piling On,” but Otherwise Business as Usual*, BLANK ROME (Sept. 2018), <https://www.blankrome.com/publications/fcpa-enforcement-under-trump-administration-no-piling-otherwise-business-usual>.

76. *See 2017 Year-End FCPA Update*, GIBSON DUNN (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update>.

nearly 100% from 2012 through 2015, when FCPA enforcement actions hovered between twenty and twenty-seven per year. In 2018, there were thirty-eight FCPA enforcement actions, “resulting in \$1 billion in corporate fines.”⁷⁷

II. U.S.-BASED NONPROFITS OPERATING INTERNATIONALLY

A. U.S. Nonprofits Operating Internationally

There are currently more than 1.56 million nonprofit organizations registered in the United States.⁷⁸ Nonprofits include a variety of organizations, from large corporations, like Big Brothers Big Sisters or Make-a-Wish, to local animal shelters and community theaters.⁷⁹ Nonprofits are often tax-exempt under Internal Revenue Code § 501(c)(3)⁸⁰ since they are organized and operated exclusively for a specified set of exempt purposes, including charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.⁸¹ The “nonprofit” designation does not necessarily mean the organization can never turn a profit, but rather, limits the use of those profits to certain purposes: nonprofits “cannot distribute its profits to any private individual . . . because tax-exempt charitable nonprofits are formed to benefit the public, not private interests.”⁸² While only two percent of nonprofits focus specifically on international development and human rights, an even greater percentage of nonprofits operate internationally⁸³ (for example, the American Red Cross might be technically classified as a health services nonprofit, but it still delivers a significant amount of international aid and operates globally).⁸⁴ According to GuideStar, there are approximately 23,000 U.S. charities focusing their efforts on international development and relief services, international human rights, international peace and security, and other global endeavors.⁸⁵

77. 2018 Year-End FCPA Update, *supra* note 58.

78. See Brice McKeever, *The Nonprofit Sector in Brief*, URB. INST. (Jan. 3, 2019), <https://nccs.urban.org/project/nonprofit-sector-brief>.

79. See *What is a “Nonprofit”?*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/what-is-a-nonprofit> (last visited Mar. 17, 2019).

80. I.R.C. § 501(c)(3) (2019).

81. See *id.*

82. *Myths About Nonprofits*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/myths-about-nonprofits> (last visited Oct. 18, 2019).

83. See *What is a “Nonprofit”?*, *supra* note 79.

84. See *International Services*, AM. RED CROSS, <http://redcross.org/about-us/our-work/international-services.html> (last visited Mar. 17, 2019).

85. See *Directory of Charities and Nonprofit Organizations*, GUIDESTAR, <https://www.guidestar.org/NonprofitDirectory.aspx?cat=6> (last visited Mar. 17, 2019).

1. Role of International Nonprofits

NGOs are “private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services or undertake community development.”⁸⁶ The World Bank has identified two broad categories of NGOs: *operational* NGOs and *advocacy* NGOs. Operational NGOs exist to “design and implement[] . . . development-related projects,” whereas advocacy NGOs aim “to defend or promote a specific cause.”⁸⁷ The World Bank further classifies operational NGOs into three main groups: (1) *community-based organizations*, “which serve a specific population in a narrow geographic area”; (2) *national organizations*, “which operate in individual developing countries,” and; (3) *international organizations*, “which are typically headquartered in developed countries and carry out operations in more than one developing country.”⁸⁸ This Note mainly focuses on international NGOs based in the United States, since these organizations are most definitively under the DOJ’s jurisdiction and could theoretically be subject to FCPA enforcement actions, but occasionally focuses on international NGOs based in other countries for the sake of comparison.

International NGOs are engaged in an exceptionally wide variety of activities, including technical assistance, capacity building, civil society reform, education, water and sanitation, health initiatives, and disaster relief. Between 1970 and 1985, “total development aid disbursed by international NGOs increased ten-fold.”⁸⁹ U.S.-based civil society NGOs such as Save the Children, World Vision, CARE International, Oxfam International, and Mercy Corps have a significant global presence.⁹⁰ In 2017 alone, Save the Children provided services for 155 million children in 120 countries,⁹¹ CARE International reached 63 million people in 93 countries through 950 development and humanitarian aid projects,⁹² and Mercy Corps reached nearly 22 million people in over 40 countries.⁹³ While there is ongoing debate about whether international development NGOs have a positive impact in developing

86. CARMEN MALENA, WORLD BANK, WORKING WITH NGOS: A PRACTICAL GUIDE TO OPERATIONAL COLLABORATION BETWEEN THE WORLD BANK AND NON-GOVERNMENTAL ORGANIZATIONS 7 (1995).

87. *Id.* at 14.

88. *Id.*

89. *Id.* at 16.

90. See Bill Morton, *An Overview of International NGOs in Development Cooperation*, in BRIAN TOMLINSON, AIDWATCH CAN., WORKING WITH CIVIL SOCIETY IN FOREIGN AID: POSSIBILITIES FOR SOUTH-SOUTH COOPERATION? 325, 325–52 (2013).

91. See *Results for Children: 2017 Annual Report*, SAVE THE CHILDREN 4 (2018), <https://www.savethechildren.org/content/dam/usa/reports/annual-report/annual-report/portrait-stc-annual-report-2018.pdf>.

92. See *Annual Report FY17*, CARE INT’L 6 (2018), https://www.care-international.org/files/files/publications/Care_International_FY17_Report_EN_10_Online.pdf.

93. See *2017 Annual Report*, MERCY CORPS 2–5 (2017), https://www.mercycorps.org/sites/default/files/2019-10/Annual_Report_2017.pdf.

countries, there is no doubting the ubiquitous global presence of these organizations.

2. Funding of International Nonprofits

While nonprofit organizations can engage in some for-profit activities, nonprofits frequently lack the funds required to continue operations.⁹⁴ Funding constraints “affect[] large international organizations, such as the United Nations, down to the smallest local NGOs.”⁹⁵ Funding shortages and grant scarcity may also cause NGOs to compromise their mission: “To a certain extent, all donors have their own agenda NGO managers may be compelled to ‘follow the money’ and allow donors to dictate the scope and direction of their activities”⁹⁶ One way to alleviate this pressure is for NGOs to diversify their funding sources.⁹⁷

Typical funding sources for U.S. NGOs are “donations from private individuals . . . private sector for-profit companies, philanthropic foundations, or grants from federal, state, or local government.”⁹⁸ Funding can also come from foreign individuals or foreign governments.⁹⁹ At the international level, the most common sources of funding come from development agencies, such as USAID, UN agencies, multilateral development banks, international foundations, multinational corporations, larger international NGOs, or foreign governments.¹⁰⁰

While international nonprofits are increasingly trying to diversify their funding sources¹⁰¹ by soliciting non-traditional donors, “[s]ignificant parts of the budgets of many NGOs are financed by the U.S. government through the U.S. Agency for International Development (USAID), the U.S. State Department, the Millennium Challenge Corporation, and other government

94. See Mechai Viravaidya & Jonathan Hayssen, *Strategies to Strengthen NGO Capacity in Resource Mobilization Through Business Activities*, UNAIDS BEST PRAC. COLLECTION, at 1 (2001), https://www.unaids.org/sites/default/files/media_asset/jc579-strategies_ngo_en_2.pdf.

95. *Id.*

96. *Id.* (emphasis omitted).

97. See *id.* at 3–6 (explaining how NGOs might diversify their funding—for example, NGOs can tap into corporate donors, charge membership fees, sell promotional items, or solicit in-kind donations or volunteer commitments).

98. U.S. DEP’T STATE, NON-GOVERNMENTAL ORGANIZATIONS (NGOS) IN THE UNITED STATES, (2017), <https://www.state.gov/non-governmental-organizations-ngos-in-the-united-states/>.

99. See *id.*

100. See Laura de Lange, *Fundraising for NGOs 101: Types of Funding for an NGO*, OXFAM NOVIB ACAD. (Dec. 6, 2017), <https://oxfamnovibacademy.wordpress.com/2017/12/06/fundraising-for-ngos-101-types-of-funding-for-an-ngo>.

101. See Viravaidya & Hayssen, *supra* note 94, at 5.

entities.”¹⁰² In fiscal year 2017, USAID assistance amounted to \$22.7 billion.¹⁰³ Among USAID’s top forty “vendors”—worldwide partners who implement programs with USAID funds—Mercy Corps, Save the Children, and World Vision make the list.¹⁰⁴

B. Corruption Risks Faced by Nonprofit Organizations

In 2010, the ABA Section of International Law published an article by Elena Helmer and Stuart H. Deming entitled *Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks*.¹⁰⁵ The authors conducted an anonymous survey of NGOs and other nonprofit organizations on the issue of corruption, specifically asking participant organizations to assess “[h]ow often . . . [they] face corruption risks associated with violating foreign bribery laws and what factors determine these risks.”¹⁰⁶ In the survey of international NGOs, “the answers . . . ranged from ‘never’ to ‘all the time.’”¹⁰⁷ Helmer and Deming identify five factors that determine an NGO’s exposure to bribery risks: “[T]he nature of its activities, the countries it operates in, the structure of the organization, the pattern of communication with its field offices, and the level of internal reporting and other internal controls.”¹⁰⁸

This Note focuses on two of these named risks: the nature of the NGO’s activities and the countries it operates in. The discussion here is limited to these two risk factors since they are the most likely to apply uniquely to NGOs. It is true that some for-profit corporations face some of the same risks as nonprofits. Many for-profits also engage in risky activities and work in corruption-prone countries. As such, the following risks are not *completely* unique to nonprofit organizations, but they are *primarily* unique to nonprofit organizations.

1. Nature of the NGO’s Activities

According to Helmer and Deming, the nature of the NGO’s activities is “the most important factor in determining whether it will face significant bribery risks.”¹⁰⁹ They explain that NGOs organizing environmental programs,

102. Elena Helmer & Stuart H. Deming, *Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks*, 45 INT’L LAW. 597, 601 (2011).

103. See U.S. AGENCY INT’L DEV., FY 2017 DEVELOPMENT AND HUMANITARIAN ASSISTANCE BUDGET (2018), at 1.

104. See U.S. AGENCY INT’L DEV. TOP 40 VENDORS, (2015), <https://www.usaid.gov/results-and-data/budget-spending/top-40-vendors> (it is important to note that the majority of USAID vendors are not nonprofits, but rather management consultancy firms and contractors [such as Chemonics International, Creative Associates, DAI, FHI 360, and Abt Associates] and multilateral organizations [such as the World Bank Group and the United Nations Children’s Fund]).

105. See Helmer & Deming, *supra* note 102.

106. *Id.* at 607.

107. *Id.*

108. *Id.* at 608.

109. *Id.*

providing educational training, or organizing children's camps "would be at a lower risk of violating the FCPA . . . than an NGO involved with providing humanitarian aid or relief and development services."¹¹⁰ In the former situation, the NGO is likely to have greater control over which services are provided and who provides them.¹¹¹ In the latter situation, "much greater opportunities are afforded to local government officials to demand improper payments."¹¹²

Humanitarian and emergency relief are likely the riskiest sectors for NGOs when it comes to bribery concerns. As noted by a participant in the Helmer and Deming survey:

[W]hen a major disaster strikes a country, NGOs delivering humanitarian aid must hire local staff very quickly. . . . [T]hey have no time to do any sort of background or reputational check and no chance to get to know the people involved, which may mean that some of the local staff may sell aid for cash or otherwise misappropriate it.¹¹³

In 2008, Médecins du Monde (MDM) interviewed "the 17 largest French NGOs regarding . . . their approaches to field work and appraising and managing risks, and the procedures they had in place to minimise and prevent such risks."¹¹⁴ The NGOs surveyed indicated that "cases of corruption were part of the significant operational challenges around humanitarian aid" and that humanitarian NGOs are particularly "vulnerable to corruption in the procurement, transport and distribution of medicines, food, building materials and other consumables, particularly in large, rapid-onset emergencies."¹¹⁵

It makes logical sense that emergency relief and humanitarian aid activities would make NGOs susceptible to corruption and bribery. Humanitarian and emergency relief efforts are also monopolized by NGOs— for-profit organizations very rarely work in these areas. Furthermore, "[h]umanitarian action generally takes place in difficult and insecure contexts where corruption is often deeply embedded in societal norms."¹¹⁶ In emergency situations, there is a mentality that people should 'do what they have to do' in order to provide the necessary assistance. This approach undoubtedly puts pressure on NGOs to engage in corrupt behavior.¹¹⁷

110. *Id.*

111. *See id.*

112. *Id.*

113. *Id.* at 620.

114. Jérôme Larché, *Corruption in the NGO world: What It Is and How to Tackle It*, HUMANITARIAN EXCHANGE MAG., at 37 (Oct. 2011), <https://odihpn.org/wp-content/uploads/1999/11/humanitarianexchange052.pdf>.

115. *Id.* at 38.

116. Paul Harvey, *Evidence on Corruption and Humanitarian Aid*, CHS ALL. (Feb. 12, 2015), <https://reliefweb.int/report/world/evidence-corruption-and-humanitarian-aid>.

117. The vast majority of literature regarding corruption and bribery in humanitarian aid contexts deals with the negative collateral effects of corruption—the diversion of donor funds, the inefficiency of service delivery, etc. *See, e.g.*, Charles Kenny, *How Much Aid Is Really Lost to*

2. NGOs Operating in High-Risk Locales

International NGOs are often on the frontlines of the developing world. The level of corruption in a country is a significant risk factor for nonprofits seeking to operate in high-risk areas.¹¹⁸ As Helmer and Deming note, “[i]n countries where corruption is a way of life, local culture may be highly tolerant of graft, even tacitly approving of it as a means of survival.”¹¹⁹ Furthermore, “[a]n NGO’s indigenous staff or its local partners may not see a problem with paying bribes, especially small ones, like facilitating payments”¹²⁰

NGOs, particularly those delivering humanitarian and emergency aid, often operate in high-risk countries where for-profit corporations have little interest. Indeed, “most emergency situations occur in countries where corruption is already widespread.”¹²¹ However, even international NGOs that do not provide humanitarian and emergency aid are more likely to work in low income, high-poverty areas than for-profit corporations—while Google and Amazon probably see few profit-generating opportunities in rural Namibia, post-ISIS Iraq, or a Rohingya refugee camp in Bangladesh, these are the places NGOs might be most active.

In fact, issuers often reference Transparency International’s Corruption Perceptions Index in periodic reports to the SEC warning investors about the corruption risks in specific countries.¹²² The Corruption Perceptions Index (CPI) “ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople”¹²³ In 2018, the ten most corrupt countries ranked by the CPI were Libya, Afghanistan, Equatorial Guinea, Guinea Bissau, Sudan, North Korea, Yemen, South Sudan, Syria, and Somalia.¹²⁴ According to a 2019 global foreign direct investment attractiveness index, both Yemen and Sudan were among the least attractive

Corruption?, CTR. FOR GLOB. DEV.: POL’Y BLOGS (Jan. 23, 2017), <https://www.cgdev.org/blog/how-much-aid-really-lost-corruption>. While corruption is almost never a ‘good choice’ in the long run, there is much less research exploring how nonprofits respond when faced with pressure to bribe. The challenges highlighted in this Note are not meant to justify corruption, but rather, explore the circumstances in which NGOs might be more susceptible to bribery than for-profit corporations.

118. See *Corruption Perceptions Index 2018*, TRANSPARENCY INT’L. (2018), <https://www.transparency.org/cpi2018> [hereinafter *Corruption Perceptions Index*]. While ‘corruption’ and ‘developing countries’ do not necessarily go hand-in-hand, the *Corruption Perception Index* does suggest some degree of correlation.

119. Helmer & Deming, *supra* note 102, at 608.

120. *Id.*

121. Larché, *supra* note 114.

122. See Richard L. Cassin, *TI’s Corruption Perceptions Index Plays Role in SEC Risk Warnings*, FCPA BLOG (Dec. 28, 2017, 1:08 PM), <http://www.fcpcbog.com/blog/2017/12/18/tis-corruption-perceptions-index-plays-role-in-sec-risk-warn.html>.

123. See *Corruption Perceptions Index*, *supra* note 118. Note that the CPI does not measure actual corruption in a country, but rather, how corrupt the country is perceived to be. Regardless, the CPI is widely regarded as a leading indicator of corruption in a given country.

124. See *id.*

countries for foreign direct investment.¹²⁵ The other eight most corrupt countries listed by the CPI were not even ranked in terms of foreign direct investment.¹²⁶ It stands to reason that for-profit corporations are largely avoiding the most corrupt countries in the world, while nonprofit corporations may find their services most needed in those places.

C. Mitigating Corruption Risks: Challenges Faced by Nonprofit Organizations

Even if a nonprofit organization recognizes the corruption risks explained in the preceding section, they may be unable to mitigate those risks for a variety of reasons. The two main mitigation challenges explored in this Note are: (1) the typical NGO's lack of funding and low overhead costs to cover compliance expenditures, and (2) the typical NGO's lack of awareness and oversight regarding corruption risks.

As noted in the previous section, for-profit corporations do face some of the same risks as nonprofits. Similarly, for-profit corporations may have just as much trouble mitigating these risks as nonprofit corporations. Large, well-established nonprofits may even be *better* equipped to address corruption risks than small, for-profit start-up companies. The following challenges are not necessarily unique to nonprofit organizations, but certainly disproportionately affect the ability of nonprofits to establish robust compliance programs.

1. Lack of Funding and Overhead Costs

Unlike large corporations, nonprofits are often unable to fund the development of robust compliance programs. In 2013, five of the top ten largest NGOs included BRAC, the Wikimedia Foundation, Acumen Fund, Partners in Health, and Mercy Corps.¹²⁷ That year, these five organizations combined took in \$438,496,353 in revenue.¹²⁸ In contrast, the *bottom* five Fortune 500 companies in 2013—Nash-Finch Company, CA, Inc., YRC Worldwide Inc., Simon Property Group, Inc., and Old Republic International Corporation—took in over \$21 billion in revenue.¹²⁹ While there are, of course, small for-profit

125. *Ranking History*, GLOBAL FOREIGN DIRECT INV. COUNTRY ATTRACTIVENESS INDEX, <http://www.fdiattractiveness.com/ranking-history/> (last visited May 29, 2020).

126. *Id.*

127. *See Top 100 NGOs*, NGO ADVISOR (2013), <https://www.ngoadvisor.net/top100ngos>.

128. For detailed figures regarding the annual revenues of these five organizations, see IRS, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX PARTNERS IN HEALTH (2013); IRS, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, MERCY CORPS (2013); IRS, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, BRAC USA, INC. (2013); IRS, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, WIKIMEDIA FOUNDATION, INC. (2013); IRS, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, ACUMEN FUND, INC. (2013).

129. For detailed figures regarding the annual revenues of these five companies, see *Annual Report 2013*, SPARTANNASH (2013), <https://s15923.pcdn.co/wp-content/uploads/2015/05/Spartan-Stores-Annual-Report-2013.pdf>; *Building for Innovation: Annual Report 2013*, CA TECHNOLOGIES

companies that have much smaller budgets than some of the largest nonprofits, it is safe to say that, in general, nonprofits have certain financial constraints that most for-profit companies do not experience. In fact, approximately ninety-two percent of public charities “had annual revenue of under one million dollars.”¹³⁰ Most nonprofits would be incapable of paying the multimillion-dollar fines routinely levied against large for-profit corporations for FCPA violations.

As noted in the section above, most nonprofits are grant-funded entities. Most grants provide for some level of overhead—expenses that “include rent, administration costs, salaries, and bills required in order to operate.”¹³¹ Both for-profit and nonprofit organizations have overhead expenses, but nonprofits are frequently vilified for spending “too much” on overhead. According to a study completed in 2012, sixty-two percent of Americans think nonprofits “spend more on overhead than what is reasonable.”¹³² On average, Americans think nonprofit organizations should spend about 22.4 cents of every dollar on overhead costs, but they believe nonprofit organizations actually spend 36.3 cents on the dollar for overhead.¹³³ Essentially, the average American thinks nonprofits “should be 40% more efficient with [their] money than [they] actually [are].”¹³⁴ Since most internationally-active nonprofits are funded by government donors—USAID, State Department, etc.—it logically follows that these donors, who are ultimately answerable to their constituents, would also be sensitive to perceived “excessive” overhead spending. The perception of “unreasonable overhead” expenses exists, for a variety of reasons, including the fact that donors have “few other metrics with which to evaluate nonprofits.”¹³⁵ While investors can look to a variety of benchmarks to assess the financial health of a for-profit corporation, including profitability ratios and debt-to-equity ratios, overhead is one of the few factors donors can consider when determining whether or not to contribute to a nonprofit organization.

Another part of the problem is that overhead funds are necessary to develop effective ethics programs, but many people think the existence of overhead is unethical in itself. Some donors have a mentality that if every dollar

(2013),

http://www.annualreports.com/HostedData/AnnualReportArchive/c/NASDAQ_CA_2013.pdf;

U.S. SEC, FORM 10-K, YRC WORLDWIDE INC. (2013); U.S. SEC, FORM 10-K, SIMON PROPERTY GROUP, INC. (2013); *Annual Report — Form 10-K — Proxy Statement*, OLD REPUBLIC INT’L CORP., 2013.

130. *Myths About Nonprofits*, *supra* note 82.

131. Katie Tatham, *Why Is Overhead Expected in the For-Profit Sector, but a Punishable Offense for Nonprofits?*, GUIDESTAR BLOG (Aug. 1, 2018, 8:00 AM), <https://trust.guidestar.org/why-is-overhead-a-punishable-offense-for-nonprofits>.

132. WHERE’D MY MONEY GO? AMERICANS’ PERCEPTIONS OF THE FINANCIAL EFFICIENCY OF NON-PROFIT ORGANIZATIONS, GREY MATTER RES. & CONSULTING 10 (2008).

133. *See id.* at 4.

134. *Id.* at 12.

135. Tatham, *supra* note 130.

is not going directly to the charitable cause, waste is occurring.¹³⁶ Nonprofits are required to “make financial and operating information public so that donors . . . [are certain their] . . . contributions have been used [effectively].”¹³⁷ The issue is that many donors do not understand what “effective use” really means. According to Helmer and Deming, “most donors give money for specific projects and programs and not for general operations This means that there is practically no money for compliance.”¹³⁸ NGOs would need to justify this expense to donors, and since no NGO has ever been subject to an FCPA enforcement action, it is unlikely that donors would see FCPA compliance as a pressing concern.¹³⁹

Simply put, a for-profit entity can choose its priorities in a way nonprofits cannot. Because nonprofits are aware of these unforgiving overhead expectations, they may respond to the pressure by either lowering their overhead or underreporting their operational costs.¹⁴⁰ Due to this “underspending and underreporting, donors’ unrealistic expectations are maintained and nonprofits struggle to do more with less to keep up.”¹⁴¹

2. Lack of Awareness and Oversight

NGOs are generally aware that corruption exists, but fail to recognize it within their own organizations. In 2014, BDO Australia conducted a survey of nonprofit organizations measuring how organizations manage corruption risks. In 2014, twelve percent of respondents indicated that bribery was their largest type of fraud.¹⁴² In terms of how fraud is perceived by the sector, “[o]nly 28% of respondents [saw] fraud as a problem for their organisation, yet 90% [saw] it as a problem for the sector.”¹⁴³ A full eighty-three percent of respondents believed their organization was at a low risk of fraud.¹⁴⁴ NGOs and nonprofits are typically mission-driven organizations. The purposes of nonprofits are generally virtuous and include activities such as civil society reform, education, water and sanitation, health initiatives, and disaster relief. Even the National Council of Nonprofits declares that “[n]onprofits embody the best spirit and values of our nation. . . . [n]onprofits . . . give shape to our boldest dreams,

136. See Keenan Wellar, *About Nonprofit Waste, Overhead, and Financial Subsistence*, NONPROFIT Q. (Sept. 21, 2018), <https://nonprofitquarterly.org/2018/09/21/about-nonprofit-waste-overhead-and-financial-subsistence>.

137. Will Kenton, *Nonprofit Organization (NPO)*, INVESTOPEDIA (updated May 13, 2019), <https://www.investopedia.com/terms/n/non-profitorganization.asp>.

138. Helmer & Deming, *supra* note 102, at 619.

139. See *id.* at 620.

140. See Tatham, *supra* note 131.

141. *Id.*

142. See Peter Best et al., *Not-For-Profit: Fraud Survey 2014*, BDO AUSTRALIA, 2014, at 39.

143. *Id.* at 6.

144. See *id.*

highest ideals, and noblest causes.”¹⁴⁵ However, “[t]his presumption of virtue leads regulators and stakeholders to neglect issues of nonprofit governance and accountability.”¹⁴⁶

Even when NGOs themselves are aware of corruption risks, it may be difficult to mitigate those risks when the organization relies heavily on volunteers. Unlike for-profit corporations, NGOs frequently engage volunteers to “ensure[] that costs are kept to a minimum.”¹⁴⁷ Unfortunately, this reliance may make it more difficult for NGOs to address corruption concerns. In 2012, Nichole Georgeou published the first ever qualitative empirical study of international development volunteering. Georgeou explained that some of the “volunteers [in her study] expressed a sense of entitlement to the privileges that are enjoyed by Westerners” despite agreeing to live in developing countries.¹⁴⁸ If international development volunteers feel dissatisfied, or even resentful, when they arrive in-country, they may be less likely to care about (or understand) corporate ethics. Further, volunteers may feel like they have nothing to lose when they engage in corrupt behaviors since they are not receiving compensation in the first place.

As highlighted in the previous section, when NGOs operate in corruption-prone countries, they expose themselves to certain risks. However, “local corruption risks are often over-looked, with most head-office staff having little real exposure to (or understanding of) the realities on the ground.”¹⁴⁹ This disconnect makes it difficult for NGOs to adequately address corruption risks. NGOs also frequently “rely on local or in-country delivery partners,” which adds an additional layer of risk since “formal due-diligence processes . . . are yet to be adopted as standard practice within the charity sector.”¹⁵⁰

III. NONPROFITS ARE FUNCTIONALLY EXEMPT FROM FCPA ENFORCEMENT

A. *The U.S. Government Has Little Incentive to Prosecute Nonprofits for*

145. *Nonprofit Impact in Communities*, NAT'L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/nonprofit-impact-communities> (last visited Mar. 17, 2019).

146. Nives Dolšak et al., *The Oxfam Scandal Shows that, Yes, Nonprofits Can Behave Badly. So Why Aren't They Overseen Like For-Profits?*, WASH. POST (Feb. 19, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/19/the-oxfam-scandal-shows-that-yes-nonprofits-can-behave-badly-so-why-arent-they-overseen-like-for-profits/?utm_term=.686bf6c2f546.

147. Jeremy Sandbrook, *10 Corruption Risks Keeping Charities/NGOs Awake at Night*, INTEGRITAS 360 (Aug. 21, 2015), <https://integritas360.org/2015/08/10-corruption-risks-keeping-charities-awake-at-night/>.

148. NICHOLE GEORGEOU, *NEOLIBERALISM, DEVELOPMENT, AND AID VOLUNTEERING* BOOK 165 (Routledge, 1st ed. 2012).

149. Sandbrook, *supra* note 147.

150. *Id.*

FCPA Violations

This Note has explored the significant limitations nonprofits face when attempting to address corruption risks. In some circumstances, it may be financially impossible for nonprofits to develop compliance programs due to restricted overhead funds. It is conceivable that the Department of Justice might choose to prosecute a nonprofit for an FCPA violation to ‘make an example’ of the organization. However, the government has little incentive to prosecute nonprofit organizations for three reasons: (1) the *Principles of Federal Prosecution of Business Organizations* gives the government significant discretion over which matters to pursue, and the U.S. government is unlikely to see much benefit from prosecuting a nonprofit; (2) under the Yates Memo, the Department of Justice has been directed to prioritize the prosecution of individuals over the prosecution of corporations; and (3) it may be difficult to establish “corrupt intent” on behalf of nonprofit organizations.

1. *The Principles of Federal Prosecution of Business Organizations* and Its Effect on DOJ Decision-making

The DOJ does not elect to prosecute (or even investigate) every FCPA matter brought to its attention. The decision to “commence, decline, or otherwise resolve an FCPA matter is guided by the *Principles of Federal Prosecution* in the case of individuals, and the *Principles of Federal Prosecution of Business Organizations* in the case of companies.”¹⁵¹ The *Principles of Federal Prosecution of Business Organizations* provide guidance regarding the prosecution of cases involving corporate wrongdoing, and ten factors are considered “[i]n conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements.”¹⁵² The three factors considered in this Note include (1) “the corporation’s . . . efforts to implement an adequate and effective corporate compliance program or to improve an existing one,” (2) “collateral consequences, including . . . impact on the public arising from the prosecution,” and (3) “the adequacy of remedies such as civil or regulatory enforcement actions.”¹⁵³ This Note focuses on these three factors because they constitute the main reasons the government will likely never prosecute nonprofit organizations for FCPA violations.

As noted above, nonprofits are significantly less likely than their for-profit counterparts to have any compliance programs in place, let alone well-developed ones. While this may make nonprofits seem like easy targets, the DOJ would probably focus more on the nonprofits’ *efforts* to implement compliance programs. Effort is necessarily a function of ability: nonprofits, especially those with small budgets and low support staff numbers, likely do not have the ability to implement strong compliance programs. Thus, any efforts

151. FCPA RESOURCE GUIDE, *supra* note 20, at 52.

152. See U.S. DOJ, JUSTICE MANUAL § 9-28.300 (2018), available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300> (listing all ten factors considered by the Department of Justice).

153. *Id.*

on behalf of nonprofits designed to reduce risk—even meager ones—may receive credit from the DOJ when deciding whether to prosecute a nonprofit for an FCPA violation.

The “collateral consequences” that may arise from prosecution of a nonprofit are likely more acute than those arising from prosecution of a large, for-profit corporation. Nonprofits are often involved in civic-minded activities—promoting environmental causes, public health, children’s rights, democracy, etc. It could be a massive shake to public confidence in nonprofits if the government were to prosecute one for an FCPA violation. Additionally, FCPA prosecution could dissuade nonprofits from operating abroad at all—if nonprofit organizations know there is a credible risk of FCPA prosecution, they might not see the value in investing time and money abroad. They may be deterred by the FCPA’s heavy fines and harsh penalties. On the other hand, prosecuting a nonprofit for an FCPA violation could potentially lead to *positive* collateral consequences precisely because of the public service activities undertaken by most nonprofits. The threat of FCPA prosecution may be the push nonprofits need to develop compliance programs and become serious about avoiding corruption. However, this is ultimately unrealistic for two reasons. First, alternative enforcement mechanisms exist to incentivize nonprofits to develop and maintain compliance programs. Second, nonprofits may not have the resources to develop compliance programs that are up-to-par with their for-profit counterparts.

The third reason the DOJ will likely never prosecute a nonprofit for an FCPA violation is the existence of adequate alternatives, including administrative and regulatory enforcement actions. The government could rely on non-FCPA enforcement mechanisms to ensure that nonprofits are adequately penalized for corrupt acts. This will be covered in greater detail in Part IV of this Note, which explains other ways nonprofits are incentivized to develop anti-corruption compliance programs (including negative incentives, such as funding losses). These penalties can also include debarment from future government contracting and debarment referral to multilateral development banks.

2. The Yates Memo and Prioritizing Individual Criminal Prosecution in Nonprofits

On September 9, 2015, the U.S. Deputy Attorney General issued a memo directed to Department of Justice attorneys asserting that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”¹⁵⁴ While acknowledging the difficulties that come with “pursuing individuals for corporate misdeeds,” the Yates Memo clearly asserts that individual criminal

154. U.S. DOJ, Memorandum from Deputy Attorney General Sally Quillian Yates to Assistant Attorneys General & U.S. Attorneys, at 1 (Sept. 9, 2015).

prosecution for corporate misconduct would become a priority for the DOJ.¹⁵⁵ The Memo explains that “[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”¹⁵⁶ In terms of FCPA prosecutions, this priority shift has materialized: in 2017, nearly two-thirds of FCPA enforcement actions commenced by the DOJ were against individual defendants.¹⁵⁷ During the first half of 2018, “[t]he number of FCPA prosecutions of individual defendants . . . was a relatively modest half dozen . . . [b]ut that number masks the true extent of FCPA-related enforcement as DOJ brought twice that many prosecutions in money laundering and wire fraud actions arising out of FCPA investigations.”¹⁵⁸

Recall that under the FCPA, companies are forbidden from indemnifying their individual employees who are found guilty of FCPA violations. Regardless of the charged individual’s financial situation—they must pay the fines on their own. It seems like this directive could lead the DOJ to increasingly prosecute individual nonprofit officers while sparing the nonprofit organization itself. In fact, this has materialized—some prosecutorial actions taking place even before the Yates Memo. In 2002, Richard G. Pitchford, former Vice President and Country Manager in Turkmenistan of the Central Asia American Enterprise Fund (CAAEF) pleaded guilty to, among other counts, violating the FCPA.¹⁵⁹ According to the information, Pitchford received unlawful kickbacks after securing contracts on behalf of CAAEF.¹⁶⁰ The Central Asian-American Enterprise Fund is a congressionally-funded nonprofit corporation,¹⁶¹ but the organization itself was not subject to any enforcement actions. That same year, Ramendra Basu and Gautam Sengupta, two individuals employed by the World Bank, pleaded guilty to FCPA charges related to bribing a Kenyan foreign official.¹⁶² Basu was sentenced to fifteen months in prison for the FCPA charge,¹⁶³ and Sengupta was sentenced to two months in prison.¹⁶⁴ A few years later in 2005, Richard Novak, an employee of

155. *See id.* at 2. The challenge of holding individuals accountable for corporate misdeeds is primarily that “[i]n large corporations, where responsibility can be diffused and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt.” *Id.*

156. *Id.* at 3.

157. *2017 Year-End FCPA Update*, *supra* note 76.

158. *2018 Mid-Year FCPA Update*, GIBSON DUNN (July 9, 2018), <https://www.gibsondunn.com/2018-mid-year-fcpa-update/>.

159. *See* Plea Agreement, *United States v. Pitchford*, No. 02-365 (D. D.C. 2002).

160. *See* Information, *United States v. Pitchford*, No. 02-365 (D. D.C. 2002).

161. *See Founder*, U.S. CENT. ASIA EDUC. FOUND., <http://www.us-caef.com/founder.html> (last visited Mar. 17, 2019).

162. *See* Plea Agreement, *United States v. Basu*, No. 02-475 (D. D.C. 2002); Plea Agreement, *United States v. Sengupta*, No. 02-040 (D. D.C. 2002).

163. *See* Judgment in a Criminal Case, *United States v. Basu*, No. 02-475 (D. D.C. 2002).

164. *See* Judgment in a Criminal Case, *United States v. Sengupta*, No. CR02-40-1 (D. D.C. 2002).

a sham ‘internet university,’¹⁶⁵ was sentenced to three years’ imprisonment for conspiracy to violate the FCPA and violation of the FCPA.¹⁶⁶ As recently as December 2018, Patrick Ho, Deputy Chairman and Secretary-General of a non-governmental organization with offices in Hong Kong and Virginia, was found guilty of FCPA offenses.¹⁶⁷ In March 2019, Ho was sentenced to three years in prison.¹⁶⁸

3. The Difficulty of Establishing “Corrupt Intent” on Behalf of NGOs

In order to be found guilty under the FCPA anti-bribery provisions, it must be established that the individual or entity had ‘corrupt intent,’¹⁶⁹ interpreted by Congress to mean an intent “to induce the recipient to misuse his official position.”¹⁷⁰ In 1998, the FCPA was amended to include payments made to secure “any improper advantage,”¹⁷¹ but an attempt to gain an improper advantage is not necessary—the act of simply inducing the bribe recipient to misuse his official position is still sufficient, regardless of the desired outcome or benefit to the payor. That said, when someone thinks of a “bribe,” they usually envision selfish motives—a contractor improperly paying a government official to secure a building permit, a businessman engaging in under-the-table deals to win a contract, etc. With for-profit companies, ‘inducing the recipient to misuse his position’ will almost always entail ‘trying to secure an improper advantage.’

With nonprofit organizations, however, corrupt intent is less cut-and-dry. As one organization put it:

Choosing to pay an illegal tax or bribe . . . when confronted by armed guards at a checkpoint may enable the organisation to access people in need, but can be misinterpreted as corruption. Choosing not to pay can mean that humanitarian needs go unmet and that lives may be lost or the risk of harm increased for NGO staff.¹⁷²

165. See Superseding Information, *United States v. Novak*, CR-05-180-3-LRS (E.D. Wash. 2006).

166. See Judgment in a Criminal Case, *United States v. Novak*, CR-05-180-3-LRS (E.D. Wash. 2008).

167. See U.S. DOJ, PATRICK HO, FORMER HEAD OF ORGANIZATION BACKED BY CHINESE ENERGY CONGLOMERATE, CONVICTED OF INTERNATIONAL BRIBERY, MONEY LAUNDERING OFFENSES, (Dec. 5, 2018), <https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-convicted>.

168. See Press Release, U.S. DOJ, Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019), <https://www.justice.gov/usao-sdny/pr/patrick-ho-former-head-organization-backed-chinese-energy-conglomerate-sentenced-3>.

169. See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2018).

170. H.R. REP. NO. 95-640 (1977).

171. 15 U.S.C. § 78dd-1(a)(1)(A).

172. Larché, *supra* note 114, at 37.

Nonprofits are mission-driven organizations—by definition, their purpose is to provide a benefit to society. Is it fair to classify a payment as a “bribe” if the purpose is to help people in need, even if that payment does intend to induce the recipient to misuse his official position? Or, perhaps, it seems unlikely that the Department of Justice would prosecute a nonprofit for giving a life-saving bribe. While not all nonprofit bribes are ‘life-saving,’ nonprofit bribes are almost certainly more likely to lack traditional ‘corrupt intent’ than for-profit bribes. For example, one can envision a hypothetical environmental NGO that bribes a local government official to halt a deforestation plan, or an educational nonprofit that bribes a government official to issue a permit to operate an after-school program. While these examples do not constitute life-or-death circumstances, and may not be morally justified, they probably do not rise to the level of ‘corrupt intent’ that most people imagine when they think about bribery.

In his article entitled *The Good Bribe*, Philip M. Nichols explores whether bribery can *ever* be morally justified.¹⁷³ He dismisses the argument that bribes must sometimes be paid as a price of conducting business. From a moral perspective, “[e]ven if bribery is necessary [to engage in business], an inchoate right to engage in business should be subordinate to a plethora of other rights that would be violated by the payment of that bribe,” such as the right to fair and equitable governance.¹⁷⁴ However, Nichols also argues that bribes may be justified as a way to escape repression under authoritarian regimes¹⁷⁵—regimes that exist in many of the high-corruption countries explored in Part II of this Note. Nichols avoids making a “blanket assertion that bribes may be paid in authoritarian regimes,” in part because “[s]uch bribes might prolong the authoritarian regime and delay reform.”¹⁷⁶ While it is “virtually impossible to measure, the overall harm generated by providing support to an authoritarian regime might outweigh the specific relief from harm secured by paying the bribe.”¹⁷⁷

But under some extraordinary circumstances, ‘good bribes’ can exist. Nichols highlights the actions of Oskar Schindler, who “used his connections with the Nazi party to secure government contracts” and subsequently employed over a thousand Jewish workers, protecting them from “abuse, torture, deportation, and death.”¹⁷⁸ It is clear that Schindler’s acts violated the law, but “[i]t would have been ludicrous to have demanded that Schindler be put on trial for bribery.”¹⁷⁹ Another historical example focuses on bribes paid by the Underground Railroad, “which rescued people from the horrors of slavery.”¹⁸⁰

173. Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647 (2015).

174. *Id.* at 672.

175. *See id.* at 674.

176. *Id.* at 676.

177. *Id.* at 677.

178. *Id.*

179. *Id.* at 679.

180. *Id.*

Nichols argues that similar situations exist in some countries today: there are widespread human rights abuses in North Korea, Eritrea, Syria, to name a few.¹⁸¹ NGOs, who frequently work and provide humanitarian relief in emergency circumstances, are significantly more likely than for-profit corporations to be confronted with borderline ethical dilemmas when it comes to paying bribes.

IV. WHY SHOULD NONPROFITS DEVELOP ANTI-CORRUPTION COMPLIANCE PROGRAMS?

No nonprofit has ever been prosecuted for an FCPA violation. While that certainly does not mean a nonprofit will *never* be prosecuted, organizations do not generally make decisions based on far-flung possibilities. Implementing an FCPA-specific compliance program is unfeasible for most nonprofit organizations—the costs are high, the benefits are low, and nonprofits may not even think they should be concerned about FCPA compliance.¹⁸² It is unlikely that nonprofit organizations will ever be prosecuted—at least not to the fullest extent—under the FCPA.

So, should nonprofits care about developing anti-corruption programs at all? The answer is yes. Even if a nonprofit is never subject to an FCPA enforcement action, it is still important for organizations to develop compliance programs that aim to prevent corruption. If nonprofits do not take corruption concerns seriously, they risk losing donor funding, being subject to suspension and/or debarment, and suffering major reputational harm. While nonprofit organizations may not be concerned with “outright requests for bribes,” they should still be concerned about “corruption in their programs and activities, such as diversion of aid, misuse of funds, fraud in procurement, fraud in reporting documents, and accounting irregularities.”¹⁸³

A. Loss of Donor Funding

Unlike for-profit corporations, NGOs are not selling a product—they may have expertise or other intangible assets, but by and large, NGOs depend on discretionary funding from donors. Because donors are able to withdraw (or refuse to renew) funding for NGO programs, NGOs fear that exposing (or even just talking about) corruption within their organizations may hurt their credibility.¹⁸⁴ In fact, “NGOs are encouraged to skim over inconvenient facts and provide an immaculate account of success to win funding.”¹⁸⁵ While these

181. *See id.* at 681.

182. Helmer & Deming, *supra* note 102, at 610–11.

183. *Id.* at 610–11 (footnotes omitted).

184. *See* Jo Adetunji, *Dealing with Corruption in Your NGO*, GUARDIAN (Jan. 28, 2013, 7:06 AM), <https://www.theguardian.com/global-development-professionals-network/2013/jan/28/corruption-ngo-development-aid>.

185. Angela Crack, *The Oxfam Scandal Has Taught Us There Is No Reward for Honest Charities*, GUARDIAN (Mar. 16, 2018, 3:07 PM), <https://www.theguardian.com/voluntary-sector-network/2018/mar/16/government-donors-reward-honest-charities-oxfam>.

concerns are understandable, several recent NGO corruption cases demonstrate that burying bad behavior may be worse than exposing it.

In February 2018, it was revealed that Oxfam, a global humanitarian organization, “employed aid workers in Haiti who hired prostitutes” while “top management seems to have ignored warnings about what was going on.”¹⁸⁶ In the aftermath, “[d]onations from individual donors have plummeted” and corporate support was withdrawn.¹⁸⁷ Oxfam also agreed to stop bidding for U.K. Government funding until their internal processes were perfected.¹⁸⁸ While most people would agree that sex-abuse scandals are more reprehensible than economic crimes, such as bribery, the Oxfam case reveals that donors are sensitive to NGO misconduct and will not hesitate to revoke funding if misconduct is revealed.

It is unclear whether Oxfam would have fared better if they had acknowledged their employees’ transgressions earlier—since donors have discretion over funding, perhaps they *still* would have revoked funding out of an abundance of caution. However, DanChurchAid (DCA), a Danish NGO, “has been publishing its annual corruption report since 2008, and a second which logs all complaints made against the organisation.”¹⁸⁹ DCA “found that funding and donations were not adversely affected by its drive for public transparency.”¹⁹⁰

While major misconduct might cause some donors to withdraw funding in its totality, U.S. nonprofits are also at risk of having specific programs cancelled if they conduct bribes with U.S. government funding. All federal grant recipients are required by law to “disclose, in a timely manner . . . all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.”¹⁹¹ If the recipient “fails to comply with Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency . . . may impose additional conditions,”¹⁹² such as requiring additional financial reports or project monitoring.¹⁹³ If deemed appropriate, the awarding agency may also withhold cash payments pending correction of the deficiency, disallow the use of funds for the activity not in compliance, wholly or partly suspend or terminate the federal award, or withhold further federal awards for the project or program.¹⁹⁴ In the most

186. Dolšak et al., *supra* note 146.

187. *Id.*

188. See Courtney Columbus, *After Oxfam’s Sex Scandal: Shocking Revelations, a Scramble for Solutions*, NPR (Mar. 16, 2018, 4:17 PM), <https://www.npr.org/sections/goatsandsoda/2018/03/16/591191365/after-oxfams-sex-scandal-shocking-revelations-a-scramble-for-solutions>.

189. Adetunji, *supra* note 184.

190. *Id.*

191. 2 C.F.R. § 200.113 (2015).

192. *Id.* § 200.338.

193. *See id.* § 200.207.

194. *See id.* § 200.338.

serious cases of noncompliance, the Agency can seek suspension or debarment.¹⁹⁵

B. Possible Suspension and Debarment

For U.S. nonprofits, suspension and debarment could be just as harmful as an FCPA enforcement action. The concept of suspension and debarment was briefly explained in Part I of this Note. The Federal Acquisition Regulations (FAR) provides that government agencies can ban companies from conducting business with the federal government for a variety of reasons, including bribery.¹⁹⁶ Even if the corporate misdeed does not rise to the level of bribery, an agency can debar the entity for “[c]ommission of any . . . offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”¹⁹⁷ Notably, while suspension and debarment is frequently invoked after a conviction or civil judgment, this need not be the case.¹⁹⁸

The decision to debar “is not made by DOJ prosecutors or SEC staff, but instead by independent debarment authorities within each agency, such as the Department of Defense or the General Services Administration.”¹⁹⁹ As explained in Part II of this Note, many U.S.-based international nonprofits are funded by government agencies, such as USAID and the State Department. These Agencies could theoretically ban nonprofits from doing business with the entire government—if “more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension . . . shall . . . coordinate . . . resolution among all interested agencies.”²⁰⁰

Suspension and debarment are not intended to be punitive, and sanctions are intended to “be imposed only in the public interest.”²⁰¹ However, a decision to suspend or debar a nonprofit organization could have a devastating effect on a nonprofit’s operations. Even though the DOJ cannot ask an agency to suspend or debar a nonprofit, the existence of these sanctions may be effective alternatives to traditional FCPA prosecution.

C. Reputational Effects

NGOs that engage in corrupt behavior may suffer severe reputational harm. As highlighted multiple times in this Note, nonprofit organizations are often treated by donors and society as the ‘gold standard’ for ethical corporate behavior. Nonprofit organizations are mission-driven and exist to serve the

195. *See id.* § 200.113.

196. 48 C.F.R. § 9.406-2 (2015).

197. *Id.*

198. *See id.* § 9.406-3.

199. FCPA RESOURCE GUIDE, *supra* note 20, at 70.

200. 48 C.F.R. § 9.402 (2014) (citation omitted).

201. *Id.*

public interest. When for-profit corporations engage in bad behavior, society may feel disappointment, but it does not elicit the kind of ‘shock to the conscience’ that nonprofit corporate misbehavior elicits. For-profit corporations exist to increase shareholder value—if a corporation, unethically, decides that engaging in bribery or other corrupt practices will increase shareholder value, this should not come as a surprise to anyone. However, nonprofit organizations have no such loyalties. There are no shareholders to enrich.

Since nonprofits are often publicly funded, an argument exists that they should be held to an even higher standard than for-profit corporations. However, as noted previously, many nonprofits fear that exposing corruption within their organizations may hurt their credibility.²⁰² In the aftermath of the Oxfam case, Oxfam not only experienced a major decline in funding, but also “depleted its moral authority.”²⁰³ When misconduct is revealed in one nonprofit, it “can deplete the moral capital of the entire sector.”²⁰⁴

Reputational concerns are, of course, linked to funding concerns—NGOs with bad reputations are less likely to obtain funding for their programs. However, NGOs should be concerned about their reputations on a more fundamental level. As reiterated throughout this Note, NGOs are mission-driven entities—they exist to further public interests and serve marginalized populations. Bribery is inconsistent with these purposes. NGOs should be motivated to develop compliance programs not only because corruption might cause funding to dry up. They should be motivated to develop compliance programs simply because corruption is wrong.

CONCLUSION

The FCPA was originally enacted in 1977 as an effort to punish and deter entities that bribe foreign officials. In the last forty years of the statute’s existence, enforcement activities have grown exponentially. While the FCPA elicits significant anxiety in for-profit entities, which have frequently been prosecuted, nonprofit organizations have operated unscathed by the FCPA’s harsh penalties. While there is no explicit carve out for nonprofits in the FCPA—in fact, the Department of Justice has affirmed that the statute does apply to nonprofits—no nonprofit has ever been prosecuted for an FCPA violation. This does not mean nonprofit organizations are free from corruption. Nonprofits actually face a number of risks when operating internationally that render them uniquely vulnerable to corruption and bribery, including the humanitarian nature of nonprofit activities and the fact that many nonprofits work in high-risk countries. Furthermore, even if nonprofits wanted to mitigate those risks, they may face insurmountable challenges—including the fact that nonprofits often lack the requisite funds to develop robust compliance programs. Donors, and sometimes the nonprofits themselves, are also inclined

202. See Adetunji, *supra* note 184.

203. Dolšak et al., *supra* note 146.

204. *Id.*

to overlook corruption risks since nonprofits are presumed to be more ‘virtuous’ than their for-profit counterparts. In part because of these obstacles, the Department of Justice will likely never prosecute a nonprofit for an FCPA violation—thus, nonprofits are functionally exempt from the statute. However, nonprofits should still be motivated to develop anti-bribery compliance programs because of other, non-FCPA consequences nonprofits could face should they become ensnarled in a corruption scandal—namely, the loss of donor funding and a major blow to the organization’s reputation. For some nonprofits, those consequences can be even more devastating than prosecution.