



United States Congress
Commission on Security and Cooperation in Europe

Hearing on
"Confronting Kremlin and CCP Corruption"

November 18, 2021

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Chairman Cardin, Co-Chairman Cohen, Ranking Member Wicker, Ranking Member Wilson, and members of the Commission:

Thank you for holding this important hearing, and for inviting Transparency International to speak to you about four actions that Congress can take right now to help combat foreign corruption and kleptocracy.

My name is Scott Greytak and I serve as the Director of Advocacy for the U.S. office of Transparency International. Transparency International, or "TI," is the oldest and largest organization focused on combating corruption in the world. TI has chapters in over 115 countries, and partners with governments, businesses, civil society, and citizens alike to promote transparency and curb the abuse of power in the public and private sectors.¹

Overview of Four Opportunities for Congressional Action

Today, corruption is the lifeblood of authoritarian governments around the world. Unable to derive legitimacy and power from the consent of the governed, authoritarian regimes such as Russia and China instead derive power through the mass pilfering of their people and public resources. It is through such large-scale embezzlement, paired with the strategic

¹ For more information, please visit Transparency International's website at www.transparency.org.

use of bribery and other forms of corruption, that these regimes maintain and grow their political and economic power.

In doing so, they suppress free speech and other human rights, contribute to mass migration, strengthen organized crime, encourage violent extremism, and threaten global political and economic security. Acknowledging the raw power, scale, and consequence of foreign corruption, the Biden Administration has, for the first time in U.S. history, designated the fight against foreign corruption as a core U.S. national security interest.²

We urge the U.S. Congress to respond to this growing threat by passing a series of new laws that are specifically designed to disrupt foreign corruption and kleptocracies. As discussed in sections II-IV below, Congress can begin to do so by:

- 1. Including in the final, conference version of the National Defense Authorization Act for Fiscal Year 2022 (the “NDAA”) the six bipartisan anticorruption bills that were included, and passed, by the House in its version of the NDAA;³**
- 2. Ensuring that the Treasury Department issues robust, comprehensive, and highly effective rules implementing the 2021 Corporate Transparency Act;⁴**
- 3. Passing the bipartisan Foreign Extortion Prevention Act,⁵ sponsored by Commissioners Whitehouse and Tillis, to prohibit corrupt foreign officials from demanding bribes from U.S. companies and workers; and**
- 4. Adopting new laws and supporting new rules, including the bipartisan ENABLERS Act,⁶ sponsored by Representatives Malinowski and Salazar as well as Commissioners Cohen and Wilson, to require certain professional service providers, including corporate formation agents, investment advisers, and**

² See The White House, “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,” June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

³ See Transparency International U.S. Office, “House Approves Half Dozen Measures to Fight Foreign Corruption via Defense Bill,” Sept. 24, 2021, available at <https://us.transparency.org/news/house-approves-half-dozen-measures-to-fight-foreign-corruption-via-defense-bill/> (also included in appendix).

⁴ See “CSO Letter of Support on the Corporate Transparency Act Rulemaking,” Oct. 21, 2021, available at <https://us.transparency.org/resource/cso-letter-of-support-on-the-corporate-transparency-act-rulemaking/> (also included in appendix). See also Transparency International U.S. Office, “TI-US Comment: ANPRM on Corporate Transparency Act Implementation,” May 5, 2021, available at <https://us.transparency.org/resource/anprm-cta/> (also included in appendix).

⁵ H.R. 4737, Foreign Extortion Prevention Act, <https://www.congress.gov/bill/117th-congress/house-bill/4737?s=1&r=94>.

⁶ H.R. 5525, ENABLERS Act, <https://www.congress.gov/bill/117th-congress/house-bill/5525/all-info>.

attorneys involved in corporate formation or financial activities, to perform anti-money laundering due diligence.

Absent strong interventions from the U.S. government, corrupt and kleptocratic regimes such as Russia and China will continue to threaten the national security of the United States and its allies, endanger public safety and global health, impoverish vulnerable societies, sow the seeds of economic and political disruption, and imperil the prospects and promises of democratic governance across the world.

These interventions would be supported by an ideologically diverse community of civil society organizations whose commitment to eliminating corruption and kleptocracy has never been stronger. Given the increased attention in the media and the growing number of multilateral meetings and summits, including the upcoming Summit for Democracy, there is a new opportunity for partnership and impact between government and outside stakeholders.

The past few months alone have shown that this opportunity is real and growing. In June, this Commission helped bring together Republican and Democratic members to form and launch the first-of-its-kind Caucus against Foreign Corruption and Kleptocracy.⁷ The Caucus has been the launching pad for nearly every significant global anticorruption and counter-kleptocracy measure currently before the Congress. It is a true, active, day-in, day-out testament to the resonance, bipartisan character, and scalability of this work.

The Administration's June 3rd National Security Study Memorandum designating the fight against corruption as a core national security interest ("NSSM") puts bluntly why this work fundamentally matters to the United States. It states that by going after corruption, the United States can secure a "critical *advantage*" for itself and for other democracies, and, moreover, that doing so is "essential to the preservation of our democracy."⁸

Below are four opportunities for this Congress to help turn those statements into reality.

⁷ See "Congressional Caucus Against Foreign Corruption and Kleptocracy," https://www.legistorm.com/organization/summary/174773/Congressional_Caucus_Against_Foreign_Corruption_and_Kleptocracy.html.

⁸ The White House, "Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption," June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joseph-r-biden-jr-on-the-national-security-study-memorandum-on-the-fight-against-corruption/> (emphasis added).

I. Ensure that the Anticorruption Measures Included in the House NDAA Are Also Included in the Final, Conference NDAA

The House version of the annual NDAA, approved in late September, includes six bipartisan anticorruption measures that are universally supported by the anticorruption community.⁹ The six bills are:

1. The Global Magnitsky Human Rights Accountability Reauthorization Act (Senate NDAA Amendment #3980, S. 93),¹⁰ led by Sen. Cardin (D-MD) with Sen. Wicker (R-MS) as an original cosponsor, and approved by the Senate Foreign Relations Committee in June, would reauthorize and enhance the Global Magnitsky Act, the U.S.'s most powerful anticorruption accountability tool focused on targeted sanctions. To date, the United States has used this legacy of Sergei Magnitsky to impose sanctions on more than two hundred individuals and entities across dozens of countries. The Act has also inspired similar sanctions regimes in the European Union, the United Kingdom, Australia, and Canada,¹¹ creating additional opportunities for coordinated sanctions.
2. The "Navalny 35" measure (S. 2986)¹² led by Sen. Cardin (D-MD) with Sen. Wicker (R-MS) as an original cosponsor, would require the administration to evaluate for Global Magnitsky Act sanctioning the 35 people identified by Alexey Navalny's Anti-Corruption Foundation as those chiefly responsible for stealing from the Russian people and repressing human rights—denying known kleptocrats, human rights abusers, and other criminals access to the United States and its financial system.
3. The Foreign Corruption Accountability Act (Senate NDAA Amendment #4296, H.R. 3887),¹³ led by Sens. Blumenthal (D-CT) and Rubio (R-FL), would authorize visa bans on any foreign national who engages in an act of corruption against a U.S. person. This distinct authority could be used to sanction, for example, the 35 individuals listed by Alexey Navalny's Anti-Corruption Foundation, or Chinese officials or

⁹ See, e.g., "Letter in Support for Including Six Bipartisan Anticorruption Measures in Forthcoming Defense Bill," Oct. 27, 2021, available at <https://us.transparency.org/resource/letter-in-support-for-including-six-bipartisan-anticorruption-measures-in-forthcoming-defense-bill/> (also included in appendix).

¹⁰ S. 93, Global Magnitsky Human Rights Accountability Reauthorization Act, <https://www.congress.gov/bill/117th-congress/senate-bill/93>

¹¹ See Beth Van Schaack, "Reauthorizing and Strengthening the Global Magnitsky Act," Just Security, Apr. 14, 2021, available at <https://www.justsecurity.org/75659/reauthorizing-and-strengthening-the-global-magnitsky-act/>.

¹² S. 2986, A bill to require a review of sanctions with respect to Russian kleptocrats and human rights abusers, <https://www.congress.gov/bill/117th-congress/senate-bill/2986>.

¹³ H.R. 3887, Foreign Corruption Accountability Act, <https://www.congress.gov/bill/117th-congress/house-bill/3887?q=%7B%22search%22%3A%5B%22Foreign+Corruption+Accountability+Act%22%5D%7D&s=3&r=1>.

businesspeople involved in Belt & Road Initiative projects who engage in acts of corruption¹⁴ against U.S. businesspeople, aid workers, employees of civil society organizations, or other U.S. persons.

4. The TRAP Act (Transnational Repression Accountability and Prevention Act) (Senate NDAA Amendment #4400, S. 1591, H.R. 4806),¹⁵ led by Sen. Wicker (R-MS) with Sen. Cardin (D-MD) as an original cosponsor, would establish priorities of U.S. engagement at the International Criminal Police Organization (“INTERPOL”), identify areas for improvement in the U.S. government’s response to INTERPOL abuse, and protect the U.S. judicial system from abusive INTERPOL notices. TRAP offers a direct means of pushing back against the Chinese Communist Party and Kremlin’s abuses of INTERPOL “red notices” to repress dissent and retaliate against whistleblowers, anticorruption activists, and journalists.¹⁶ Importantly, TRAP would codify into U.S. law that the United States may not arrest and extradite the subject of a red notice absent an independent arrest warrant issued pursuant to federal law.
5. The Combating Global Corruption Act (CGCA) (Senate NDAA Amendment #3981, S. 14, H.R. 4322),¹⁷ led by Sen. Cardin (D-MD) with Sen. Young (R-IN) as an original cosponsor, and approved by the Senate Foreign Relations Committee in June, would require the State Department to produce a public report that evaluates country-by-country compliance with internationally recognized anticorruption norms and standards, and that places each country in one of three tiers. Foreign persons who have “engaged in significant corruption” in those countries that score in the bottom tier would be evaluated for Global Magnitsky Act sanctioning.

¹⁴ This includes, but is not limited to, soliciting or accepting bribes, using the authority of the state to extort payments, or engaging in extortion, as well as conspiring to engage in such corruption, or knowingly and materially assisting, sponsoring, or providing significant financial, material, or technological support for such acts of corruption. See Foreign Corruption Accountability Act, available at <https://www.congress.gov/bill/117th-congress/house-bill/3887/all-info?r=36&s=1>.

¹⁵ S. 1521, TRAP Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/1591?s=1&r=3>.

¹⁶ See, e.g., Ted Bromond, “China Confesses to Abusing Interpol System in the United States,” *Forbes*, June 25, 2019, available at <https://www.forbes.com/sites/tedbromund/2019/06/25/china-confesses-to-abusing-interpol-system-in-the-united-states/?sh=66cd55c411c2> (“China is using Interpol, and a variety of extra-legal means, to pursue a highly publicized list of individuals accused of crimes with a distinctly political edge”); Kathy Gilsinan, “How Russia Tries to Catch Its Criminals by Abusing Interpol,” *The Atlantic*, May 30, 2018, available at <https://www.theatlantic.com/international/archive/2018/05/russia-interpol-abuse/561539/> (“International law-enforcement cooperation is a fine thing when, as it often does, it helps apprehend legitimate criminals trying to evade justice in their own country. But ultimately the international justice system is only as good as the countries writing and enforcing the laws—and some notions of ‘justice’ are not fit for export overseas.”).

¹⁷ S. 14, Combating Global Corruption Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/14>.

6. The Justice for Victims of Kleptocracy Act (Senate NDAA Amendment #4296, S. 2010, H.R. 3781),¹⁸ led by Sens. Blumenthal (D-CT) and Rubio (R-FL), would create a public U.S. Department of Justice (“DOJ”) database that lists, by country, the total amount of assets stolen by corrupt foreign officials that has been successfully recovered by the United States. This would have listed, for example, the millions of dollars recovered by the DOJ related to the *Prevezon* money laundering and fraud scheme uncovered by Sergei Magnitsky.¹⁹ Such transparency would attract attention and create a sense of urgency for the U.S. government to return recovered funds via aid organizations or other appropriate recipients who use them to benefit the victims of kleptocracy.

Altogether, these six bills would enhance the U.S.’s ability to sanction corrupt actors, increase transparency, encourage cooperative anticorruption efforts among the United States and its allies, and provide actionable information to victims of corruption. On their own—but especially together—they can help provide strong new means of combating corruption across the world, including corrupt activities by Russian and Chinese actors that are actively undermining rules-based systems.

II. Ensure that Treasury’s Rule Implementing the Corporate Transparency Act is Robust, Comprehensive, and Highly Effective

According to the World Bank and the United Nations Office on Drugs and Crime, anonymous companies were used in over 70 percent of grand corruption cases they reviewed to either carry out the corrupt activity or to hide its proceeds.²⁰ In January, Congress passed the Corporate Transparency Act (“CTA”) to effectively abolish anonymous companies in the United States, finding that “malign actors seek to conceal their ownership” of companies in order to facilitate illicit activity, including “acts of foreign corruption.”²¹

¹⁸ S. 2010, Justice for Victims of Kleptocracy Act of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/2010?s=1&r=2>.

¹⁹ See U.S. Department of Justice, “Acting Manhattan U.S. Attorney Announces \$5.9 Million Settlement Of Civil Money Laundering And Forfeiture Claims Against Real Estate Corporations Alleged to Have Laundered Proceeds of Russian Tax Fraud,” May 12, 2017, available at <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-59-million-settlement-civil-money-laundering-and>.

²⁰ See Emile van der Does de Willebois et al., “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It,” World Bank, 2011, available at <https://openknowledge.worldbank.org/handle/10986/2363>.

²¹ See The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020) § 6403. See also Scott Greytak, “Explained: The Corporate Transparency Act,” Jan. 25, 2021, available at <https://www.transparency.org/en/blog/explained-the-corporate-transparency-act>.

The Treasury Department and the Financial Crimes Enforcement Network (“FinCEN”) are currently drafting the rule that will implement the CTA. Treasury and FinCEN must meet the clear intent of the CTA by delivering a robust, comprehensive, and highly effective rule that ensures that corporations, limited liability companies, and other similar entities cannot continue to serve as the “getaway cars” for corrupt activity.²²

In particular, and as conveyed in a recent letter signed by over 30 civil society organizations²³ to the Acting Director of FinCEN, Himamauli Das, Treasury and FinCEN must ensure that the rule:

1. Maintains the comprehensive definition of “beneficial owner” expressly included in the CTA;
2. Provides for broad coverage of the types of entities required to register, including, but not limited to, all non-exempted trusts;
3. Limits the interpretations of exemptions to the CTA’s reporting requirement to, as best as possible, include only those categories of entities that file beneficial ownership information elsewhere with authorities, or that are truly low risk for money laundering, terrorist financing, and other harms; and
4. Allows for timely and complete access to beneficial ownership information for all law enforcement and for those with legal obligations to protect our financial system.

Given the global impact that an effective U.S. beneficial ownership directory could have on identifying and disrupting corrupt and kleptocratic networks, stemming the rise of authoritarianism, and defending human rights—including by empowering international partners and other parts of the U.S. government to counter illicitly financed malign behavior from Russia and China—Congress must help ensure that the final rule adheres to these important principles. In addition, Congress must help ensure that a draft rule is published for the consideration of the international community prior to the U.S. Summit for Democracy on December 9-10.²⁴

III. Pass the Foreign Extortion Prevention Act

Globalization and a growing international economy require that more and more American companies rely on foreign markets. And with more than two-thirds of all foreign countries

²² See Alexandra Gillies, “U.S. Policy on Shell Companies Enables Corruption. Congress Can Change That,” National Resource Governance Institute, July 12, 2017, available at <https://resourcegovernance.org/blog/us-policy-shell-companies-enables-corruption-congress-can-change>.

²³ See “CSO Letter of Support on the Corporate Transparency Act Rulemaking,” Oct. 21, 2021, available at <https://us.transparency.org/resource/cso-letter-of-support-on-the-corporate-transparency-act-rulemaking/> (also included in appendix).

²⁴ See U.S. Department of State, “The Summit for Democracy,” available at <https://www.state.gov/summit-for-democracy/>.

currently dealing with high levels of corruption,²⁵ this means that more and more American workers are finding themselves doing business in countries with corrupt officials. In fact, when American workers enter these environments, be it former Soviet states like Ukraine and Belarus or growing economic powers like China, they are often specifically targeted for exploitation.

For example, from 2000 to 2007, officials in the Russian Attorney General's office used their positions to receive bribes from Hewlett Packard in exchange for a valuable contract.²⁶ In these situations, when a U.S. company crosses the line by offering to pay a bribe or by actually paying a bribe to a foreign government official, the Department of Justice rightfully intervenes to punish the company under the federal Foreign Corrupt Practices Act.²⁷ In the Hewlett Packard case, Hewlett Packard ultimately paid nearly \$60 million in fines for their role.²⁸ But bribery is a two-way street, and we will never mitigate the continuing costs of corruption if the corrupt government official who demands or accepts those bribes goes unpunished. Right now, though, whether a corrupt official is ever brought to justice is up to the official's home government, and according to the Organisation for Economic Co-operation and Development ("OECD"), only about 20 percent of government officials who demand or receive bribes are ever prosecuted.²⁹ Sure enough, in the Hewlett Packard case, the Russian bribe-takers were never prosecuted.

This "incomplete justice" not only leaves American companies and workers unprotected in corrupt environments, but it gives less-scrupulous foreign competitors—especially state-owned companies from authoritarian countries like China and Russia that are more than willing to pay bribes to grow their influence and undercut U.S. competitiveness—a distinct advantage.³⁰ China, in particular, is notorious for its use of strategic bribery to capture business opportunities. For example, the chief executive of a Chinese energy conglomerate closely aligned with the Chinese government offered bribes of \$2 million and \$500,000,

²⁵ Transparency International, 2020 Corruption Perceptions Index, available at <https://www.transparency.org/en/cpi/2020/index/nzl>.

²⁶ U.S. Department of Justice, "Hewlett Packard Russia Pleads Guilty to Sentenced for Bribery of Russian Government Officials," Sept. 11, 2014, available at <https://www.justice.gov/opa/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials>.

²⁷ 15 U.S.C. §§ 78dd-1, et seq.

²⁸ U.S. Department of Justice, *supra* note 26.

²⁹ See OECD, "Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?" Dec. 11, 2018, available at www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm. See also Gillian Dell, "Exporting Corruption," 2020, https://images.transparencycdn.org/images/2020_Report-Full_Exporting-Corruption_EN.pdf (finding that of 47 countries analyzed, only four were actively enforcing their anti-bribery laws).

³⁰ See Tom Firestone & Maria Piontkovska, "Two to Tango: Attacking the Demand Side of Corruption," *The American Interest*, Dec. 17, 2018, https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/#_ftnref10.

respectively, to the presidents of Chad and Uganda in exchange for opening the countries' oil and gas markets to Chinese businesses.³¹ In Malaysia, Chinese officials even offered to help conceal the siphoning of \$4.5 billion from Malaysia's public development fund in exchange for stakes in lucrative infrastructure projects.³²

It's time for the United States to even the scales of justice and impose a cost on those officials who would solicit or accept bribes. Dozens of other countries,³³ including the United Kingdom, Germany, and France have passed laws making it a crime for a foreign official to demand a bribe, and the United Nations Convention Against Corruption—to which the United States has been a signatory since 2003—expressly encourages countries to criminalize the “demand side” of foreign bribery.³⁴ The importance of this two-directional legal framework has been reinforced by the OECD, which noted:

To have a globally effective overall enforcement system, both the supply-side participants (i.e., the bribers) and the demand-side participants (i.e., the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.³⁵

The Foreign Extortion Prevention Act (“FEPA”) is a bipartisan, bicameral bill³⁶ that would create these risks by making it a crime for a foreign official to demand or accept a bribe

³¹ See Jenni Marsh, “The rise and fall of a Belt and Road billionaire,” CNN, available at <https://www.cnn.com/interactive/2018/12/asia/patrick-ho-ye-jianming-cefc-trial-intl/>.

³² See Tom Wright & Bradley Hope, “China Offered to Bail Out Troubled Malaysian Fund in Return for Deals,” *The Wall Street Journal*, Jan. 7, 2019, available at <https://www.wsj.com/articles/how-china-flexes-its-political-muscle-to-expand-power-overseas-11546890449>.

³³ Other countries that have criminalized the demand-side of bribery include Albania, Algeria, Armenia, Bolivia, Bosnia and Herzegovina, Bulgaria, the Republic of Congo, Croatia, Estonia, France, Georgia, Germany, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Malaysia, Macedonia, Moldova, Montenegro, the Netherlands, Poland, Romania, Russia, Serbia, Slovenia, Sweden, Switzerland, Ukraine, and the United Kingdom. See Firestone & Piontkovska, *supra* note 30, and Lucinda Low, Sarah R. Lamoree, and John London, “The ‘Demand Side’ of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn’t Enough,” *Fordham L. Rev.* Vol. 84, 2 (2015), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5145&context=fllr>.

³⁴ See *generally* United Nations Convention against Corruption, Sept. 2004, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf. Article 16 of the Convention recommends criminalizing both the “offering or giving to” and “the solicitation or acceptance by a foreign public official or an official of a public international organization.” *Id.* at art. 16.

³⁵ OECD, *supra* note 29, at 9.

³⁶ H.R. 4737, Foreign Extortion Prevention Act, <https://www.congress.gov/bill/117th-congress/house-bill/4737?s=1&r=94>.

from a U.S. person or company, or in any way that substantially impacts U.S. interstate commerce.³⁷

Criminalizing the demand side of foreign bribery would yield a host of important outcomes: It would protect U.S. companies and American workers doing business abroad, protect vulnerable populations in those countries from subpar services or deprivation of services, protect the environment by holding accountable those who would turn a blind eye to illegal mining, logging, or poaching of wildlife in exchange for bribes, bring new pressure on foreign governments to prosecute bribery offenses taking place in their own backyards, better align U.S. law with international best practices, establish a consistent U.S. policy against bribery, and help reassert the United States as a global anticorruption leader, among others.³⁸ FEPA also has remarkable cross-partisan support: It was recently introduced in the Senate by Commissioners Whitehouse (D-RI) and Tillis (R-NC) and in the House by Representatives Jackson Lee (D-TX) and Curtis (R-UT), and is backed by the U.S. Chamber of Commerce, Greenpeace USA, and two dozen organizations and prominent individuals working to combat the abuse of power in the public and private sectors.³⁹

Statements from leading U.S. anticorruption experts⁴⁰ and Transparency International chapters around the world⁴¹ make clear that FEPA would have immediate, practical applications.⁴² For example, according to Transparency International Moldova:

³⁷ See *generally* Transparency International U.S. Office, “Fight Foreign Corruption, Protect U.S. Business,” July 2021, available at <https://us.transparency.org/resource/foreign-extortion-prevention-act-fepa-factsheet/> (also included in appendix).

³⁸ See Daniel T. Judge, “Receiver Beware: How the Foreign Extortion Prevention Act Could Change the Foreign Corrupt Practices Act,” 2020 U. Ill. L. Rev. Online 152, 161 (Aug. 26, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683382.

³⁹ See Letter of Support for the Foreign Extortion Prevention Act, Nov. 2, 2021, available at <https://us.transparency.org/resource/civil-society-letter-of-support-for-the-foreign-extortion-prevention-act/> (also included in appendix).

⁴⁰ Transparency International U.S. Office, “What U.S. Experts Are Saying About the Foreign Extortion Prevention Act” November 2021, available at <https://us.transparency.org/resource/what-us-experts-are-saying-about-the-foreign-extortion-prevention-act/> (also included in appendix).

⁴¹ Transparency International U.S. Office, “What Transparency International Chapters Around the World Are Saying About the Foreign Extortion Prevention Act,” November 2021, available at <https://us.transparency.org/resource/what-transparency-international-chapters-around-the-world-are-saying-about-the-foreign-extortion-prevention-act/> (also included in appendix).

⁴² As discussed at length in a new white paper from our office, FEPA is clearly within Congress’s ambit of authority, is constitutional, and is unimpeded by existing legal and doctrinal obstacles to robust extraterritorial application, making it enforceable as a matter of law. See *generally* Scott Greytak, “The U.S. Legal Framework for Extraterritorial Application of American Criminal Law & The Foreign Extortion Prevention Act,” November 2021, available at <https://us.transparency.org/resource/fepa-white-paper/> (also included in appendix). As with other U.S. laws that apply extraterritorially, FEPA would also be enforceable as a matter of *practice*. Those

FEPA is a positive initiative that could bring many benefits to Moldova. In Moldova, foreign companies are hesitant to bring their business to the country due to potential corruption issues and a corrupt justice system. There is significant risk for investors because of fear that their investments won't be protected. Moldovans are eager to have a stronger market for foreign investment that can help grow our economy. Even public awareness that the U.S. will seek to prosecute corrupt officials who demand bribes would be a good initiative for fighting corruption in Moldova, and could bring change.

According to Transparency Venezuela:

We think that FEPA would be a good tool for going after corrupt officials in Venezuela. The prosecutor's office can prosecute petty corruption, but they cannot go after high-ranking officials, senior civil servants, or grand corruption. Grand corruption is rampant in Venezuela, and does not only involve high officials, but also the people who have worked with them, many of whom have companies in the U.S.

IV. Adopt New Laws, and Support New Rules, to Require Certain Professional Service Providers to Perform Anti-money Laundering Due Diligence

Last month, the largest exposé of global financial data in history, known as the Pandora Papers, revealed how the world's elite—including hundreds of political leaders responsible for transparency laws in their countries—use the secretive “offshore industry” to conceal their assets and grow their personal wealth.⁴³ Central to this groundbreaking exposé was a high-profile spotlight on the role that professional service providers in the United States play in helping to move and hide money in the U.S. and elsewhere. As detailed throughout many of the Pandora Papers' stories, the United States has become complicit in global illicit financial flows by playing host to a highly specialized group of “enablers” who help the world's elite move, hide, and grow their money.

For example, the Pandora Papers detailed how a Roman Catholic order, disgraced by an international pedophilia scandal, secretly held nearly \$300 million in U.S. real estate and

indicted by the DOJ for FEPA violations, for instance, could be apprehended by U.S. law enforcement if present in, or upon entering, the territory of the United States, and by foreign law enforcement upon entering a jurisdiction with which the United States has a relevant extradition treaty, pursuant to a U.S. extradition request. The U.S. government could also freeze assets associated with the planning, implementation, or concealment of a FEPA violation. And as mentioned above, the threat of any of these actions may increase the likelihood that the offender's home country pursues criminal and/or civil penalties before the U.S. government does. *See id.*

⁴³ International Consortium of Investigative Journalists, “Pandora Papers,” available at <https://www.icij.org/investigations/pandora-papers/>.

other assets through a network of trusts and an investment company in Florida.⁴⁴ The funds were amassed at the same time victims of the sexual abuse were seeking compensation for the harm.⁴⁵ The Pandora Papers also revealed how an adviser to the former Prime Minister of Malaysia used affiliates of an American law firm, Baker McKenzie, to assemble and consult with a network of companies—despite the adviser fitting the “textbook definition” of a high-risk client.⁴⁶ The adviser went on to use his companies to help steal \$4.5 billion from Malaysia’s public investment fund in “one of the world’s biggest-ever financial frauds.”⁴⁷

The Biden Administration’s NSSM calls out the role of professional service providers in “enable[ing] the movement and laundering of illicit wealth” in the United States.⁴⁸ Congress can and must act to close the loopholes that allow such complicity from American enablers by requiring professional service providers who serve as gatekeepers to the U.S. financial system, including corporate formation agents, investment advisers, and attorneys involved in corporate formation or financial activities, to perform full due diligence on their prospective clients. One compelling approach for doing so is the bipartisan ENABLERS Act, sponsored by Representatives Malinowski (D-NJ) and Salazar (R-FL) as well as Commissioners Cohen (D-TN) and Wilson (R-SC).⁴⁹ Congress can also urge the Biden Treasury Department to use its existing authority to require investment advisers—which are currently only required to ensure that they take on “qualified purchasers” or “accredited investors”⁵⁰—to perform full due diligence checks on their prospective clients.

We hope Congress seizes the opportunity before it to adopt new laws specifically designed to disrupt foreign corruption and kleptocracy. Such action has the potential to expose and counteract the consequences of corruption in all corners of the world, and would begin to

⁴⁴ See Spencer Woodman, “As Catholic order fought sex abuse claims, secret trusts devoted to it poured millions into American rental properties,” International Consortium of Investigative Journalists, Oct. 5, 2021, available at <https://www.icij.org/investigations/pandora-papers/legion-of-christ-us-property-evictions-offshore/>.

⁴⁵ See *id.*

⁴⁶ See Sydney P. Freedberg, Agustin Armendariz, and Jesus Escudero, “How America’s biggest law firm drives global wealth into tax havens,” International Consortium of Investigative Journalists, Oct. 4, 2021, available at <https://www.icij.org/investigations/pandora-papers/baker-mckenzie-global-law-firm-offshore-tax-dodging/>.

⁴⁷ *Id.*

⁴⁸ The White House, *supra* note 2.

⁴⁹ H.R. 5525, ENABLERS Act, <https://www.congress.gov/bill/117th-congress/house-bill/5525/all-info>.

⁵⁰ Transparency International U.S. Office, “Private Investment Funds Are A High Risk for Money Laundering,” May 2021, available at <https://us.transparency.org/resource/money-laundering-risks-of-private-investment-funds/> <https://us.transparency.org/resource/money-laundering-risks-of-private-investment-funds/> (also included in appendix).

treat the fight against foreign corruption and kleptocracy as a true national security priority.

Thank you again for the opportunity to share my views today, and I look forward to working with you on these important issues.

Appendix

1. Transparency International U.S. Office, "Combating Global Corruption: A Bipartisan Plan," February 2021, also available at <https://us.transparency.org/resource/combating-global-corruption/>
2. Transparency International U.S. Office, "House Approves Half Dozen Measures to Fight Foreign Corruption via Defense Bill," Sept. 24, 2021, also available at <https://us.transparency.org/news/house-approves-half-dozen-measures-to-fight-foreign-corruption-via-defense-bill/>
3. CSO Letter of Support on the Corporate Transparency Act Rulemaking," Oct. 21, 2021, also available at <https://us.transparency.org/resource/cso-letter-of-support-on-the-corporate-transparency-act-rulemaking/>
4. Transparency International U.S. Office, "TI-US Comment: ANPRM on Corporate Transparency Act Implementation," May 5, 2021, also available at <https://us.transparency.org/resource/anprm-cta/>
5. "Letter in Support for Including Six Bipartisan Anticorruption Measures in Forthcoming Defense Bill," Oct. 27, 2021, also available at <https://us.transparency.org/resource/letter-in-support-for-including-six-bipartisan-anticorruption-measures-in-forthcoming-defense-bill/>
6. Transparency International U.S. Office, "Fight Foreign Corruption, Protect U.S. Business," July 2021, also available at <https://us.transparency.org/resource/foreign-extortion-prevention-act-fepa-factsheet/>
7. Letter of Support for the Foreign Extortion Prevention Act, Nov. 2, 2021, also available at <https://us.transparency.org/resource/civil-society-letter-of-support-for-the-foreign-extortion-prevention-act/>
8. Transparency International U.S. Office, "What Transparency International Chapters Around the World Are Saying About the Foreign Extortion Prevention Act," November 2021, also available at <https://us.transparency.org/resource/what-transparency-international-chapters-around-the-world-are-saying-about-the-foreign-extortion-prevention-act/>
9. Transparency International U.S. Office, "What U.S. Experts Are Saying About the Foreign Extortion Prevention Act" November 2021, also available at <https://us.transparency.org/resource/what-us-experts-are-saying-about-the-foreign-extortion-prevention-act/>
10. Scott Greytak, "The U.S. Legal Framework for Extraterritorial Application of American Criminal Law & The Foreign Extortion Prevention Act," November 2021, also available at <https://us.transparency.org/resource/fepa-white-paper/>
11. Transparency International U.S. Office, "Private Investment Funds Are A High Risk for Money Laundering," May 2021, also available at <https://us.transparency.org/resource/money-laundering-risks-of-private-investment-funds/> <https://us.transparency.org/resource/money-laundering-risks-of-private-investment-funds/>

A black and white photograph of the U.S. Capitol dome at night, illuminated against a dark sky. The dome's intricate architectural details are visible, and the surrounding building is partially lit. In the foreground, a statue on a pedestal is visible, and the steps of the Capitol are faintly seen.

COMBATING GLOBAL CORRUPTION: A BIPARTISAN PLAN

21 Commitments for 2021

By Transparency International—U.S. Office

Transparency International is a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.

The U.S. office focuses on stemming the harms caused by illicit finance, strengthening political integrity, and promoting a positive U.S. role in global anti-corruption initiatives. Through a combination of research, advocacy, and policy, we engage with stakeholders to increase public understanding of corruption and hold institutions and individuals accountable.

Gary Kalman, **Director**

Scott Greytak, **Director of Advocacy**

Annalise Burkhart, **Operations Associate**

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COMBATING GLOBAL CORRUPTION: A BIPARTISAN PLAN

The U.S. Office of Transparency International is uniquely indebted to **Paul Massaro**, Policy Advisor to the U.S. Commission on Security and Cooperation in Europe (the “Helsinki Commission”), and the Members of the Commission whose commitments to countering kleptocracy and preserving public integrity he champions with persistence, humility, and unrivaled passion.

TI U.S. is also indebted to **Elaine Dezenski** and **Josh Birenbaum** for their excellent and meticulous research and drafting.

We also acknowledge and appreciate the organizations and individuals that contributed expertise and feedback on drafts of this report, including Brad Brooks-Rubin, David Luna, Daniel Weiner, Drago Kos,

Elise Bean, Jen Ahearn, Josh Kirschenbaum, Joe Kraus, Josh Rudolph, Jonathan Rusch, Jodi Vittori, Jim Wasserstrom, Kyle Matous, Louise Shelley, Matthew Stephenson, Nate Sibley, Rob Berschinski, Rick Messick, Tom Cardamone, Trevor Sutton, Sarah Chayes and Zoe Reiter.

We thank the Open Society Policy Center for funding this report.

This report was prepared by Transparency International’s U.S. Office (TI-US). It represents their research and viewpoints, and does not necessarily reflect those of other Transparency International chapters, partners, funders, or board members.

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Combating Global Corruption: A Bipartisan Plan, Published February 2021

Design: Mardiyah Alexandra Miller

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“ This report identifies practical steps to combat corruption. We know what to do; the question now is whether we have the political will to get the stuff done.

Elise Bean

Anti-Corruption Investigator and Former Staff Director and Chief Counsel to the Senate Permanent Subcommittee on Investigations

“ Systemic corruption is proving to be one of the gravest challenges of our generation. Its influence can be found in almost every international and national security crises of our day. The recommendations in this report should be familiar by now -- they have been discussed, honed, and tested against likely scenarios. They are logical, feasible, and that holy grail, “achievable.” Given the degree of danger, they represent a reasonable, effective and necessary approach.

Sarah Chayes

Author of *On Corruption in America -- And What Is at Stake?* and Former special assistant to the Chairman of the Joint Chiefs of Staff

“ Whether you care about kleptocrats and terrorists or bribery and inequality, this plan addresses countless threats at once with the most comprehensive bipartisan roadmap for what would be the most sweeping U.S.-led anti-corruption policy reform campaign in history.”

Josh Rudolph

Fellow for Malign Finance at the Alliance for Securing Democracy, German Marshall Fund of the United States

“ These recommendations provide a thought provoking, must-do list which will further protect the United States from the scourge of illicit financial flows and money laundering related to transnational crime, kleptocracy, corruption and tax evasion. It is long past the time when the US should be considered the go-to place to launder the proceeds of crime. Implementing these recommendations will underscore the government’s commitment to addressing not only the flow of illicit money but also the underlying criminal activity.

Tom Cardamone

President and CEO of Global Financial Integrity

“ TI U.S.’s 21 commitments for 2021 represent a bold and comprehensive agenda that marks a new phase of anti-corruption legislation and policy action in the U.S., recognizing corruption’s corrosive effects on democracy, security, economic growth, and human rights. By addressing corruption risks and remedies systemically, the TI agenda moves anti-corruption efforts -- once and for all -- from the margins to its rightful place in the mainstream of the U.S policy agenda.

Elaine Dezenski

Managing Partner, LumiRisk, LLC and Senior Advisor, Foundation for Defense of Democracies

“ Government, whether in the United States or elsewhere, should work in the public interest, not for the personal benefit of those in power. These common-sense, bipartisan solutions were crafted in this spirit. They would improve millions of lives, and deserve serious consideration from U.S. policymakers

Daniel I. Weiner

Deputy Director, Election Reform Program at the Brennan Center for Justice

“

The recommendations in this report provide important next steps for our government in addressing the corrosive impact of corruption on our society, political and economic systems. Far-reaching in their scope, they are fundamental building blocks of a more transparent society. They are also key in ensuring that the corruption that is so entrenched in other societies does not continue to undermine the rule of law in the United States. Advocating for these changes is fundamental to our national security and the human security of Americans.

Louise Shelley

Author of *Dark Commerce*, Professor and Director of the Terrorism, Transnational Crime and Corruption Center (TraCCC) at George Mason University

“

Globalized kleptocracy is just as serious and pervasive a threat as communism was in the 20th Century, but the United States is still playing catch-up. The proposals put forward here by Transparency International have been consistently advocated by conservative and progressive experts alike as necessary steps to protect our prosperity and security from the corrosive effects of dirty money from China, Russia and other regimes that disregard the rule of law.

Nate Sibley

Fellow, Hudson Institute's Kleptocracy Initiative

“

President Biden has declared that fighting kleptocracy, corruption, and illicit finance will be a cornerstone of his administration's foreign policy, and an important domestic legislative priority. Transparency International's '21 Commitments for 2021' supplies a valuable blueprint for how the Administration, and Members of Congress from both parties, can move forward in translating this vision into reality. TI's proposals are ambitious but practical, and offer the prospect of genuine near-term progress on a set of issues that often seem intractable. This document will serve as an invaluable foundation for anticorruption reformers both inside and outside the U.S. government.

Matthew C. Stephenson

Eli Goldston Professor of Law, Harvard Law School and Editor-in-Chief, Global Anticorruption Blog

“

This excellent report makes a compelling case for why combating corruption at home and abroad should be an urgent national security priority. Just as importantly, it offers concrete, much-needed recommendations on how the United States can better identify and sanction corrupt actors and those who enable them. By following the roadmap set out in the report, the United States can once again become a global leader in the fight against graft.

Trevor Sutton

Senior Fellow for National Security and International Policy, Center for American Progress

05

Introduction

10

Who are the people?

1. Extend anti-money laundering obligations to those who serve as “gatekeepers” to the U.S. financial and political systems.
2. Root out foreign corruptive influence in the U.S.
3. Prevent “Golden Visa” shopping.
4. Protect American whistleblowers.
5. Provide a safe haven for foreign whistleblowers and anti-corruption advocates.

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Where is the money?

6. Establish a cross-border payments database.
7. Publicize the repatriation of foreign stolen assets recovered by U.S. law enforcement.
8. Crack down on trade-based money laundering through greater transparency and better information sharing.

9. Require extractive companies to disclose payments to foreign governments.

10. Require that the procurement process for U.S. foreign assistance allocations to third parties be fully transparent.

28

What are the loopholes?

11. Criminalize the demand side of foreign bribery.
12. Extend money laundering predicate offenses to include violations of foreign law that would be predicate offenses in the U.S.
13. Expand, and make permanent, the use of geographic targeting orders.
14. Promote the widespread adoption of Legal Entity Identifiers, a global standard for corporate identification.
15. Actively enforce the existing requirement that money services businesses register at the federal level.

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How do we strengthen institutions?

16. Strengthen the U.S. Treasury’s tools for combating money laundering.
17. Coordinate, combine, and focus the foreign anti-corruption efforts of federal agencies into a coherent, whole-of-government approach.
18. Establish an Anti-corruption Action Fund to finance U.S. anti-corruption efforts across the world.
19. Mandate the development of a “National Authoritarian Influence Risk Assessment.”
20. Track country progress on freely made anti-corruption commitments.
21. Improve the Mutual Legal Assistance Treaty process.

WHY CORRUPTION?

If you pull on the thread of virtually any global threat, you will find corruption at its source. Corruption funds terrorists¹ and protects drug traffickers.² It erodes basic human rights³ and exacerbates environmental degradation.⁴ It distorts the private sector,⁵ overheats the real estate market,⁶ and poisons the global banking system.⁷ It destabilizes regions and causes wars,⁸ violence,⁹ and repression.¹⁰ It leads to crackdowns on free expression and dissent.¹¹ It causes bridges to collapse¹² and trains to derail.¹³ It steals livelihoods¹⁴ and dignity,¹⁵ and causes poverty on a massive scale.¹⁶ At its worst, corruption affects every institution, undermining our political system¹⁷ and hobbling our economy.¹⁸



Corruption is not merely abstract. Where it is endemic, it wrecks the daily lives of citizens. In Venezuela, for example, government corruption has wreaked such havoc on the economy that one out of every three citizens report skipping meals just to survive.

Corruption is not abstract. Where it is endemic, it wrecks the daily lives of citizens. In Venezuela, for example, government corruption has wreaked so much havoc on the economy that one out of every three citizens report skipping meals just to survive.¹⁹ In countries like the U.S., the facilitation of corruption is rampant. While we assume that systemic corruption is something that happens “somewhere else,” corruption – often assisted by U.S. citizens and U.S. policies – is in fact bringing drugs over our borders,²⁰ aiding terrorists who attack U.S. soldiers overseas,²¹ and assisting corrupt foreign leaders who undermine our democracy.²²

Corruption, defined by Transparency International as the abuse of entrusted power for private gain,²³ occurs whenever someone seeks a personal advantage at the expense of the public good, undermining institutions and destroying trust in the process.

A police officer demanding a bribe, for example, is corruption at its most local level. This simple action can destroy citizens’ trust in government. However, corruption can also take place on a large scale, often referred to as grand corruption²⁴ or kleptocracy, meaning “rule by thieves.” Entire governments can be taken over and run by corrupt politicians, dictators, or kings. When these small groups of powerful individuals treat their governments as their personal bank account, a kleptocracy is born. For example, between 2009 and 2016, former Prime Minister Najib Razak of Malaysia stole as much as \$4.5 billion from his country’s national development fund. When authorities finally raided his house, they found 12,000 pieces of jewelry, including 14 tiaras. As a result, as many as 7 million rural Malaysians stand to lose out on hospitals, roads, and other infrastructure that bring health and prosperity to their communities.

Like a virus that must spread to survive, kleptocrats and dictators have turned to the use of corruption as a strategic weapon of the state. China, for instance, actively fed corruption in Sri Lanka, helping then-president Mahinda Rajapaksa build what has been called the world's emptiest airport, with no daily commercial flights, in exchange for maritime access to the strategically important island along one of the world's busiest shipping lanes. Now there tend to be more birds and elephants in the airport than passengers.²⁵

From Russia and China to North Korea and Iran, corruption has been weaponized to prop

up corrupt regimes, influence elections, attack journalists, and seize strategic infrastructure. In 2016, for example, Russia engaged in a campaign to influence the outcome of the U.S. presidential election that included targeting all 50 states' election systems, compromising government networks, and financing widespread social media disinformation.²⁶ Like Russia, China is using bribes, misinformation, and quid pro quos (Latin for "something for something") to influence global policy throughout Asia, Africa, Latin America, and Europe. European Union (EU) officials, for example, have been accused of passing sensitive information to

China and influencing EU policy in exchange for remuneration in the form of travel and lodging, including a trip to the 2008 Beijing Olympic Games, among other gifts, from the Chinese government.²⁷

This large-scale weaponization of corruption by authoritarian regimes represents an immediate threat to the U.S. and its allies. Not since 9/11 has the United States been so directly under attack.

Combating corruption no longer resides on the fringes of U.S. foreign policy. Nor can it be dismissed as a side business undertaken by a small number

01

The U.S. office of Transparency International, with input from a broad, diverse, and bipartisan range of stakeholders and partners, proposes in this report a concrete and integrated set of actions that the new Congress and new Administration can take. These actions are organized around four fundamental questions:

WHO ARE THE PEOPLE?

There are good actors, seeking to report and call out corruption, and there are bad actors, seeking to hide their ill-gotten gains, exploit loopholes, and evade detection. This set of proposals protects the whistleblowers, catches the bad actors, and disables the facilitators of corruption.

02

WHERE IS THE MONEY?

Corruption is, at its base, about money and influence. Follow the money, and you will find the corruption. This set of proposals strengthens the power of the U.S. government and its allies to follow the stolen money and root out corrupt actors at their source.

of nonprofits and activists who operate on the margins. As evidenced recently by the broad coalition that worked to end the abuse of anonymous shell companies by corrupt actors – a coalition that included law enforcement, financial institutions, faith groups, business trade associations, civil rights organizations, environmental groups, and congressional leaders across the political spectrum – the fight against corruption has America behind it.²⁸ Now, more than ever, combating corruption is fundamental to protecting a free, open, and democratic way of life.

Corruption, however, is extraordinarily complex. Its impact on governance is multifaceted, and disentangling it requires an integrated approach. The interdependencies inherent in the global financial system, in cross-border supply chains, and in regional and international political and legal systems, among other variables, demonstrate that corruption cannot be addressed piecemeal or ad hoc. It is a whole-system problem that demands a whole-system solution.

Without a whole-of-government approach to corruption, corrupt actors will find weak points and

exploit them, like the kleptocrats who use existing loopholes in our due diligence rules to stash stolen money in U.S. real estate,²⁹ or the Chinese firms that use bribes to displace Western competition abroad.³⁰ As a new Congress and a new Administration assume office, we have an opportunity to build a new, integrated approach to combating corruption, one that reinforces both the U.S. commitment to the rule of law and U.S. global leadership in the fight to end corruption.

03

WHAT ARE THE LOOPHOLES?

A single corruption loophole is like a single hole in a roof: only one can be enough to compromise the whole system. Corruption thrives because loopholes exist – either in the laws themselves or in the lax enforcement of those laws. Most loopholes are unintended and closing them is often relatively straightforward. Others exist because powerful enablers intentionally inserted them. Either way, loopholes facilitate crime, corruption, terrorism, and dictatorships. Without the systematic closing of these loopholes and the vigorous enforcement of anti-corruption laws, corruption will always find a way.

04

HOW DO WE STRENGTHEN INSTITUTIONS?

To fundamentally address corruption, some institutions must be strengthened, while others must be structurally reformed. This set of proposals aims to build well-resourced, reliable institutions that can work hand-in-glove with anti-corruption allies and watchdogs to stamp out corruption worldwide.

THERE ARE GOOD ACTORS, SEEKING TO REPORT AND CALL OUT CORRUPTION, AND THERE ARE BAD ACTORS, SEEKING TO HIDE THEIR MONEY, EXPLOIT LOOPHOLES, AND EVADE DETECTION.

WHO ARE THE PEOPLE?

There are good actors, seeking to report and call out corruption, and there are bad actors, seeking to hide their money, exploit loopholes, and evade detection. This set of proposals protects the whistleblowers, catches the bad actors, and disables the facilitators of corruption.



01

EXTEND ANTI-MONEY LAUNDERING OBLIGATIONS TO THOSE WHO SERVE AS “GATEKEEPERS” TO THE U.S. FINANCIAL AND POLITICAL SYSTEMS.

Behind every foreign corrupt official is a professional who does the dirty work of moving, disguising, and hiding stolen assets. In 2016, for example, the “Panama Papers” – an enormous leak of financial and

legal records of the now-defunct Panamanian law firm Mossack-Fonseca – exposed the role of professional middlemen who set up thousands of anonymous shell companies that were used by corrupt politicians, celebrities,

and businesses for everything from facilitating fraud to tax evasion.³¹

When kleptocrats wish to move their money to the U.S. or its territories, lawyers, accountants,

and consultants are often the ones who make it happen. These “gatekeepers” regularly take advantage of legal loopholes to ignore with impunity even the most blatant signs that they are assisting corrupt or illicit financial activity. Under existing rules, for example, they can secretly purchase high-value art, real estate, or private equity investments to launder and legitimize corrupt assets. Providing an aura of legitimacy and professional qualifications, these gatekeepers allow corruption to thrive.

While banks, bank holding companies, casinos, mutual funds, and certain other financial services businesses are required to perform due diligence on their customers to establish whether they present corruption risks, other gatekeepers to the U.S. financial and political systems are not required to do so, providing ample room for bad actors to move dirty money

and exert foreign corruptive influence without raising a red flag with U.S. authorities. This leaves a gaping hole in the ability of the U.S. government to track kleptocrats and find stolen funds before they are lost in an opaque web of transactions. And when dirty money finds its way to lobbyists and others who seek to influence our political system, the dangers of lax oversight undermine our very system of government.

Rather than being the first lines of defense in the fight against corruption, these professionals provide, with legally sanctioned deniability, the lubrication that keeps stolen money coursing through the U.S. financial and political systems. The U.S. can – and must – bring professional service providers into the fight against corruption by requiring them to perform client due diligence and flag suspicious behavior.

When kleptocrats wish to move their money to the U.S. or its territories, lawyers, advisors, accountants, and consultants are the ones who make it happen. These “gatekeepers” regularly take advantage of existing legal loopholes to ignore with impunity even the most blatant signs that they are assisting corrupt and illicit financial activity.



WHAT CAN BE DONE?

- | | | |
|--|---|--|
| <p>+ Require lawyers, accountants, art dealers, investment advisers (including private equity advisers, hedge fund and venture capital advisers and managers), lobbyists, real estate professionals,</p> | <p>corporate formation agents, and third-party service providers (including money services businesses and other payment processors, as well as check consolidation and cash vault service</p> | <p>providers) to conduct due diligence on prospective clients and to establish effective anti-money laundering programs.</p> |
|--|---|--|

ROOT OUT FOREIGN CORRUPTIVE INFLUENCE IN THE U.S.

Foreign corruptive influence is the corrosive attempt to undermine our government by kleptocrats, dictators, and other corrupt regimes. Like physical corrosion, corruptive influence works by weakening the foundation on which our democracy rests.

When we catch foreign enemies infiltrating social media platforms and swaying public opinion with disinformation,³² we see the danger of foreign corruptive influence. When foreign adversaries influence U.S. policy by secretly funding

well-connected Washington lobbyists to advance foreign interests,³³ we see the danger of foreign corruptive influence. When foreign interests spend money to influence U.S. elections, whether through secret political contributions or by exploiting the corporate form, we see foreign corruptive influence undermining American self-government.³⁴

Democracy and the American way of life are contingent upon free and fair elections, transparency in governing, and freedom from corruptive foreign

influence. Russia's interference in the 2016 presidential election, where a Kremlin-backed campaign of misinformation and hacking of election systems sought to sway the outcome, was a sobering reminder that the future stability of the world's democracies depends on taking a forceful stand against foreign corruptive influence in our elections and throughout our digital lives. China, too, has weaponized corruption in both the developed and developing world to mold foreign policies to its liking and steal sensitive national security information.



Together, China and Russia have spent hundreds of millions of dollars to directly interfere with the democratic process in the U.S. and other countries around the world.³⁵ Unfortunately, much of that interference here in the U.S. is funneled through loopholes in our outdated campaign finance, lobbying, and ethics laws.

This is a new Cold War, fought with tweets and retweets, where the dangers lie not in the proliferation of warheads, but in the proliferation of misinformation, and where secret deals bring in foreign money that sells out the American people.

Without concrete steps to address foreign corruptive influence, and proper resources to enforce the law, America's adversaries will continue to subvert our political process, skew traditional and social media content to their interests, and sow divisiveness and discord in the hopes of undermining the United States. Unless the U.S. takes aggressive steps to discover and

stop those who are working to undermine American democracy, we run the risk of losing a new Cold War before most Americans even know we're fighting one.

This is a new Cold War, fought with tweets and retweets, where the dangers are not the proliferation of warheads, but the proliferation of misinformation, and where backroom deals bring in foreign money that sells out the American people.



WHAT CAN BE DONE?

- + Strengthen the enforcement of the Foreign Agents Registration Act, which requires U.S. citizens to disclose lobbying done on behalf of foreign governments, by providing adequate resources for meaningful enforcement and routine auditing;³⁶
- + Require senior-level federal employees to disclose job negotiations and job offers from foreign entities;³⁷
- + Require candidates for federal office to report offers of assistance from foreign entities to law enforcement;³⁸
- + Require nonprofits to publicly disclose their foreign funders;³⁹
- + Ban foreign entities from paying for ads that support or oppose a candidate, or for online or digital ads⁴⁰ that mention a candidate within a certain number of days before an election;
- + Ban foreign governments and foreign political parties from paying for "issue ads" (ads that discuss political issues like the defense budget or taxes rather than specific candidates) during a federal election year;⁴¹ and
- + Ban subsidiaries of foreign companies, and companies with significant foreign ownership, from all non-issue-ad political spending.

PREVENT “GOLDEN VISA” SHOPPING.

For the kleptocrat who already has everything, the ultimate prize is often a ticket to America – and the United States has made it shockingly easy to get one.

Programs that allow wealthy people to invest money in a country's economy in exchange for a visa or citizenship, known as “golden visa” programs, exist in many countries, and are particularly appealing for people seeking to enter the U.S. or Europe. The golden visa program in the U.S. is known as an EB-5 visa, and can be obtained by investing less than \$1 million in certain areas in the U.S.

Not surprisingly, this is a “golden” opportunity for foreign corrupt officials to launder money by transferring their stolen assets to safe havens where they can “invest” it in real estate and businesses—and get a first-world passport to boot.

In the European Union, golden visas can be particularly problematic. In Cyprus, for example, a 2020 investigation revealed that golden visa programs were widely exploited by convicted corrupt foreign officials and other criminals,

such as Maleksabet Ebrahimi, who is wanted by Iran on numerous charges, including money laundering, fraud, and leading an organized criminal group.⁴² The Cyprus golden visa program, however, turned a blind eye to Ebrahimi, granting him and others like him visa-free travel throughout the twenty-seven EU member countries.⁴³ Such golden visa programs create opportunities for corrupt actors to move their money and their family members out of the reach of their home country's jurisdiction.

Expedited secondary passports under golden visa programs can also help obscure the identities of criminals and allow them to avoid sanctions. For example, the U.S. Department of Treasury's Financial Crimes Enforcement Network (or FinCEN) flagged the island nation of St. Kitts' citizenship-by-investment program as a conduit for illicit financial activity in 2014. Eventually, St. Kitts recalled 16,000 passports, and all St. Kitts citizens lost their visa-free access to Canada as a result.⁴⁴

Golden visas not only raise the risk of kleptocrats flying to

America or Europe with stolen money, they also represent a serious American national security hazard that can be exploited by our adversaries. For example, more than 80 percent of applications to the U.S. EB-5 golden visa program over the past decade were filed on behalf of Chinese citizens.⁴⁵ The EB-5 program has become an avenue through which Chinese state-sponsored individuals can seek U.S. residency as a “means of extending surveillance and intelligence gathering” for the Chinese Communist Party.⁴⁶ The program has similarly drawn criticism for being exploitable by corrupt Russian nationals.⁴⁷

We should not permit investor visas to be abused by foreign corrupt officials or nations to steal money or undermine America's security. The EU and the countries of the Five Eyes (the U.S., UK, Australia, New Zealand, and Canada) are the countries in which foreign officials most often “shop” for a golden visa. It therefore falls to the U.S. and its allies to stop our immigration systems from being gamed by those who would do us harm.



WHAT CAN BE DONE?

- + Direct the State Department and the Department of Homeland Security to establish and maintain a common, U.S.-led investor visa denials government database to prevent “golden visa” shopping and expose corrupt actors who are denied access to the U.S. By enabling the Five Eyes, the EU, and other allies to both contribute to the database and confirm which individuals have been denied investor visas
- + by other jurisdictions, we can help protect investor visa programs in the U.S. and around the world from abuse;
- + Direct the Department of Homeland Security to develop stronger due diligence procedures for determining whether applicants are state-sponsored, and whether the funds associated with EB-5 applicants originate from a legitimate source; and
- + Temporarily halt the EB-5 program on national and economic security grounds until the program’s well-known vulnerabilities are addressed.

04

PROTECT AMERICAN WHISTLEBLOWERS.

Uncovering corruption often begins with whistleblowers. Frequently the first to identify wrongdoing, and often those with the most to lose by doing so, whistleblowers are on the front lines of the fight against corruption.⁴⁸ Yet too often they face retaliation and dire consequences as a result. And while existing whistleblower laws provide some degree of protection, many are out of date, allow for retaliation, and fail to cover the full range of whistleblower activities.

For instance, whistleblower statutes often address concrete personnel actions like firings or demotions, but do not

prohibit revealing the identity of the whistleblower, harassing “investigations,” or other covert attacks. Indeed, in 2020 the Federal Circuit Court of Appeals ruled that retaliatory “investigations” are not covered by the Whistleblower Protection Act, concluding that “stigma and fear” are not considered changes in working conditions.⁴⁹ This and similar rulings have opened the door for a flood of retaliations against those upon whom government transparency and accountability depend.

In addition, whistleblowers in the United States too often lack meaningful due process protections, including access

to fair and independent avenues for relief, leaving them vulnerable to harassment, threats, blacklisting, and even violence, while those who retaliate against them too often enjoy impunity. And Congress could do more to encourage legitimate whistleblowing by expanding whistleblower reward programs.

A well-functioning democracy applauds those who hold it to its highest standards. Protected whistleblowers represent America at its best – shining a light on corruption and the abuse of power to make us a better nation.



WHAT CAN BE DONE?

- + Extend appropriate whistleblower protections to all executive branch employees, as many such employees are inadequately covered, or not covered at all, by current protections;
- + Make it a criminal offense for a state or federal employee to reveal the name of a government whistleblower;
- + Protect whistleblowers from retaliations disguised as “investigations”;
- + Give federal whistleblowers the right to a jury trial;
- + Permit whistleblowers to receive a stay of adverse actions (like firings and demotions) from the Merit Systems Protection Board if they can establish a credible case of retaliation; and
- + Expand whistleblower reward programs, and opportunities for redress.

05

PROVIDE A SAFE HAVEN FOR FOREIGN WHISTLEBLOWERS AND ANTI-CORRUPTION ADVOCATES.

On the front lines in the fight against corruption around the world is a cadre of dedicated activists who expose themselves, their families, and their associates to serious, life-threatening consequences as a result.

Lesser known, but equal in effect, are those who blow the whistle because they have witnessed, discovered, or suffered the ill effects of corruption, and cannot acquiesce to a corrupt status quo. Yet in many countries, the legal system is not a viable option for these whistleblowers, as it proves unreliable, excessively costly, corrupt, or slow, often requiring years to reach even an initial judgment. This discourages whistleblowers from coming forward, and adds to corruption's corrosive effect on society.

Judge Claudia Escobar, for example, was a Magistrate Judge on Guatemala's Court of Appeals who sounded the alarm on a judicial selection process orchestrated by corrupt politicians and drug lords, and on attempted bribery schemes by the country's sitting vice president and former leader of the Guatemalan legislature. In her words, such corruption marked "the end of our incipient democracy and the last step to becom[ing] a failed state."⁵⁰ For her whistleblowing, Judge Escobar faced a series of death threats, and ultimately was able to flee to the United States with her family because her husband is a U.S. citizen."

Many other whistleblowers who are just as brave are not as lucky. Alexander Perepilichny, who exposed a \$230 million money laundering scheme by the Russian government and Russian mafia groups, was found dead in

the road with an obscure poison in his system.⁵¹ Poipynhun Majaw, a "Right to Information" activist investigating mining corruption in India, was killed by multiple blows to the head with a wrench.⁵² James Nkambule, a South African politician who exposed corruption in the construction of a World Cup soccer stadium.⁵³

When activists and whistleblowers call out corruption abroad, endangering their lives and livelihoods, they must know that America stands by their side and offers them sanctuary. For generations, the United States has been a beacon of liberty and a refuge from tyranny. If anti-corruption activists and whistleblowers are unable to receive adequate protection at home, they should be able to receive it from an American government that understands their sacrifice, appreciates their courage, and often benefits from what they have risked.

WHAT CAN BE DONE?

+ Establish a first-of-its-kind national center where a limited number of anti-corruption activists and whistleblowers whose lives or livelihoods face impending danger, or who have suffered egregious retaliation, can come with their immediate families to recover and recharge before

they resume their work at home. The center would provide housing, health care, and access to the legal, policy, research, organizational, and technical expertise needed for these heroes to return home and advance an in-country anti-corruption agenda.⁵⁴

+ Authorize the State Department to fast-track asylum applications for anti-corruption activists and whistleblowers who face personal risks in their home countries.

**CORRUPTION IS, AT ITS BASE,
ABOUT MONEY AND INFLUENCE.
FOLLOW THE MONEY, AND YOU
WILL FIND THE CORRUPTION.**

**THIS SET OF PROPOSALS
STRENGTHENS THE POWER OF THE
U.S. GOVERNMENT AND ITS ALLIES
TO FOLLOW THE STOLEN MONEY
AND ROOT OUT CORRUPT ACTORS
AT THEIR SOURCE.**

WHERE IS THE MONEY?

Corruption is, at its base, about money and influence. Follow the money, and you will find the corruption. This set of proposals strengthens the power of the U.S. government and its allies to follow the stolen money and root out corrupt actors at their source.

06

ESTABLISH A CROSS-BORDER PAYMENTS DATABASE.

When Malaysian Prime Minister Najib Razak stole \$4.5 billion from his country, JPMorgan Chase lent a hand. As the largest bank in the U.S., it helped move more than \$1 billion of that money despite repeatedly flagging the transfers as suspicious.⁵⁵ In time, these illicit funds were used to buy a

New York penthouse, as well as paintings by Monet and Van Gogh, for those close to Razak.⁵⁶

Billions of dollars in electronic payments “cross” our borders every day. Some are small transfers sent to family members back home. Some are massive payments between multinational

corporations. Others occur wholly outside the U.S. but use American banks or U.S. currency – and even those impact our financial system.

U.S. banks serve a crucial function in these cross-border payments, not only as the facilitator of these transactions,



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but also as the first line of defense against illegal transfers associated with corruption or money laundering. Over the years, the U.S. government has required U.S. banks to take on a greater role in policing cross-border payments by flagging suspicious transactions and reporting them to the Treasury Department's Financial Crimes Enforcement Network (FinCEN). Yet even with the cooperation of banks and the hard work of FinCEN, an unbelievable amount of laundered money and other criminal assets pass through. For example, a 2020 leak known as the "FinCEN Files" showed more than \$2 trillion in "suspicious" transfers from suspected terrorists, drug dealers, and corrupt officials were permitted to proceed, despite being flagged by Western banks.⁵⁷ Among the funds transferred were millions of dollars linked to the Taliban and the North Korean government.

Clearly, more needs to be done.

Congress recognized this challenge more than 15 years ago when it authorized the Treasury Department to develop a cross-border payments database in 2004. Such a database would allow the U.S. government to conduct more targeted anti-corruption investigations and stem the flood of dirty money. Yet despite widely acknowledged feasibility and overwhelming need, the Treasury Department has yet to implement the database.

Not surprisingly, many of our allies are dealing with the same challenges. The "cross-border" nature of the problem means that governments must work together to curb the flow of illicit finance wherever possible.

The U.S. has an opportunity to play a leading role in setting up a cross-border payments database, and through it, to define global standards that will serve the interests of America, its allies, and the global financial system.



WHAT CAN BE DONE?

- + Require the Treasury Department to create a cross-border payments database within two years, and require that any illicit funds that are identified and seized as a result of the database be used to fund programs (including the database itself) that combat illicit finance and other corrupt activities; and
- + Direct the Treasury Department to take a leading role in developing the standards for the database, and in encouraging broader adoption by and interoperability with our allies.

PUBLICIZE THE REPATRIATION OF FOREIGN STOLEN ASSETS RECOVERED BY U.S. LAW ENFORCEMENT.

Developing countries lose between \$20 and \$40 billion a year from bribery, embezzlement, and corruption, according to the Stolen Asset Recovery Initiative, a partnership between the World Bank Group and the United Nations.⁵⁸ And the vast majority of these funds are lost forever: the Organisation for Economic Co-operation and Development (OECD) estimates that less than \$150 million in stolen assets were returned from its member countries to developing nations between 2010-2012.⁵⁹ Money that could be used for infrastructure, health care, and schools, instead ends up in a corrupt official's pocket. When funds are recovered, the challenges and delays in repatriating those funds can be tremendous.⁶⁰

For example, the administration of Peruvian President Alberto Fujimori is believed to have stolen more than \$2 billion from 1990-2000, but only \$185 million was ever recovered and returned.⁶² Former Philippines strongman Ferdinand Marcos stole between \$5 and \$10 billion from his country between 1965-1986. It took 18 years to recover and repatriate the small fraction (less than \$700 million) that was ultimately found.⁶³

We know that corruption further impoverishes the world's most vulnerable people. Corrupt officials and kleptocrats prey on those who can least afford it. And yet returning stolen funds is complex and fraught with moral dilemmas, such as how to make sure that returned funds are not just stolen anew.

We can, and should, do more to build momentum for the efficient and effective recovery and repatriation of stolen assets by corrupt foreign officials.

Bureaucratic logjams should be eased to speed up the process, and safeguards, like post-return auditing and accounting, must be a prerequisite for repatriation. Greater transparency throughout the process will also encourage a more equitable outcome.

America should do more to publicly tie stolen assets to the criminals responsible for their theft, and to make these criminals' identities known to audiences around the world. By shining a light on the seized proceeds of corruption, the U.S. can put additional, productive pressure on corrupt regimes and those that support them.

USD 20-40 BILLION

DEVELOPING COUNTRIES LOSE BETWEEN \$20 AND 40 BILLION A YEAR FROM BRIBERY, EMBEZZLEMENT, AND CORRUPTION.



WHAT CAN BE DONE?

- + Direct the Department of Justice to publicize on a website the funds stolen from citizens of corrupt regimes and recovered by U.S. law enforcement, including status updates on the repatriation of those assets.

CRACK DOWN ON TRADE-BASED MONEY LAUNDERING THROUGH GREATER TRANSPARENCY AND BETTER INFORMATION-SHARING.

Every day, millions of shipments enter the United States – importing goods from abroad, but also, inevitably, importing corruption. Increasingly, sophisticated criminals use global trade shipments to launder money, hide their ill-gotten gains, funnel money to terrorist organizations, and traffic people, wildlife, counterfeit goods, drugs, and weapons.

This is not a marginal problem. From 2008-2017, trade-based money laundering was responsible for potential revenue losses of \$1.5 trillion.⁶⁴

Trade-based money laundering works, in part, by disguising the origins of shipments, concealing their contents, and falsely reporting the value of goods.

To further complicate matters, legitimate and illegitimate goods are often mixed together in a single shipment.⁶⁵

The U.S. currently collects some information about trade shipments, such as their contents, value, the identity of the shipper, the point of origination, and the final destination. This data can help determine whether certain shipments pose a risk of illicit activity. In practice, however, criminals have learned to circumvent those controls. Banks, which process the financial transactions that these shipments are based on, are also responsible for flagging suspicious trade-based transactions, but according to the U.S. Government Accountability Office, it is

“difficult for them to identify suspicious activity.”⁶⁶

Trade-based money laundering is complex in tactics and vast in scale. The solutions to it need to be just as varied. A good starting point is strengthening the government’s ability to detect the problem. The Department of Homeland Security’s Trade Transparency Units (TTUs) have primary responsibility for detecting trade-based money laundering. A TTU is an investigative strike force that is set up by the Department of Homeland Security to work with a specific trading partner in order to analyze both sides of a trade transaction, and to uncover money laundering but there are limitations to the effectiveness of the current program.

We must provide those on the front lines of combating trade-based money laundering with the data they need, including by providing real-time information to customs officials. Use of blockchain and other technology, combined with more and better data sharing, could help us reach a new level of transparency in trade, flushing out the corrupt officials and other criminals that exploit our trading systems.

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\$1.5 TRILLION LOST

FROM 2008-2017, TRADE-BASED
MONEY LAUNDERING WAS
RESPONSIBLE FOR POTENTIAL
REVENUE LOSSES



WHAT CAN BE DONE?

- + Create a system of automatic information exchange with trusted trading partners, including by directing U.S Customs and Border Protection (CBP) to establish agreements in which basic trading data is shared between customs officials;
 - + Direct Customs to explore the implementation of blockchain technology for information sharing
 - + to ensure the integrity of that data and its timely exchange. The relevant data is already collected by the Census Bureau, so no new collection mechanism is needed, and no new private sector reporting or other engagement is required; and
 - + Make additional trade data (minus company identifying information) available and free to the public. This data
- is already collected by the Census Bureau, and the public already has access to the data, but for a fee of thousands of dollars per year. Those fees generate minimal revenue, and create unnecessary obstacles to access, preventing journalists, academics, and civil society from using the data to flag problems that suggest illicit activity.

09

REQUIRE EXTRACTIVES INDUSTRIES TO DISCLOSE PAYMENTS TO FOREIGN GOVERNMENTS.

When multinational oil giant Shell paid over \$1 billion for an oil license in Nigeria, those funds could have been used for the good of the Nigerian people. That should have been especially important, since under the “unprecedented” terms of the contract, Nigeria was giving up nearly \$6 billion in future revenues that it would have received under a standard contract. Instead, it appears that nearly the entire amount from Shell was used to pay bribes.⁶⁷

Many developing countries rely on revenues from oil, gas, mining and other “extractives” to lift their citizens out of poverty. Unfortunately, these revenues also provide a lucrative stream of wealth for corrupt officials to siphon from their countries.

There are also substantial risks for the businesses working in the extractive industry. Companies like Shell are frequently shaken down for bribes in exchange for valuable deals – and exposed to huge fines from the U.S. Department of Justice and U.S. Securities and Exchange Commission if they pay them. While the temptation to pay kickbacks and bribes to advance business interests exists in the short-term, the longer-term urge for a level playing field creates a strong incentive for businesses and regulators to work together to combat corruption and increase transparency in the extractive industry.

One path for improving transparency is requiring extractive companies to provide detailed reports for any substantial payments to foreign governments. Doing so would bring the U.S. into alignment with international standards for the extractive industry: Over 30 countries have similar requirements for payment transparency and adding U.S. leadership in this area would send a strong signal that America stands for an open, clean, and free market.

Many developing countries rely on revenues from oil, gas, and mining and other “extractives” to lift their citizens out of poverty. Unfortunately, these revenues also provide a lucrative stream for corrupt officials to siphon off their country’s wealth.



WHAT CAN BE DONE

- + Adopt a strong implementing rule for Section 1504 of the Dodd-Frank Act that requires all U.S.-listed oil, gas, logging, and mining companies to publicly disclose on a country-by-country and a project-by-project basis all payments above \$100,000 to foreign governments.

10

REQUIRE THAT THE PROCUREMENT PROCESS FOR U.S. FOREIGN ASSISTANCE ALLOCATIONS TO THIRD PARTIES BE FULLY TRANSPARENT.

The United States provides almost \$40 billion in aid to foreign countries every year,⁶⁸ and much more when including aid provided by the Department of Defense. Sometimes, this funding is a lifeline for brave people working to root out corruption in those countries. Other times the aid itself is misappropriated by public officials in the countries we are trying to help. When the U.S. seeks to rebuild countries after wars, such as in Afghanistan and Iraq, those funds may be distributed to a wide range of organizations and stakeholders in the target country. Even when most recipients are honest and trustworthy, a lack of transparency will virtually guarantee that large amounts go missing.⁶⁹ For example, the U.S. government has lost some \$19 billion in Afghanistan alone since 2002.⁷⁰

The U.S. government takes care to use foreign aid funds wisely to combat corruption. Money and technical expertise are used, for example, to support local non-governmental organizations that serve as watchdogs in kleptocracies, to train local journalists to investigate corruption cases, and to improve judicial systems that can prosecute corrupt politicians. All the more reason, therefore, to push for transparency that's sufficient to ensure that U.S. tax dollars are supporting our intended outcomes. We can't afford to lose to corruption the very funds that are needed to keep it in check.

While laws such as the Foreign Aid Transparency and Accountability Act, and America's participation in the International Aid Transparency Initiative, have made information on foreign assistance more transparent and accessible in recent years, additional measures are needed.

For example, requiring all recipients of significant foreign assistance, including those involved in aid delivery, to disclose their beneficial owners – meaning revealing the person or persons who really own or control a company – would significantly boost aid transparency. If recipients of significant foreign assistance disclose their beneficial owners, the U.S. could better ensure there are no “back door” ties to individuals who are sanctioned or linked to corrupt governments.



WHAT CAN BE DONE?

+ Improve transparency in the procurement process for U.S. foreign assistance allocations to third parties by requiring all recipients of significant foreign

assistance, prior to receiving such assistance, to disclose their beneficial ownership information, to agree to publish any significant contracts administering such

assistance, and to agree to submit to an independent audit of all significant expenditures of such assistance.

A SINGLE CORRUPTION LOOPHOLE IS LIKE A SINGLE HOLE IN A ROOF: ONLY ONE CAN BE ENOUGH TO DISABLE THE WHOLE SYSTEM. CORRUPTION THRIVES BECAUSE LOOPHOLES EXIST — EITHER IN THE LAWS THEMSELVES OR IN THE LAX ENFORCEMENT OF THOSE LAWS.

WITHOUT THE SYSTEMATIC CLOSING OF CORRUPTION LOOPHOLES AND THE VIGOROUS ENFORCEMENT OF ANTI-CORRUPTION LAWS, CORRUPTION WILL ALWAYS FIND A WAY.

WHAT ARE THE LOOPHOLES?

A single corruption loophole is like a single hole in a roof: only one can be enough to disable the whole system. Corruption thrives because loopholes exist – either in the laws themselves or in the lax enforcement of those laws. Most loopholes are unintended, and closing them is relatively straightforward. Others exist because powerful enablers intentionally inserted them. Either way, loopholes facilitate crime, corruption, terrorism, and dictatorships. Without the systematic closing of corruption loopholes and the vigorous enforcement of anti-corruption laws, corruption will always find a way.

11

CRIMINALIZE THE DEMAND SIDE OF FOREIGN BRIBERY.

With the 1977 passage of the Foreign Corrupt Practices Act (FCPA), the United States became a leader in addressing global corruption. The law was a huge leap forward, allowing the U.S. to prosecute individuals and companies that paid bribes to foreign officials, and implementing strict accounting

requirements and controls for companies to prevent cover-ups.

Attacking foreign bribery is essential to global stability and American security. The regime of Saddam Hussein, for example, shook down international companies for \$1.7 billion in bribes and kickbacks⁷¹

But not everyone involved in overseas corruption is punished equally. When a senior government official in Tamil Nadu, India, demanded a bribe from Cognizant Technology Solutions, a U.S.-based tech company, for permission to build a facility in Chennai, India, Cognizant paid it. But that wasn't



Attacking foreign bribery is essential to global stability and American security. The Saddam Hussein regime shook down international companies for \$1.7 billion in bribes and kickbacks – and more than \$10 billion in illegal revenue – paid under the Iraqi Oil-For-Food program leading up to the second Gulf War.

the true cost. The U.S. Securities and Exchange Commission fined Cognizant \$25 million and charged two of its executives with violating federal securities laws.⁷² The government official who demanded the bribe, however, got off scot-free.⁷³

While the FCPA once put the U.S. at the forefront of the fight against foreign corruption, the legal framework it created is now outdated and incomplete. Dozens of other countries, including many of our economic competitors, criminalize both the “supply” and the “demand” side of bribery. As the Organisation for Economic Co-operation and Development (OECD) has noted:

To have a globally effective overall enforcement system, both the supply-side participants (i.e., the bribers) and the demand-side participants (i.e., the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.⁷⁴

It’s time for the U.S. to join this fight against corrupt foreign officials. Passage of the Foreign Extortion Prevention Act of 2019 or similar legislation would represent a tremendous addition to the U.S. arsenal in the fight against foreign corruption and would help level the playing field for U.S. companies operating abroad.



WHAT CAN BE DONE?

- + Expand federal bribery law to cover any foreign official or agent thereof who corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value in exchange for being influenced in their performance of an official act; and
- + Create a reward program for tipsters or whistleblowers who provide evidence of “demand-side” foreign bribery.

EXTEND MONEY LAUNDERING PREDICATE OFFENSES TO INCLUDE VIOLATIONS OF FOREIGN LAW THAT WOULD BE PREDICATE OFFENSES IN THE U.S.

When kleptocrats and corrupt foreign officials steal money from their citizens, they too often launder the proceeds of that corruption in the U.S., buying American real estate, businesses, and luxury goods.

To make a case for money laundering, prosecutors must show that a criminal broke a separate law relating to the money (like drug distribution or human trafficking). These separate laws are called “predicate offenses.” For money laundering that takes place within the U.S., there are numerous domestic laws that can act as predicate offenses. But kleptocrats and corrupt foreign officials are often not breaking U.S. laws, even as they blatantly violate the laws of their own countries.

In order to empower federal law enforcement to bring foreign corrupt officials to justice, prosecutors should be able to treat violations of foreign law as equivalent to violations of U.S. law. In other words, breaking a foreign law should be considered a predicate offense for money laundering (assuming that violating a similar U.S. law would be considered a predicate offense here in the U.S.) So, an Afghan warlord that traffics opium in violation of Afghan law could be prosecuted for money laundering in the U.S. when he uses the proceeds of those drug trafficking crimes to, say, buy a mansion in Miami – even if he breaks no underlying American laws.

In addition, U.S. law currently spells out a limited list of specific crimes that can serve as predicate offenses for money laundering. Money laundering techniques, however, change rapidly, as do the crimes to which money laundering relates. Quickly evolving cybercrimes and cryptocurrency offenses, for instance, increasingly raise money laundering risks. For federal prosecutors to keep pace, the Department of Justice should submit a report to Congress every two years listing new, recommended money laundering predicate offenses. While Congress would ultimately be responsible for adding any new predicate offenses to the list, these reports would alert legislators to evolving risks that law enforcement is encountering.



WHAT CAN BE DONE?

- + Allow violations of foreign law to serve as a predicate offense for money laundering, if a violation of an equivalent U.S. law would be considered a predicate offense domestically; and
- + Require the Department of Justice to submit a report to Congress every two years listing new, recommended money laundering predicate offenses.

13

EXPAND, AND MAKE PERMANENT, THE USE OF GEOGRAPHIC TARGETING ORDERS.

We know that billions go missing from public coffers when corrupt foreign officials steal vast sums from their countries, but where does all that money end up? When such funds reach offshore bank accounts, these corrupt officials often use them to enjoy a luxury lifestyle in the most desirable and safe destinations. Not surprisingly, many look to the United States. High on the list of “must haves” is luxury American, Canadian, and European real estate – often bought with cash to obscure the identities of their new owners.

In London, it’s actually possible to take a guided tour of swanky properties linked to corrupt Russian oligarchs. In 2016, a group of anti-corruption activists in London created a high-profile bus tour of Russian-linked properties to shine a light on how the city had “become the home of dodgy money,” identifying more than £4.4 billion in suspicious wealth.⁷⁵

From Kensington to Knightsbridge, some of the best addresses in London are home to some of the world’s most disreputable characters.

High-end real estate in the U.S. has been an all-too-easy way to move funds into safe havens and away from the scrutiny of law enforcement. This use of illicit funds distorts the property market by creating empty apartments that generate little if any economic activity for the community, and by driving housing prices up – often prohibitively – for the average citizen, all while offering a good night’s sleep for both kleptocrats and their stolen money.⁷⁶

New York, Miami, San Francisco, and many other U.S. cities are attractive places to park stolen funds in luxury real estate. In Washington, D.C., a shell company linked to Russian mogul Oleg Deripaska purchased a \$15 million mansion, in cash, on swanky Embassy Row – just blocks from the White House.⁷⁷

In 2016, the Treasury Department’s Financial Crimes Enforcement Network (FinCEN)

piloted a temporary program using “geographic targeting orders” (GTOs) in the high-risk real estate markets of New York and Miami. These GTOs required that any shell company using cash to purchase expensive real estate disclose its “beneficial owners” – that is, the person or persons who actually own or control the company.⁷⁸ A study by FinCEN on some early results of the GTOs found that over 30 percent of the covered real estate transactions involved a person that had been the subject of Suspicious Activity Reports (SARs) filed by financial institutions.⁷⁹

While the GTO program has now been extended to 12 U.S. metropolitan areas,⁸⁰ the program should be expanded nationwide. To avoid a game of money laundering whack-a-mole, this innovative program must extend to all U.S. jurisdictions, showing criminals that their dirty money has no place in the American real estate market. The GTO program can also be strengthened by being made permanent, and by extending its coverage to both commercial and residential real estate.



WHAT CAN BE DONE?

+ Expand FinCEN’s temporary geographic targeting orders (GTOs) to make the program

nationwide, permanent, and inclusive of commercial real estate.

PROMOTE THE WIDESPREAD ADOPTION OF LEGAL ENTITY IDENTIFIERS, A GLOBAL STANDARD FOR CORPORATE IDENTIFICATION.

Understanding who's who in our complicated global financial system is a necessary step to rooting out the bad actors. Before you can prosecute corruption, there must be enough transparency to know who's involved.

To that end, the U.S. has long been part of a global effort to persuade business entities to obtain unique, 20-character numerical identifiers known as Legal Entity Identifiers (LEIs) – a kind of social security number for companies.⁸¹ When Lehman

Brothers collapsed in the wake of the 2008 financial crisis, the U.S. government found it nearly impossible to assess which companies had done business with the firm.⁸² In response, the U.S. and the other G20 nations devised the LEI system, which is now required for a hodgepodge of financial transactions.

If LEIs were required for all major financial and regulatory transactions, the transparency dividends would be tremendous. Because LEIs provide a clear and unique i

dentification, no matter where an entity is located or does business, they can serve as a global “yellow pages” for governments and businesses around the world to track transactions and separate out the good actors from the bad.

LEIs would also help the government and private companies accurately identify businesses and their affiliates. The Securities and Exchange Commission (SEC), the Federal Reserve System, the Commodity Futures Trading Commission (CFTC), and the National Association of Insurance Commissioners (NAIC) already mandate LEI disclosure for some filings. But more could be done to require the use of LEIs across the board.

A robust LEI mandate would allow the U.S. government to sweep aside the dizzying number of names and “identifiers” currently in use, and to pinpoint and root out corrupt actors in complex transactions.

Understanding who's who in our complicated global financial system is a necessary step to rooting out the bad actors. Before you can prosecute corruption, there must be enough transparency to know who's involved.



WHAT CAN BE DONE?

+ In order to jumpstart the widespread use of LEIs, require U.S. publicly traded corporations, companies

that contract with the U.S. government, and recipients of major U.S. government grants to adopt LEIs.

15

ACTIVELY ENFORCE THE EXISTING REQUIREMENT THAT MONEY SERVICES BUSINESSES REGISTER AT THE FEDERAL LEVEL.

The U.S. has thousands of “money services businesses,” or MSBs. There are a wide variety of MSBs, but they are typically small, independently operated businesses that provide basic financial services to individuals – such as check cashing, transmitting of funds to family members abroad (remittances), and exchanging foreign currency. Overall, however, the scale of money flowing through MSBs is enormous. For example, more than \$550 billion was sent in remittances worldwide in 2019, exceeding all foreign direct investment.⁸³ Overall, MSBs have around \$1.4 trillion in assets.⁸⁴ Also, MSBs are often a lifeline for people who do not have access to traditional banking services, especially communities that are underserved by traditional banks.

However, MSBs have been misused by corrupt foreign officials, criminals, terrorists, and fraudsters who want to avoid detection, and therefore prefer the relative anonymity of transacting through MSBs. Around half of all suspicious activity reports submitted to the government every year involve MSBs,⁸⁵ MSB transactions allowed two of the 9/11 hijackers to wire funds to and from Al Qaeda affiliates through Western Union,⁸⁶ and, more recently, in Maryland in 2017, the ISIS operative Mohamed Elshinawy received payments through MSBs meant to fund a terrorist attack on U.S. soil.⁸⁷

After 9/11, the U.S. government required MSBs to register with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) in order

to more closely monitor their financial crime risks. Unfortunately, it’s clear that many MSBs are slipping through the cracks: Federal registration statistics show that only an estimated one-quarter of MSBs have registered with FinCEN.⁸⁸

Moreover, because non-bank issuers of cryptocurrency, like Bitcoin, are considered MSBs under federal law, it is imperative that FinCEN keep pace with evolving technology and evolving threats in this sector.

We must do more to make sure that all MSBs operate legitimately and transparently, so that they can continue to fulfill their essential functions while still closing the door to future corruption, money laundering, and terrorism.



WHAT CAN BE DONE?

- + Require FinCEN to actively enforce the requirement that MSBs register, and to more closely monitor MSBs to ensure they do so.

TO FUNDAMENTALLY ADDRESS CORRUPTION, SOME INSTITUTIONS MUST BE STRENGTHENED, WHILE OTHERS MUST BE STRUCTURALLY REFORMED.

THIS SET OF PROPOSALS AIMS TO BUILD WELL-RESOURCED, RELIABLE INSTITUTIONS THAT CAN WORK HAND-IN-GLOVE WITH ANTI-CORRUPTION ALLIES AND WATCHDOGS TO STAMP OUT CORRUPTION WORLDWIDE.

HOW DO WE STRENGTHEN INSTITUTIONS?

To fundamentally address corruption, some institutions must be strengthened, while others must be structurally reformed. This set of proposals aims to build well-resourced, reliable institutions that can work hand-in-glove with anti-corruption allies and watchdogs to stamp out corruption worldwide.

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STRENGTHEN THE U.S. TREASURY'S TOOLS FOR COMBATING MONEY LAUNDERING.

In the wake of 9/11, Congress enacted sweeping reforms to our nation's national security laws, including provisions in the PATRIOT Act that allow the Treasury Department to designate a foreign jurisdiction or financial institution "of primary money laundering concern." What this means is that Treasury can call out those who help launder money for corrupt officials, force them to change their behaviors, and punish them with penalties and prosecution if they don't.

Corrupt actors seek to launder their funds as effectively as possible, and too frequently they do so through a complex network of banks and jurisdictions linked to the United States. For instance, Paul Manafort, President Donald

Trump's former campaign chairman, laundered \$75 million in illegal payments from corrupt Ukrainian politicians through a labyrinth of offshore accounts, shell companies, bank accounts, and dozens of U.S. and foreign corporations.⁸⁹

Originally designed to help combat the financing of terrorism, this Treasury Department authority should be one of America's most powerful sanctions tools to counter the movement of illicit funds by corrupt actors. But the rule remains largely unused.

In 2002, the Treasury Department designated Ukraine and Nauru (a tiny island country in Micronesia) as jurisdictions of primary money laundering concern, utilizing PATRIOT Act

authorities for the first time and sending a warning shot across the global financial system. However, since then the U.S. has only invoked this authority a handful of times.⁹⁰ Why? To some extent, the use of this authority has been undermined by the need to publish a rule for every use. Each rule can take years to finalize – in one case it took five years to review and finalize comments to the rule.⁹¹ The rulemaking process should not serve as a barrier to the Treasury Department's efforts to effectively deter money laundering risks within financial institutions. Rather, the Department should have greater discretion to designate foreign financial institutions that present such risks.

In addition, more resources should be directed toward the Treasury Department's capacities to aggressively pursue financial institutions and jurisdictions that assist with money laundering. The new Global Investigations Division within the Financial Crimes Enforcement Network (FinCEN) of Treasury should be given sufficient funding to keep pace with the criminals and kleptocrats hijacking our financial system to launder money.

At the same time, the U.S. government must also move more quickly to address these threats, hobbling those institutions that enable and facilitate corruption. One

way to do this is to expand the engagement between government regulators, law enforcement, and financial institutions to pursue corrupt actors more quickly and effectively.

The United Kingdom's Joint Money Laundering Intelligence Taskforce (JMLIT) is one example of this type of cooperation. The JMLIT brings together regulators, financial institutions, and law enforcement to share information and exchange ideas to better identify and track illicit activity. That model ensures that people who provide the data are talking directly with those who use the data, leading to measurable improvements in the data collected, in how it can

be used, and in better-equipped law enforcement to root out bad actors. The U.S. Treasury's Bank Secrecy Act Advisory Group is a similar model yet does not currently include law enforcement.

Finally, FinCEN's traditional role as a data aggregator and disseminator of information must evolve, just as the threats to our financial system continue to evolve. FinCEN should take on an expanded and leading role to combat money laundering, and it should receive the resources and political support necessary to meet rising threats.



WHAT CAN BE DONE?

- + Modify Section 311 of the PATRIOT Act to allow the Secretary of the Treasury to designate foreign financial institutions that pose a money laundering risk without the need for a formal rule for each action;
- + Require the Treasury Department to conduct a comprehensive annual risk assessment to more accurately target money laundering risks within the U.S. financial system;
- + Increase the Treasury Department's resources in order to allow it to aggressively pursue institutions and jurisdictions that assist with money laundering, and provide the new Global Investigations Division within FinCEN sufficient funding to assist in these efforts;
- + Improve government-industry coordination by expanding the Bank Secrecy Act Advisory Group to include a larger set of constituencies, including regulators, regulated entities, and relevant U.S. law enforcement; and
- + Revise the mission of FinCEN to reflect its evolving role in protecting our national security, empowering it to lead a strong and coordinated U.S. effort to safeguard our financial system.

COORDINATE, COMBINE, AND FOCUS THE FOREIGN ANTI-CORRUPTION EFFORTS OF FEDERAL AGENCIES INTO A COHERENT, WHOLE-OF-GOVERNMENT APPROACH.

The U.S. is one of the world's leading anti-corruption enforcers.⁹² But our efforts are sometimes needlessly limited, or made piecemeal, as we work to address the threat of foreign corruption. Too frequently, a lack of coordination, communication, and resources puts at risk the hard work of bringing down corrupt actors around the globe.

As we learned after 9/11, addressing threats to U.S. national security demands seamless coordination among

agencies, information sharing, the flexible allocation of resources, and institutional collaboration on a "whole-of-government" scale. This begins with a better game plan at home – one that removes siloed efforts and bureaucratic roadblocks to addressing and preventing corruption overseas. For corruption, much like the terrorism that corruption feeds, we must have all hands on deck. If we hope to lift fledgling democracies in the face of autocratic threats, or combat

China's aggressive export of corruption around the globe, we must act decisively with the full weight of the United States government.

The global corruption challenge requires new approaches and a renewed commitment to U.S. leadership. Now is the time to send a message to the world that the U.S. as a whole is ready to lead in the fight against corruption.



WHAT CAN BE DONE?

- + Create an interagency coordination framework that brings together key U.S. agencies, including the departments of Treasury, Justice, Homeland Security, Defense, and State, along with USAID, the Development Finance Corporation, and the Export-Import Bank of the U.S. (EXIM) to leverage American legal, regulatory, investment, and finance mechanisms in order to support anti-corruption efforts, democratic norms, clean U.S. foreign direct investment, and the mitigation of corruption as a strategic tool of our foreign adversaries;
- + Create within the State Department a central clearinghouse for corruption-related information, and mandate dynamic, systematic analyses of the structures and operations of corrupt networks in select countries;
- + Assign new, trained Anti-corruption Officers to at least 30 U.S. embassies in corruption hotspots around the world to oversee the implementation of the whole-of-government approach in specific foreign states; and
- + Name and train anti-corruption points of contact in every U.S. embassy to ensure that embassies are aligning and informing their anti-corruption efforts with the whole-of-government approach, while responding to the unique circumstances of each foreign state.



If we hope to lift fledgling democracies in the face of autocratic threats or combat China's aggressive export of corruption around the globe, we must act decisively with the full weight of the United States government.

ESTABLISH AN ANTI-CORRUPTION ACTION FUND TO FINANCE U.S. ANTI-CORRUPTION EFFORTS ACROSS THE WORLD.

Fragile democracies around the world face tremendous challenges when protecting their institutions from corrupt actors. Corrupt foreign officials can quickly unravel promising democratic reforms aimed at building free, open, and democratic societies.

Perhaps the most visible examples of this lie just beyond the borders of the European Union (EU). The fall of the Berlin Wall more than thirty years ago ushered in a new wave of democratic transitions in the former Soviet protectorates of Belarus, Ukraine, Poland, and Hungary. During the 1990s, the United States invested in strengthening the burgeoning democratic institutions of former Soviet Bloc countries. While some of these efforts helped bring about stronger transitions to democracy, not enough was done to address the emerging risks

of corruption in these nascent states.⁹³ In recent years, an uptick of support for authoritarian, populist styles of leadership, such as Hungarian President Viktor Orbán⁹⁴ and Belarus President Alexander Lukashenko,⁹⁵ has raised serious concerns about the future of democratic transition at the borders of the EU.

One high-profile example of this problem today is Ukraine. Widespread corruption in the country has severely damaged its economy – reducing tax revenue, undermining growth, deterring foreign investment, and inciting political instability. The 2004 Orange Revolution and the 2014 Euromaidan Revolution saw a population desperately trying to wrest control of their country back from corrupt forces.⁹⁶ Yet much remains unchanged, as entrenched kleptocrats continue to pilfer the country's public coffers and move its assets to safe harbors with ease and impunity.⁹⁷

With too many countries teetering on the brink of kleptocracy, the U.S. can and should help those that are struggling to move toward democratic stability. While we work to close the kleptocrat-friendly loopholes in our financial and political systems at home, we must respond more quickly and directly when countries in transition need our help against kleptocrats abroad. An Anti-corruption Action Fund would give the U.S. quick-strike capabilities to shore up fledgling democratic institutions, encourage reformers, protect civil society, and support media efforts to bring the perpetrators of corruption to task.

The money to establish such a fund is already available: The enforcement of domestic anti-corruption laws such as the Foreign Corrupt Practices Act consistently generates billions of dollars in fines and penalties that could be repurposed for the fight against corruption. There would be profound justice in using the seized proceeds of corruption to help defeat it at its source.

WHAT CAN BE DONE?

+ Create an Anti-corruption Action Fund financed by the proceeds of anti-corruption laws and programs – including the Foreign Corrupt

Practices Act, a new cross-border payments database, and a new prohibition against “demand-side” foreign bribery – that can

transform the proceeds of short-term victories against corruption into the types of long-term investments that stifle corruption at its source.



MANDATE THE DEVELOPMENT OF A “NATIONAL AUTHORITARIAN INFLUENCE RISK ASSESSMENT.”

Much like our pivot after 9/11 to address terrorism on a global scale, global corruption – and the authoritarianism that it feeds – requires similar attention today, as we face a broad range of threats to open government, the free exchange of ideas, and the international rule of law.

U.S. efforts to detect, deter, disrupt, and defund authoritarian influence starts with deeper knowledge. To counter China, Russia, and other authoritarian regimes worldwide, we must know the full extent of emerging threats, and we must understand with precision how our adversaries intend to impact our systems and our way of life.

For example, China’s export of corruption has created new forms of dependency in many countries, making fragile economies vulnerable to distorted politics, over-priced infrastructure, and extractive loans that hold citizens hostage to Chinese influence.⁹⁸ Meanwhile, Russia’s emerging use of cyber weapons to upset and influence democracy through widespread disinformation, hacking, and infiltration of election systems and social media⁹⁹ has created rapidly evolving risks that the U.S. must fully understand in order to counter.

This new “Cold War” is a tug of war between democracy and authoritarianism – and the battle is being waged through the malign use of economic tools, systems, and global financial connectivity, corrupting the very systems through which the world has prospered.

If we are to fight back against the emerging pathways of corruptive and authoritarian influence, we must acknowledge the new ways we are at risk, understand the new mechanisms of attack, and ensure we have sufficient information to effectively counter new threats to our way of life.

To that end, Congress should require the Treasury Department to conduct an annual “National Authoritarian Influence Risk Assessment.” Treasury already oversees a National Terrorist Financing Risk Assessment, a public report on financial weaknesses that could enable terrorist financing. A National Authoritarian Influence Risk Assessment could yield similar dividends, helping the U.S. tailor its global approach to the landscape of risks we currently face.



WHAT CAN BE DONE?

- + Designate the “Countering of Authoritarian Influence” as a national security priority at the Treasury Department and other relevant agencies, putting it on par with anti-money laundering and combating the financing of terrorism; and
- + Develop a National Authoritarian Influence Risk Assessment, modeled after the Treasury Department’s National Terrorist Financing Risk Assessment, that could be used as a factor in determinations regarding foreign assistance and other programs.

TRACK COUNTRY PROGRESS ON FREELY MADE ANTI-CORRUPTION COMMITMENTS.

Corruption crosses borders. Understanding this, countries around the world have agreed to work together to combat it.

The groundwork for this cross-border approach to combating corruption began when the United States passed the Foreign Corrupt Practices Act (FCPA) in 1977, which has since served as a global blueprint for efforts to rein in foreign bribery. As other countries followed the U.S.'s lead, the growing patchwork of international efforts demonstrated the need for a more unified approach.

To address that need, the U.S. pursued an international agreement with the member countries of the Organization of Economic Co-operation and Development (OECD), the international body representing the world's largest economies, in an attempt to outlaw foreign bribery and corruption among the U.S.'s main

business competitors. This effort led to the 1997 OECD Anti-Bribery Convention, which effectively brought all of the world's major economic powers on board in the fight against corruption.

Of course, corruption does not only occur in large economies. Seeking to create a uniform approach to combating corruption throughout the world, the United Nations, beginning in 2003, brought countries together to adopt the UN Convention against Corruption (UNCAC), which has since been ratified by 187 countries.

The UNCAC is a powerful agreement that requires all party states to criminalize a wide range of corrupt acts.¹⁰⁰ It also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, merit-based recruitment, and enhanced ac

counting and auditing standards for the private sector. Signatory countries also commit to cooperating on information gathering, as well as on tracing, freezing, and seizing corrupt assets.

However, despite widespread adoption, many countries have failed to implement these and other international anti-corruption commitments, or have done so poorly, passing laws in name only and failing to pursue implementation or enforcement.¹⁰¹

International agreements are essential to creating a unified and globally consistent approach to corruption. Yet such work is irrelevant if the countries that sign and ratify these agreements then fail to establish or enforce robust laws on the national level.

By tracking and compiling clear and accessible information on which countries have and have not lived up to their commitments, the U.S. can exert pressure on lagging nations and help stir slow-moving governments into action.



WHAT CAN BE DONE?

+ Create a public report that tracks international corruption commitments by country. The report should include information about

whether the commitments have been implemented, and if so, whether they are being enforced. The report should cover the United

Nations Convention against Corruption and all other international agreements.

IMPROVE THE MUTUAL LEGAL ASSISTANCE TREATY PROCESS.

Mutual Legal Assistance is the formal process of cooperation between countries on issues such as cross-border money laundering, asset recovery, and tax evasion. When the U.S. suspects a drug kingpin is laundering money through Panamanian banks, for example, it can use Mutual Legal Assistance to request evidence about the assets from the Panamanian government. Because criminal conduct does not stop at a country's border, Mutual Legal Assistance Treaties (MLATs) are critical for law enforcement and anti-corruption efforts.

Complex corruption cases, in particular, often rely on the ability of U.S. law enforcement to cooperate with foreign officials. For example, when the U.S. government was investigating corrupt FIFA soccer officials, cooperation between the U.S. and Swiss officials was essential to making its case.¹⁰²

Unfortunately, while corrupt actors and their money move quickly, the MLAT process is too often cumbersome and slow. It can take years after an MLAT request before the evidence is produced.¹⁰³ By the time the issue is resolved, the target or the cash has frequently moved

elsewhere. Too often, authorities are faced with the need to drop cases or end investigations because of MLAT delays.¹⁰⁴ Some such delays are even intentional, as corrupt foreign officials attempt to stymie investigations into their own wrongdoing or that of their allies.

For the U.S. to lead the global fight against corruption, it must improve and streamline the use of MLATs. As originally envisioned, Mutual Legal Assistance is a powerful tool to promote rule of law and cooperation in criminal investigations. With careful study and modifications, it can achieve that potential.



WHAT CAN BE DONE?

+ Complete a study on the efficacy of MLATs and how they can be improved or built upon in multilateral fora; and

+ Require the regular publication of data on the number of MLAT requests received, the number returned for noncompliance,

the reasons why they were returned, and the median time it took to satisfy a request.

APPENDIX

Measures are listed where there is authority and a political path forward. Certain measures are listed in both categories.

WHAT THE EXECUTIVE BRANCH CAN DO

Who are the people?

1. Extend anti-money laundering obligations to those who serve as “gatekeepers” to the U.S. financial and political systems.

- + Require lawyers, accountants, art dealers, investment advisers (including private equity advisers, hedge fund and venture capital advisers and managers), lobbyists, real estate professionals, corporate formation agents, and third-party service providers (including money services businesses and other payment processors, as well as check consolidation and cash vault service providers) to conduct due diligence on prospective clients and to establish effective anti-money laundering programs.

2. Root out foreign corruptive influence in the U.S.

- + Require senior-level federal employees to disclose job negotiations and job offers from foreign entities.

3. Protect American whistleblowers.

- + Extend appropriate whistleblower protections to more executive branch employees, as many such employees are inadequately covered, or not covered at all, by current protections;
- + Permit whistleblowers to receive a stay of adverse actions (like firings and demotions) from the Merit Systems Protection Board if they can establish a credible case of retaliation; and
- + Expand whistleblower reward programs, and opportunities for redress.

Where is the money?

4. Establish a cross-border payments database.

- + Create a cross-border payments database within two years, take a leading role in developing the standards for the database and encouraging broader adoption by and interoperability with our allies, and use any illicit funds that are identified and seized

as a result of the database to fund programs (including the database itself) that combat illicit finance and other corrupt activities.

5. Require extractive companies to disclose payments to foreign governments.

- + Adopt a strong implementing rule for Section 1504 of the Dodd-Frank Act that requires all U.S.-listed oil, gas, logging, and mining companies to publicly disclose on a country-by-country and a project-by-project basis all payments above \$100,000 to foreign governments.

What are the loopholes?

6. Expand, and make permanent, the use of geographic targeting orders.

- + Expand FinCEN's temporary geographic targeting orders (GTOs) to make the program nationwide, permanent, and inclusive of commercial real estate.

7. Promote the widespread adoption of Legal Entity Identifiers, a global standard for corporate identification.

- + In order to jumpstart the widespread use of LEIs, require U.S. publicly traded corporations, companies that contract with the U.S. government, and recipients of major U.S. government grants to adopt LEIs.

8. Actively enforce the existing requirement that money services businesses register at the federal level.

- + Actively enforce the requirement that MSBs register at the federal level, and more closely monitor MSBs to ensure they do so.

How do we strengthen institutions?

9. Mandate the development of a “National Authoritarian Influence Risk Assessment.”

- + Designate the “Countering of Authoritarian Influence” as a national security priority at the Treasury Department and other relevant agencies, putting it on par with anti-money laundering and combating the financing of terrorism.

10. Track country progress on freely made anti-corruption commitments.

- + Create a public report

that tracks international corruption commitments by country. The report should include information about whether the commitments have been implemented, and if so, whether they are being enforced. The report should cover the United Nations Convention against Corruption and all other international agreements.

11. Improve the Mutual Legal Assistance Treaty process.

- + Complete a study on the efficacy of MLATs and how they can be improved or built upon in multilateral fora; and

WHAT CONGRESS CAN DO

Who are the people?

12. Extend anti-money laundering obligations to those who serve as “gatekeepers” to the U.S. financial and political systems.

- + Require lawyers, accountants, art dealers, lobbyists, and corporate formation agents to conduct due diligence on prospective clients and to establish effective anti-money laundering programs.

13. Root out foreign corruptive influence in the U.S.

- + Strengthen the enforcement of the Foreign Agents Registration Act, which requires U.S. citizens to disclose lobbying done on behalf of foreign

governments, by providing adequate resources for meaningful enforcement and routine auditing;

- + Require candidates for federal office to report offers of assistance from foreign entities to law enforcement;
- + Require nonprofits to publicly disclose their foreign funders;
- + Ban foreign entities from paying for ads that support or oppose a candidate, or for online or digital ads that mention a candidate within a certain number of days before an election;
- + Ban foreign governments and foreign political parties from paying for “issue ads”

(ads that discuss political issues like the defense budget or taxes rather than specific candidates) during a federal election year; and

- + Ban subsidiaries of foreign companies, and companies with significant foreign ownership, from all non-issue-ad political spending.

14. Prevent “Golden Visa” shopping.

- + Direct the State Department and the Department of Homeland Security to establish and maintain a common, U.S.-led investor visa denials government database to prevent “golden visa” shopping and expose

corrupt actors who are denied access to the U.S. By enabling the Five Eyes, the EU, and other allies to both contribute to the database and confirm which individuals have been denied investor visas by other jurisdictions, we can help protect investor visa programs in the U.S. and around the world from abuse;

- + Direct the Department of Homeland Security to develop stronger due diligence procedures for determining whether applicants are state-sponsored, and whether the funds associated with EB-5 applicants originate from a legitimate source; and
- + Temporarily halt the EB-5 program on national and economic security grounds until the program's well-known vulnerabilities are addressed.

15. Protect American whistleblowers.

- + Extend appropriate whistleblower protections to all executive branch employees, as many such employees are inadequately covered, or not covered at all, by current protections;
- + Make it a criminal offense for a state or federal employee to reveal the name of a government whistleblower;
- + Protect whistleblowers from retaliations disguised as "investigations";

- + Give federal whistleblowers the right to a jury trial;
- + Permit whistleblowers to receive a stay of adverse actions (like firings and demotions) from the Merit Systems Protection Board if they can establish a credible case of retaliation; and
- + Expand whistleblower reward programs, and opportunities for redress.

16. Provide a safe haven for foreign whistleblowers and anti-corruption activists.

- + Establish a first-of-its-kind national center where a limited number of anti-corruption activists and whistleblowers whose lives or livelihoods face impending danger, or who have suffered egregious retaliation, can come with their immediate families to recover and recharge before they resume their work at home. The center would provide housing, health care, and access to the legal, policy, research, organizational, and technical expertise needed for these heroes to return home and advance an in-country anti-corruption agenda.
- + Authorize the State Department to fast-track asylum applications for anti-corruption activists and whistleblowers who face personal risks in their home countries.

Where is the money?

17. Publicize the repatriation of foreign stolen assets recovered by U.S. law enforcement.

- + Direct the Department of Justice to publicize on a website the funds stolen from citizens of corrupt regimes and recovered by U.S. law enforcement, including status updates on the repatriation of those assets. Crack down on trade-based money laundering through greater transparency and better information sharing.
- + Create a system of automatic information exchange with trusted trading partners, including by directing U.S. Customs and Border Protection (CBP) to establish agreements in which basic trading data is shared between customs officials; Direct Customs to explore the implementation of blockchain technology for information sharing to ensure the integrity of that data and its timely exchange. The relevant data is already collected by the Census Bureau, so no new collection mechanism is needed, and no new private sector reporting or other engagement is required; and
- + Make additional trade data (minus company identifying info) available and free to the public. Basic data is already collected by the Census Bureau, and the public already has access to the data, but for a fee of thousands of dollars per

year. Those fees generate minimal revenue, and create unnecessary obstacles to access, preventing journalists, academics, and civil society from using the data to flag problems that suggest illicit activity.

18. Require that the procurement process for U.S. foreign assistance allocations to third parties be fully transparent.

- + Improve transparency in the procurement process for U.S. foreign assistance allocations to third parties by requiring all recipients of significant foreign assistance, prior to receiving such assistance, to disclose their beneficial ownership information, to agree to publish any significant contracts administering such assistance, and to agree to submit to an independent audit of all significant expenditures of such assistance.

What are the loopholes?

19. Criminalize the demand side of foreign bribery.

- + Expand federal bribery law to cover any foreign official or agent thereof who corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value in exchange for being influenced in their performance of an official act; and
- + Create a reward program for tipsters or whistleblowers who provide evidence of “demand-side” foreign bribery.

20. Extend money laundering predicate offenses to include violations of foreign law that would be predicate offenses in the U.S.

- + Allow violations of foreign law to serve as a predicate offense for money laundering, if a violation of an equivalent U.S. law would be considered a predicate offense domestically; and
- + Require the Department of Justice to submit a report to Congress every two years listing new, recommended money laundering predicate offenses.

How do we strengthen institutions?

21. Strengthen the U.S. Treasury's tools for combating money laundering.

- + Modify Section 311 of the PATRIOT Act to allow the Secretary of the Treasury to designate foreign financial institutions that pose a money laundering risk without the need for a formal rule for each action;
- + Require the Treasury Department to conduct a comprehensive annual risk assessment to more accurately target money laundering risks within the U.S. financial system;
- + Increase the Treasury Department's resources in order to allow it to aggressively pursue institutions and jurisdictions that assist with money laundering, and provide the new Global Investigations Division within FinCEN sufficient funding to assist in

these efforts;

- + Improve government-industry coordination by expanding the Bank Secrecy Act Advisory Group to include a larger set of constituencies, including regulators, regulated entities, and relevant U.S. law enforcement; and
- + Revise the mission of FinCEN to reflect its evolving role in protecting our national security, empowering it to lead a strong and coordinated U.S. effort to safeguard our financial system.

22. Coordinate, combine, and focus the foreign anti-corruption efforts of federal agencies into a coherent, whole-of-government approach.

- + Create an interagency coordination framework that brings together key U.S. agencies, including the departments of Treasury, Justice, Homeland Security, Defense, and State, along with USAID, the Development Finance Corporation, and the Export-Import Bank of the U.S. (EXIM) to leverage American legal, regulatory, investment, and finance mechanisms in order to support anti-corruption efforts, democratic norms, clean U.S. foreign direct investment, and the mitigation of corruption as a strategic tool of our foreign adversaries;

- + Create within the State Department a central clearinghouse for corruption-related information, and mandate dynamic, systematic analyses of the structures and operations of corrupt networks in select countries;
- + Assign new, trained Anti-corruption Officers to at least 30 U.S. embassies in corruption hotspots around the world to oversee the implementation of the whole-of-government approach in specific foreign states; and
- + Name and train anti-corruption points of contact in every U.S. embassy to ensure that embassies are aligning and informing their anti-corruption efforts with the whole-of-government approach, while responding to the unique circumstances of each foreign state.

23. Establish an Anti-corruption Action Fund to finance U.S. anti-corruption efforts across the world.

- + Create an Anti-corruption Action Fund financed by the proceeds of anti-corruption laws and programs – including the Foreign Corrupt Practices Act, a new cross-border payments database, and a new prohibition against “demand-side”

foreign bribery – that can transform the proceeds of short-term victories against corruption into the types of long-term investments that stifle corruption at its source.

24. Mandate the development of a “National Authoritarian Influence Risk Assessment.”

- + Develop a National Authoritarian Influence Risk Assessment, modeled after the Treasury Department’s National Terrorist Financing Risk Assessment, that could be used as a factor in determinations regarding foreign assistance and other programs.

25. Improve the Mutual Legal Assistance Treaty process.

- + Complete a study on the efficacy of MLATs and how they can be improved or built upon in multilateral fora; and
- + Require the regular publication of data on the number of MLAT requests received, the number returned for noncompliance, the reasons why they were returned, and the median time it took to satisfy a request.

ENDNOTES

- 1 International Centre for the Study of Radicalisation, "Terrorist Financing in South Africa", March 10, 2011, <https://icsr.info/2011/03/10/terrorist-financing-in-south-africa/>
- 2 Alan Feuer, "El Chapo Trial Shows that Mexico's Corruption is Even Worse than You Think", The New York Times, December 28, 2018, <https://www.nytimes.com/2018/12/28/nyregion/el-chapo-trial-mexico-corruption.html>
- 3 Angela Barkhouse, Hugo Hoyland, and Marc Limon, "Corruption: A Human Rights Impact Assessment", Universal Rights Group, May 2018, https://www.universal-rights.org/wp-content/uploads/2018/04/Policy_report_corruption_LR.pdf
- 4 Sarah Chayes, "A Hidden Cost of Corruption: Environmental Devastation", The Washington Post, June 2017, https://www.washingtonpost.com/outlook/a-hidden-cost-of-corruption-environmental-devastation/2017/06/16/03f93c1e-52b8-11e7-b064-828ba60fbb98_story.html
- 5 Emile van de Does de Willebois, Emily M. Halter, Robert A. Harrison, Ji Won Park, and J.C. Sharman, "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It", The International Bank for Reconstruction and Development: The World Bank, 2011, <https://star.worldbank.org/publication/puppet-masters>
- 6 Global Witness, "On the House", September 23, 2020, <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-companies-used-to-launder-money-in-us-real-estate/>
- 7 International Consortium of Investigative Journalists, "Global Banks Defy U.S. Criminals and Terrorists", September 20, 2020, <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>
- 8 Giorgio Spagnol, "Correlation Between Corruption and Conflict", IERI, February 2, 2019, <http://www.ieri.be/fr/publications/wp/2019/f-vrier/correlation-between-corruption-and-conflict>
- 9 Odd-Helge Fjeldstad, "Violence, Poverty and Police Corruption", Chr. Michelson Institute, January 2007 – December 2009, <https://www.cmi.no/projects/1002-violence-poverty-and-police-corruption>
- 10 United Nations News, "North Koreans Trapped in 'Vicious Cycle of Deprivation, Corruption, Repression' and Endemic Bribery: UN Human Rights Office", May 28, 2019, <https://news.un.org/en/story/2019/05/1039251>
- 11 Amnesty International, "Zimbabwe: Authorities Continue their Crackdown on Dissent with Arrest of Investigative Journalist and Activist", July 20, 2020, <https://www.amnesty.org/en/latest/news/2020/07/zimbabwe-authorities-continue-their-crackdown-on-dissent-with-arrest-of-investigative-journalist-and-activist/>
- 12 Nick Squires, "Neglect, Corruption and Mafia Infiltration: Genoa Bridge Collapse Shines Spotlight on Italy's Woeful Infrastructure", The Telegraph, August 17, 2018, <https://www.telegraph.co.uk/news/2018/08/17/neglect-corruption-mafia-infiltration-geoa-bridge-collapse/>
- 13 Evan Osnos, "Boss Rail: The Disaster that Exposed the Underside of the Boom", The New Yorker, October 15, 2012, <https://www.newyorker.com/magazine/2012/10/22/boss-rail>
- 14 Mirage, "Reducing corruption in construction could save lives and livelihoods", November 27, 2020, miragenews.com/reducing-corruption-in-construction-could-save-lives-and-livelihoods/
- 15 Ruben Carranza, and Mohamed Azer Zouari, "Work, Freedom, Dignity, The International Center for Transitional Justice", February 2020, https://www.ictj.org/sites/default/files/ICTJ_Briefing_Tunisia_Youth_Corruption_Web.pdf
- 16 Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme, "Does Corruption Affect Income Inequality and Poverty?", International Monetary Fund: Fiscal Affairs Department, May 1998, <https://www.imf.org/external/pubs/ft/wp/wp9876.pdf>
- 17 David Pegg, "Leak Reveals \$2tn of Possibly Corrupt US Financial Activity", The Guardian, September 20, 2020, <https://www.theguardian.com/us-news/2020/sep/20/leak-reveals-2tn-of-possibly-corrupt-us-financial-activity>
- 18 Kwabena Gyimah-Brempong, 2002, "Corruption, Economic Growth, and Income Inequality in Africa", Economics of Governance, 3, 183-209, <https://www.usf.edu/arts-sciences/departments/economics/documents/corruption.growth.inequality.africa.econgov.02.pdf>
- 19 Zeeshan Aleem, "Venezuela's Economic Crisis is So Dire that Most People have Lost an Average of 19 pounds", Vox, February 22, 2017, <https://www.vox.com/world/2017/2/22/14688194/venezuela-crisis-study-food-shortage>
- 20 James O. Finckenauer, Joseph R. Fuentes, and George L. Ward, "Mexico and the United States: Neighbors Confront Drug Trafficking", United Nations Activities, January 2001, <https://www.ncjrs.gov/pdffiles1/nij/218561.pdf>
- 21 Charlie Savage, Mujib Mashal, Rukmini Callimachi, Eric Schmitt, and Adam Goldman, "Suspensions of Russian Bounties Were Bolstered by Data on Financial Transfers", The New York Times, June 30, 2020, <https://www.nytimes.com/2020/06/30/us/politics/russian-bounties-afghanistan-intelligence.html>

- 22 International Consortium of Investigative Journalists, "Offshore Trove Exposes Trump-Russian Links and Piggy Banks of the Wealthiest 1 Percent", November 2017, <https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/>; Julian Hans, "The Evidence is Strong", Panama Papers, n.d., <https://panamapapers.sueddeutsche.de/articles/57161f07a1bb8d3c3495bc36/>
- 23 Transparency International, "What is Corruption?", <https://www.transparency.org/en/what-is-corruption>
- 24 The United Nations defines "grand corruption" as: "corruption that pervades the highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability." United Nations Office on Drugs and Crime, "The Global Programme Against Corruption: UN Anti-Corruption Toolkit", September 2004, https://www.un.org/ruleoflaw/files/UN_Anti%20Corruption_Toolkit.pdf
- 25 Wade Shepard, "The Story Behind the World's Emptiest International Airport", Forbes, May 28, 2016, <https://www.forbes.com/sites/wadeshepard/2016/05/28/the-story-behind-the-worlds-emptiest-international-airport-sri-lankas-mattala-rajapaksa/?sh=342779b47cea>
- 26 David E. Sanger and Catie Edmonson, "Russia Targeted Election Systems in All 50 States, Report Finds", The New York Times, July 25, 2019, <https://www.nytimes.com/2019/07/25/us/politics/russian-hacking-elections.html>
- 27 Laurens Cerulus, "Beijing's influence in European Parliament draws fresh scrutiny", Politico, November 26, 2020, <https://www.politico.eu/article/china-influence-european-parliament-friendship-group/>
- 28 Zachary Warmbrodt, "Lawmakers Clinch Deal on Decadelong Fight Against Shell Companies", Politico, November 25, 2020, <https://www.politico.com/news/2020/11/25/lawmakers-fight-shell-companies-440618>
- 29 Terry Gross, "Journalist: Kleptocrats' 'Ill-Gotten Fortunes' are Being Parked in U.S. Real Estate", NPR Fresh Air, February 13, 2019, <https://www.npr.org/2019/02/13/694226853/journalist-kleptocrats-ill-gotten-fortunes-are-being-parked-in-u-s-real-estate>
- 30 FTI Consulting, "China in Africa: Competing with China", March 2013, https://www.empea.org/app/uploads/2017/03/FTI_Competing_with_China_White_Paper.pdf
- 31 International Consortium of Investigative Journalists, "The Panama Papers: Exposing the Rogue Offshore Finance Industry", 2020, <https://www.icij.org/investigations/panama-papers/>
- 32 Sheera Frenkel and Julian E. Barnes, "Russians Again Targeting Americans With Disinformation, Facebook and Twitter Say," The New York Times, September 22, 2020, <https://www.nytimes.com/2020/09/01/technology/facebook-russia-disinformation-election.html>
- 33 Anna Massoglia, "Ukrainian foreign influence operation bankrolled by secret donors in coordinated effort", The Center for Responsive Politics, December 10, 2019, <https://www.opensecrets.org/news/2019/12/ukraine-foreign-influence-operation-bankrolled-by-secret>
- 34 Scott Greytak and Lawrence Tribe, "Get Foreign Political Money Out of U.S. Elections", The Boston Globe, June 22, 2016, <https://www.bostonglobe.com/opinion/2016/06/22/get-foreign-political-money-out-elections/qEkLMpfA23Blwxw815RJML/story.html>; Michael Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections", Center for American Progress, November 21, 2019, <https://www.americanprogress.org/issues/democracy/reports/2019/11/21/477466/ending-foreign-influenced-corporate-spending-u-s-elections/>
- 35 Josh Rudolph and Thomas Morley, "Covert Foreign Money: Financial Loopholes Exploited by Authoritarians to Fund Political Interference in Democracies", Alliance for Securing Democracy, August 18, 2020, <https://securingdemocracy.gmfus.org/covert-foreign-money/>
- 36 Foreign Agents Disclosure and Registration Enhancement Act of 2019, S. 1762, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1762>
- 37 Adapted from § 3(j)(2) of the CORE Act, S. 3855, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3855>;
- 38 Stopping Harmful Interference in Elections for a Lasting Democracy Act, S. 2669, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2669/text>
- 39 Rudolph and Morley, 2020
- 40 Scott Greytak, "As the Internet and Social Media Drown in Opaque Political Ads, U.S. Reform Efforts Have Gone Nowhere", Voices for Transparency, October 20, 2020, <https://www.transparency.org/en/blog/us-election-2020-opaque-political-digital-advertising>
- 41 PAID AD Act, H.R. 2135, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/2135/text>
- 42 Alex Crutcher, "The Cyprus Papers", Al Jazeera, 2020, <https://interactive.aljazeera.com/aje/2020/cyprus-papers/index.html>
- 43 Transparency International, "The Underworld of EU Golden Visa, Cyprus Papers Edition", 2020, <https://www.transparency.org/en/blog/underworld-eu-golden-visas-cyprus-papers>

- 44 Elaine Dezenski and Emanuele Ottolenghi, "A Better Way to Sell Citizenship", The National Interest, December 29, 2015, <https://nationalinterest.org/feature/better-way-sell-citizenship-14750>
- 45 Rob Schmitz, "Chinese Investors Among Majority Of EB-5 Visa Recipients," All Things Considered, May 22, 2017, <https://www.npr.org/2017/05/22/529550240/chinese-investors-among-majority-of-eb-5-visa-recipients>
- 46 Homeland Security Advisory Council, "Final Report: Economic Security Subcommittee," November 2020, https://www.dhs.gov/sites/default/files/publications/final_economic_security_subcommittee_report_1.pdf
- 47 Alina Bashirova, "Lucky Rich Russians?", Transparency International, September 29, 2020, <https://www.transparency.org/en/blog/united-states-eb-5-visa-corruption-lucky-rich-russians>
- 48 Transparency International, "Whistleblowing", <https://www.transparency.org/en/our-priorities/whistleblowing>
- 49 *Sistek v. Dept. of Veteran Affairs*, No. 19-1168, 955 F.3d 948 (Fed. Cir. 2020), http://www.ca9.uscourts.gov/sites/default/files/opinions-orders/19-1168.Opinion.4-8-2020_1565965.pdf
- 50 Radcliffe Institute for Advanced Study Harvard University, "Claudia Escobar, Judicial Independence, Separation of Powers, and Corruption", January 6, 2016, <https://www.radcliffe.harvard.edu/video/claudia-escobar-judicial-independence-separation-powers-and-corruption>
- 51 ABC News, "Alexander Perepilichny: Rare Chinese Poison Found in Stomach of Russian Whistleblower", May 19, 2015, <https://www.abc.net.au/news/2015-05-20/poison-chemical-found-on-russian-who-died-in-uk3a-report/6483118>
- 52 Dilsher Dhillon, "For 74 Indian Activists, the Punishment for Seeking the Truth has been Death", Business Insider India, March 23, 2018, <https://www.businessinsider.in/for-74-indian-activists-the-punishment-for-seeking-the-truth-has-been-death/articleshow/63425570.cms>
- 53 David Smith, "World Cup Whistleblower: Inquest Opens into 'Poisoning' Death", The Guardian, October 18, 2010, <https://www.theguardian.com/world/2010/oct/18/world-cup-whistleblower-inquest>
- 54 James Wasserstrom and Drago Kos, "The Integrity Fellowship and Sanctuary," https://docs.google.com/document/d/1YW_1IMF4mnL_u_8jOQmMUSauGK1E9Iedg6Wb0iaZ-o/edit
- 55 Alicia Tatone, "Global Banks Defy U.S. Crackdowns by Serving Oligarchs, Criminals and Terrorists", International Consortium of Investigative Journalists, September 20, 2020, <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>
- 56 International Consortium of Investigate Journalists, "Confidential Clients", September 20, 2020, <https://www.icij.org/investigations/fincen-files/confidential-clients/#client=Jho-Low>
- 57 Noam Scheiber and Emily Flitter, "Banks Suspected Illegal Activity, but Processed Big Transactions Anyway", The New York Times, September 20, 2020, <https://www.nytimes.com/2020/09/20/business/fincen-banks-suspicious-activity-reports-buzzfeed.html>
- 58 Jean-Pierre Brun, Larissa Gray, Clive Scott, and Kevin M. Stephenson, "Asset Recover Handbook", The World Bank and UNODC, 2011, <https://star.worldbank.org/sites/star/files/Asset%20Recovery%20Handbook.pdf>
- 59 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride, and Linnea Mills, "Few and Far: The Hard Facts and Stolen Asset Recovery", The World Bank, 2014, <https://www.oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf>
- 60 Transparency International, "Asset Recovery and the Theft of Public Money", <https://www.transparency.org/en/our-priorities/asset-recovery-and-the-theft-of-public-money>
- 62 World Bank, "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan", United Nations, June 2007, <https://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>
- 63 World Bank, 2007; Andrew Marshall, "What's Yours is Mine: New Actors and New Approaches to Asset Recovery in Global Corruption Cases (Policy Paper 018)", Center for Global Development, April 2013, https://www.cgdev.org/sites/default/files/whats-yours-is-mine_0.pdf
- 64 Global Financial Integrity, "Trade Integrity", <https://gfintegrity.org/issue/trade-integrity/>
- 65 U.S. Government Accountability Office (GAO), "Countering Illicit and Trade: U.S. Efforts to Combat Trade-Based Money Laundering", December 30, 2019, <https://www.gao.gov/assets/710/703609.pdf>
- 66 GAO, December 2019
- 67 Ben Chapman, "Shell's \$1.1bn Deal for Nigerian Oil Field Funded Alleged Bribery Scheme, Report Finds", Independent, April 29, 2019, <https://www.independent.co.uk/news/business/news/shell-nigerian-oil-field-deal-funded-alleged-bribery-scheme-global-witness-a8891676.html>
- 68 George Ingram, "What Every American Should Know About US Foreign Aid", Brookings, October 2, 2019, <https://www.brookings.edu/opinions/what-every-american-should-know-about-u-s-foreign-aid/>

- 69 Special Inspector General for Iraq Reconstruction, "Learning from Iraq", March 2013, <https://www.globalsecurity.org/military/library/report/2013/sigir-learning-from-iraq.pdf>
- 70 Special Inspector General for Afghanistan Reconstruction, "Corruption in Conflict: Lessons for the U.S. Experience in Afghanistan", September 2016, <https://www.sigar.mil/pdf/special%20projects/SIGAR-21-05-SP.pdf>
- 71 Sharon Otterman, "IRAQ: Oil for Food Scandal", Council on Foreign Affairs, October 28, 2005, <https://www.cfr.org/background/iraq-oil-food-scandal>
- 72 U.S. Securities and Exchange Commission, "SEC Charges Cognizant and Two Former Executive with FCPA Violations", February 15, 2019, <https://www.sec.gov/news/press-release/2019-12>
- 73 MC Rajan, "Cognizant Bribery Case: DMK Demands Action Against Official Who Took Kickbacks", Hindustan Times, September 17, 2019, <https://www.hindustantimes.com/india-news/cognizant-bribery-case-dmk-demands-action-against-official-who-took-kickbacks/story-E7axb3kIAXxVyOProlRR2J.html>
- 74 OECD, "Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?", 2018, <https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf>
- 75 Owen Jones, Maeve Shearlaw, Adam Sich, and Alex Healey, "Owen Jones Goes on a Russian Dirty Money Tour: 'We Need to Hit Kleptocrats in their Wallets'", The Guardian, <https://www.theguardian.com/world/video/2018/apr/06/owen-jones-goes-on-a-russian-dirty-money-tour-we-need-to-hit-kleptocrats-in-their-wallets>
- 76 Patrick Radden Keefe, "The Kleptocrat in Apartment B", The New Yorker, January 21, 2016, <https://www.newyorker.com/news/daily-comment/the-kleptocrat-in-apartment-b>
- 77 Rosalind S. Helderman and Alice Crites, "The Russian Billionaire Next Door: Putting Ally is Ties to One of D.C.'s Swankiest Mansions", November 29, 2017, The Washington Post, https://www.washingtonpost.com/politics/the-russian-tycoon-next-door-putin-ally-is-tied-to-one-of-dcs-swankiest-mansions/2017/11/28/15f913de-cef6-11e7-81bc-c55a220c8cbe_story.html
- 78 Matthew Stephenson, "Ownership Transparency Works: Geographic Targeting Orders in the US Real Estate Market", The Global Anticorruption Blog, February 12, 2019, <https://globalanticorruptionblog.com/2019/02/12/ownership-transparency-works-geographic-targeting-orders-in-the-us-real-estate-market/>
- 79 FinCEN Advisory FIN-2017-A003 https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf, August 8, 2017
- 80 Financial Crimes Enforcement Network, "FinCEN Reissues Real Estate Geographic Targeting Orders and Expands Coverage to 12 Metropolitan Areas", November 15, 2018, <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-and-expands-coverage-12>; Financial Crimes Enforcement Network, "FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas", November 5, 2020, <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-2>
- 81 Office of Financial Research, "Legal Entity Identifier – Frequently Asked Questions", U.S. Department of the Treasury, n.d., <https://www.financialresearch.gov/data/legal-entity-identifier-faqs/>
- 82 Scott M. Straub and Matt Rumsey, "Who is Who and What is What? The Need for Universal Entity Identification in the United States", Data Foundation, September 2017, https://static1.squarespace.com/static/56534df0e4b0c2babdb6644d/t/59a6f2e5f7e0ab8b4a859756/1504113383346/LEI_Report_2017.pdf
- 83 World Bank Group and KNOMAD, "COVID-19 Crisis Through a Migration Lens: Migration and Development Brief 32", Knomad, April 2020, https://www.knomad.org/sites/default/files/2020-06/R8_Migration%26Remittances_brief32.pdf
- 84 Andrew P. Scott, "Telegraphs, Steamships, and Virtual Currency: An Analysis of Money Transmitter Regulation", Congressional Research Service, August 20, 2020, <https://fas.org/sgp/crs/misc/R46486.pdf>
- 85 The Financial Accountability and Corporate Transparency (FACT) Coalition, "Advancing Financial Transparency and Tax Fairness to Build Back Better", November 9, 2020, <https://thefactcoalition.org/fact-memo-to-biden-harris-presidential-transition-team/>
- 86 Bloomberg Business, "Western Union: Where the Money is – in Small Bills", November 15, 2001, <https://www.bloomberg.com/news/articles/2001-11-14/western-union-where-the-money-is-in-small-bills>
- 87 <https://www.banking.senate.gov/imo/media/doc/D'Antuono%20Testimony%2011-29-18.pdf>
- 88 FACT Coalition, 2020
- 89 Megan Leonhardt, "Paul Manafort is Accused of Money Laundering. Here's What That Means", Money, October 30, 2017, <https://money.com/paul-manafort-money-laundering-explained/>
- 90 U.S. Department of the Treasury, "Resource Center", December 1, 2010, https://www.treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Pages/311_actions.aspx; Financial Crimes Enforcement Network, "311

- Special Measures”, U.S. Treasury, n.d., <https://www.fincen.gov/resources/statutes-and-regulations/311-special-measures>
- 91 United States Government Accountability Office, “USA Patriot Act: Better Interagency Coordination and Implementing Guidance for Section 311 Could Improve U.S. Anti-Money Laundering Efforts”, September 2008, <https://www.gao.gov/assets/290/282229.pdf>
 - 92 Gillian Dell, “Exporting Corruption: Progress Report 2020: Assessing Enforcement of the OECD Anti-Bribery Convention”, Transparency International, 2020, https://images.transparencycdn.org/images/2020_ReportFull_ExportingCorruption_English.pdf
 - 93 Anna Grzymala-Busse and Pauline Jones, “30 Years After the Berlin Wall Fell, Some Former Soviet-Controlled Countries are Dismantling Democracy. What Happened?”, The Washington Post, November 8, 2019, <https://www.washingtonpost.com/politics/2019/11/08/years-after-berlin-wall-fell-much-eastern-europe-is-dismantling-democracy-free-markets-what-happened/>
 - 94 Daniel Odin Shaw, “In Hungary’s Brewing Conflict with the EU, Orbán Holds All the Cards”, The Geopolitics, May 4, 2018, <https://thegeopolitics.com/in-hungarys-brewing-conflict-with-the-eu-orban-holds-all-the-cards/>
 - 95 Mykhailo Minakov, “Eastern Europe’s Authoritarian Belt in Crisis”, Wilson Center, October 6, 2020, <https://www.wilsoncenter.org/blog-post/eastern-europes-authoritarian-belt-crisis>
 - 96 Kateryna Kruk, “In Ukraine, We are Protesting to Preserve Our Dignity”, The Guardian, December 17, 2013, <https://www.theguardian.com/commentisfree/2013/dec/17/ukraine-protesting-euromaidan>
 - 97 Gustav Gressel, “Ukraine on the Brink of Kleptocracy”, European Council on Foreign Relations, January 5, 2018, https://ecfr.eu/article/commentary_ukraine_on_the_brink_of_kleptocracy/
 - 98 Elaine K. Dezenski, “Below the Belt and Road”, Foundation for Defense of Democracies, May 6, 2020, <https://www.fdd.org/analysis/2020/05/04/below-the-belt-and-road/>
 - 99 Sheera Frenkel and Julian E. Barnes, “Russians Again Targeting Americans With Disinformation, Facebook and Twitter Say,” The New York Times, September 22, 2020, <https://www.nytimes.com/2020/09/01/technology/facebook-russia-disinformation-election.html>
 - 100 Office on Drugs and Crime, “United Nations Convention Against Corruption”, United Nations, 2004, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
 - 101 Helena Schwertheim, “Innovations in Anti-Corruption Approaches”, International Institute for Democracy and Electoral Assistance, 2017, <https://www.idea.int/gsod-2017/files/IDEA-GSOD-2017-RESOURCE-GUIDE-ANTI-CORRUPTION.pdf>
 - 102 Mark Hosenball and Mica Rosenberg, “Swiss Probe into FIFA Runs into Obstacles: Sources”, Reuters, August 21, 2015, <https://www.reuters.com/article/soccer-fifa-swiss/swiss-probe-into-fifa-runs-into-obstacles-sources-idUSL1N10W15B20150821>
 - 103 Evan Norris and Morgan J. Cohen, “How US Authorities Obtain Foreign Evidence in Cross-Border Investigations”, Global Investigations Review, October 13, 2020, <https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2021/article/how-us-authorities-obtain-foreign-evidence-in-cross-border-investigations>
 - 104 OECD, “Typology on Mutual Legal Assistance in Foreign Bribery Cases”, 2012, <http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf>

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House Approves Half Dozen Measures to Fight Foreign Corruption via Defense Bill

TI-US calls on Senate to quickly follow suit

A statement from the U.S. office of Transparency International
September 24, 2021

The U.S. House of Representatives has approved six measures to combat corruption and kleptocracy around the world. Adopted as part of the House annual defense bill (known as the National Defense Authorization Act for Fiscal Year 2022), the measures include the Foreign Corruption Accountability Act, the Justice for Victims of Kleptocracy Act, the Transnational Repression Accountability and Prevention Act, the Combating Global Corruption Act, the reauthorization of the Global Magnitsky Human Rights Accountability Act, and a measure requiring the Biden Administration to determine whether the 35 kleptocrats and government officials named by Russian political opposition leader Alexei Navalny meet the criteria for sanctioning under the Global Magnitsky Human Rights Accountability Act. Each of the measures is supported by a coalition of civil society organizations working to promote transparency and accountability in government.

Scott Greytak, Director of Advocacy for Transparency International's U.S. office (TI-US), offered the following statement:

These measures will enhance our nation's ability to sanction corrupt actors, increase transparency, provide actionable information to victims of corruption around the world, and encourage coordinated anticorruption efforts among the United States and our allies.

Corruption allows a small group of people to purchase power and protection. It is the lifeblood of violent extremists, drug trafficking organizations, transnational criminal enterprises, and authoritarian governments in every corner

of the globe. Corruption is a leading cause of violence, mass migration, environmental degradation, economic volatility, and the suppression of free speech and other human rights around the world. It is for these reasons and others that the Biden Administration recently designated the fight against foreign corruption as a core U.S. national security interest.

The House of Representatives has recognized the threat posed by foreign corruption by approving six measures that will help expose and counteract corruption across the world.

It is imperative that the Senate quickly follow suit by including these measures in its forthcoming version of the annual defense bill.

###

Transparency International is the world's largest coalition against corruption. In collaboration with national chapters in more than 100 countries, the U.S. office focuses on stemming the harms caused by illicit finance, strengthening political integrity, and promoting a positive U.S. role in global anti-corruption initiatives.

Related Resources

- Read a letter of support for the Counter-Kleptocracy Act—a legislative package that includes four of the six measures (the Foreign Corruption Accountability Act, the Justice for Victims of Kleptocracy Act, the Transnational Repression Accountability and Prevention Act, and the Combating Global Corruption Act)—signed by 35 civil society organizations and prominent individuals [here](#);
- Read TI-US's 2021 policy plan for fighting foreign corruption, "[Combating Global Corruption: A Bipartisan Plan](#)".

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October 21, 2021

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Dear Director Das,

We, the undersigned organizations, write to urge you to ensure that the rules currently being drafted to implement the Corporate Transparency Act (CTA) are comprehensive, avoid unintended loopholes, and accurately reflect the intent of Congress.

The recent release of the Pandora Papers underscores the need for strong CTA implementation. [According to](#) the Washington Post, “Within hours of publication, at least eight national governments [promised to launch](#) their own inquiries into the financial activities revealed in the papers.” This builds on the mountain of data released in previous publications of leaked documents, including the Panama Papers and the Paradise Papers, that documented how anonymous corporate structures have been used to hide damaging bribery payments, obscure corrupt public procurement practices, illegally profit off health disasters, move dangerous counterfeit goods around the world, pay private militias to engage in egregious human rights abuses, facilitate tax evasion, and more. We should not have to rely upon leaks to protect the integrity of our financial system.

As a result, the passage of the CTA was heralded by a wide array of stakeholders as the most important anti-money laundering law in twenty years.

To ensure the law meets its challenge, we encourage the Financial Crimes Enforcement Network (FinCEN) to take special care to ensure that the rules:

- Maintain the comprehensive definition of “beneficial owner” expressly included in the CTA;
- Provide for broad coverage of the types of entities required to register, including, but not limited to, all non-exempted trusts;
- Limit the interpretations of the exemptions, as best as possible, to include only those that file beneficial ownership information elsewhere with authorities or are truly low risk for money laundering, terrorist financing, and other harms; and
- Allow for timely and complete access to beneficial ownership information for all law enforcement and those with legal obligations to protect our financial system.

We also encourage you to clarify FinCEN’s intent to verify the beneficial ownership data provided to the directory. The United Kingdom’s experience with a non-verified directory provides overwhelming evidence of the need to verify the data with simple, real-time checks against other existing government databases.

Given the global impact that an effective U.S. beneficial ownership directory would have on fighting corruption, stemming the rise of authoritarianism, and defending human rights, we urge you to issue

a rule that adheres to the important principles detailed above, and to present a draft rule for the consideration of the international community prior to the U.S. Summit for Democracy in December.

Thank you for your consideration of our views.

Sincerely,

Accountability Lab
American Sustainable Business Council
Americans for Tax Fairness
Anti-Corruption Data Collective
Be Just
Bekker Compliance Consulting Partners, LLC
Coalition for Integrity
Crude Accountability
Foreign Policy for America
Financial Accountability and Corporate Transparency (FACT) Coalition
Freedom House
Government Accountability Project
Human Rights First
Human Rights Foundation
Institute for Policy Studies-Program on Inequality
Institute on Taxation and Economic Policy
Integrity Initiatives International
International Coalition Against Illicit Economies (ICAIE)
Missionary Oblates JPIC
Natural Resource Governance Institute
Never Again Coalition
Oxfam America
Project on Government Oversight
Publish What You Pay – US
Sassoufit Collective
The ONE Campaign
The Sentry
Transparency International – U.S. Office
U.S. PIRG
UNISHKA Research Service
WatchDog.MD Community (Republic of Moldova)

May 5, 2021

By electronic submission (via the Federal E-rulemaking Portal)

Michael Mosier
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Advance Notice of Proposed Rulemaking on Implementation of the Corporate Transparency Act, RIN 1506-AB49, Docket Number FINCEN-2021-0005

Dear Director Mosier,

The U.S. office of Transparency International (“TI-US”) appreciates the opportunity to provide comments on the Financial Crimes Enforcement Network’s (“FinCEN”) Advance Notice of Proposed Rulemaking (“ANPRM”) on questions pertinent to the implementation of the Corporate Transparency Act (“CTA”), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).

TI-US is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, Transparency International (“TI”) partners with businesses, governments, and citizens to promote transparency and curb the abuse of power in the public and private sectors.

All around the world, TI chapters are actively involved in efforts to establish robust, effective, and accountable beneficial ownership registries as a means of curbing corruption, increasing government accountability and financial transparency, and building public confidence in the integrity of financial and political systems.¹ Corruption poses a unique, multidimensional threat to society in that it destabilizes economies, breaks down the rule of law, threatens political stability, and injects rent-seeking behaviors and other inefficiencies into free markets.² It is a globally resonant problem,³ and efforts to reduce it—including the establishment of highly useful

¹ For more information on TI’s work on global illicit finance, see Transparency International, “Dirty Money,” available at <https://www.transparency.org/en/our-priorities/dirty-money>.

² See generally U.S. Department of State, “International Narcotics Control Strategy Report, Volume II, Money Laundering,” March 2019, available at <https://www.state.gov/wp-content/uploads/2019/03/INCSR-Vol-INCSR-Vol.-2-pdf>.

³ For example, more than two-thirds of the 180 countries scored on TI’s 2020 “Corruption Perceptions Index”—which scores countries from 0 (very corrupt) to 100 (very clean)—received scores below 50. Transparency International, “Corruption Perceptions Index,” available at

beneficial ownership directories—can have truly global resonance.

A canvassing of over a decade of FinCEN advisories, relevant U.S. Department of the Treasury (“Treasury”) communications, including National Risk Assessments, and information from law enforcement and other government agencies shows that corruption is a top illicit finance threat.⁴ In February of last year, for example, Treasury’s National Strategy for Combating Terrorist and Other Illicit Financing identified corruption as one of the most significant illicit finance threats facing the U.S.⁵ Six months later, FinCEN issued a statement titled “Addressing the money-

<https://www.transparency.org/en/cpi/2020/index/nzl>.

⁴ See, e.g., Financial Crimes Enforcement Network, “Updated FinCEN Advisory Warns Against Continued Corrupt Venezuelan Attempts to Steal, Hide, or Launder Money,” May 3, 2019, available at <https://www.fincen.gov/news/news-releases/updated-fincen-advisory-warns-against-continued-corrupt-venezuelan-attempts>; Financial Crimes Enforcement Network, “FinCEN Advisory Warns of Risks Linked to Corruption in Nicaragua,” Oct. 4, 2018, available at <https://www.fincen.gov/news/news-releases/fincen-advisory-warns-risks-linked-corruption-nicaragua>; Financial Crimes Enforcement Network, “FinCEN Warns Financial Institutions to Guard Against Corrupt Venezuelan Money Flowing to U.S.,” Sept. 20, 2017, available at <https://www.fincen.gov/news/news-releases/fincen-warns-financial-institutions-guard-against-corrupt-venezuelan-money>; Financial Crimes Enforcement Network, “Advisory to Financial Institutions and Real Estate Firms and Professionals,” Aug. 22, 2017, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a003>; Financial Crimes Enforcement Network, “Certain South Sudanese Senior Political Figures May Seek to Abuse the Financial System,” Sept. 6, 2017, <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a004>; Financial Crimes Enforcement Network, “FinCEN Issues Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and Their Financial Facilitators,” June 12, 2018, <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign#:~:text=FinCEN%20is%20issuing%20this%20advisory,said%20Treasury%20Undersecretary%20Sigal%20Mandelker>; Financial Crimes Enforcement Network, “Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovych and Other Ukrainian Officials,” Mar. 6, 2014, <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002>; Financial Crimes Enforcement Network, “Certain South Sudanese Senior Political Figures May Seek to Abuse the Financial System,” Sept. 6, 2017, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a004>; Financial Crimes Enforcement Network, “FinCEN Issues Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and Their Financial Facilitators,” June 12, 2018, available at <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign#:~:text=FinCEN%20is%20issuing%20this%20advisory,said%20Treasury%20Undersecretary%20Sigal%20Mandelker>; Financial Crimes Enforcement Network, “Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovych and Other Ukrainian Officials,” Mar. 6, 2014, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002>.

⁵ U.S. Department of the Treasury, “National Strategy for Combating Terrorist and Other Illicit Financing, 2020” 2020, 8, available at <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>.

laundering threat posed by corruption of foreign officials continues to be a national security priority for the United States.”⁶ And in testimony given to the U.S. Senate Banking Committee in November 2018, FinCEN twice identified corruption as an “important illicit finance and national security issu[e].”⁷

In particular, corrupt officials, rogue nations, terrorists, and other criminals routinely hide behind anonymous companies to launder the proceeds of their crimes with impunity. For example, anonymous companies were used in approximately 70 percent of all grand corruption cases over a 30-year period reviewed by the World Bank and the United Nations Office on Drugs and Crime.⁸ Iran was infamously able to evade U.S. sanctions for years by purchasing real estate in New York City through an anonymous company.⁹ A notorious illegal arms dealer, Viktor Bout, used anonymous companies, including several in the U.S., to move weapons and money to conflict zones and corrupt leaders around the world.¹⁰ And the U.S. Department of Defense unwittingly entered into contracts with anonymous companies that were later revealed to be secretly owned by individuals associated with the Taliban.¹¹

As the world’s largest economy, the U.S. is a favored target for corrupt and other illicit funds. As detailed in several studies and evaluations that call out the U.S. as a top secrecy jurisdiction, the inadequacy of our current laws compounds the problem. By providing a safe haven for corrupt and criminal actors and their stolen funds, we undermine our own safety and security.

The CTA therefore provides a once-in-a-generation opportunity to combat these and other threats by providing highly useful information to law enforcement and the financial institutions charged with anti-money laundering responsibilities that can help protect the U.S. financial system and

⁶ Financial Crimes Enforcement Network, “Agencies Issue Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons,” Aug. 21, 2020, available at <https://www.fincen.gov/news/news-releases/agencies-issue-statement-bank-secrecy-act-due-diligence-requirements-customers>.

⁷ Testimony for the Record of Kenneth A. Blanco, Director, Financial Crimes Enforcement Network, U.S. Department of the Treasury, Nov. 29, 2018, available at <https://www.fincen.gov/news/testimony/testimony-fincen-director-kenneth-blanco-senate-committee-banking-housing-and-urban>.

⁸ See Transparency International, “Recommendations on Beneficial Ownership Transparency for Open Government Partnership National Action Plan,” November 2019, available at <https://www.transparency.org/en/publications/recommendations-on-beneficial-ownership-transparency-for-ogp-national-action>.

⁹ See The FACT Coalition, “How Rogue Nations & Sanctioned Groups Use Shell Companies,” Feb. 14, 2019, available at thefactcoalition.org/how-rogue-nations-sanctioned-groups-use-shell-companies/.

¹⁰ See Casey Michel, “The U.S. Is a Good Place for Bad People to Stash Their Money,” *The Atlantic*, Aug. 10, 2017, available at www.theatlantic.com/business/archive/2017/07/us-anonymous-shell-companies/531996/.

¹¹ See Karen DeYoung, “U.S. Trucking Funds Reach Taliban, Military-Led Investigation Concludes,” *The Washington Post*, July 24, 2011, available at www.washingtonpost.com/world/national-security/us-trucking-funds-reach-taliban-military-led-investigation-concludes/2011/07/22/gIQAmMDUXI_story.html?utm_term=.361db33ec736.

ameliorate the consequences of corruption across the globe. FinCEN must now adopt strong, effective implementing rules that meet and respond to the seriousness and urgency of these threats.

Question 1

The CTA requires reporting of beneficial ownership information by “reporting companies,” which are defined, subject to certain exceptions, as including corporations, LLCs, or any “other similar entity” that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document.

- a. How should FinCEN interpret the phrase “other similar entity,” and what factors should FinCEN consider in determining whether an entity qualifies as a similar entity?**
- b. What types of entities other than corporations and LLCs should be considered similar entities that should be included or excluded from the reporting requirements?**
- c. If possible, propose a definition of the type of “other similar entity” that should be included, and explain how that type of entity satisfies the statutory standard, as well as why that type of entity should be covered. For example, if a commenter thinks that state-chartered non-depository trust companies should be considered similar entities and required to report, the commenter should explain how, in the commenter’s opinion, such companies satisfy the requirement that they be formed by filing a document with a secretary of state or “similar office.”**

During the negotiations leading up to the final text of the CTA, the issue of exemptions was discussed and debated extensively. A wide variety of constituencies was consulted, and exemptions were added throughout the process. To this end, the rationale for not including a specific exemption was far more likely to be a negotiated decision from policymakers than an absence of forethought. While some commenters may choose to relitigate the types, number, and scope of exemptions, Treasury and FinCEN should be aware that these arguments were very likely considered, and subsequently rejected, by Congress. Among other concerns, Members of Congress were concerned throughout the policymaking process about creating additional loopholes—whether intentionally or inadvertently—that could and surely would be exploited by corrupt and/or criminal actors.

FinCEN should also be aware of the extensive discussions leading to the understanding that the inclusion of a certain type of entity does not, in any way, suggest that that vehicle is itself corrupt. Many legitimate individuals and ownership structures may employ certain business vehicles. Rather, included vehicles were determined to be potential targets for abuse by corrupt and criminal actors because of their lack of transparency.

Constituencies seeking exemptions have made reasonable arguments that their members are not corrupt. However, it does not follow that the type of *vehicle* cannot be used by corrupt

actors. Therefore, FinCEN should consider the risk for exploitation of the vehicle itself when considering any exemption under the implementing rules. For example, certain private investment vehicles have suggested that a multi-year time horizon for investments make them a low risk for money laundering.¹² But such a suggestion does not take into account the changing nature of corrupt and criminal networks. For example, the president of Equatorial Guinea passed his stolen fortune onto his son,¹³ and money stolen by a former president of Angola made his daughter possibly the wealthiest woman in Africa.¹⁴ Longer-term planning with diversified portfolios is now intrinsic to the investment strategies of corrupt actors and criminal networks.

Critically, FinCEN must also not repeat mistakes acknowledged by other countries when setting up their beneficial ownership directories. The United Kingdom (“UK”) originally exempted certain types of partnerships, only to see the use of those vehicles skyrocket after the UK database went into effect. Lawmakers were forced to revisit the issue and, based on a second risk assessment, chose to revoke the relevant exemptions.¹⁵

This is important context as FinCEN determines how broadly or narrowly to interpret reporting company language. And given the CTA’s legislative history, final implementing rules interpreting “reporting companies” and “similar entities” broadly, beyond the specific exemptions detailed in the legislative text, would more closely reflect the intent of the drafters.

In particular, FinCEN should define the phrase “other similar entity” to include *all* types of entities that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by filing a document with a secretary of state or a similar office under the laws of a State or Indian Tribe” and *not* specifically exempted in the CTA. At a minimum, this phrase must include limited liability partnerships, non-charitable trusts and foundations, joint-stock companies, joint ventures, societies, clubs, funds, and business associations that do not qualify for an exemption. Furthermore, sole proprietorships that operate under a “doing business as” or “fictitious name” registration should be covered, as these vehicles create an opaque layer to separate the individual and the entity. And finally, where exemptions do exist, FinCEN must appropriately tailor them in order to minimize risk of abuse or exploitation. See our answer to Question 6, which addresses exempt entities, below.

¹² See Heather Vogell, “Why Aren’t Hedge Funds Required to Fight Money Laundering?” Jan. 23, 2019, available at <https://www.propublica.org/article/why-arent-hedge-funds-required-to-fight-money-laundering>.

¹³ See Transparency International, “On trial for corruption: Teodoro Obiang, son of the president of Equatorial Guinea,” June 19, 2017, available at <https://www.transparency.org/en/news/on-trial-for-corruption-teodoro-obiang-son-of-the-president-of-equatorial-g>.

¹⁴ See Laure Brillaud, Transparency International EU, “Why the EU needs to rethink its approach to asset recovery,” July 13, 2020, available at <https://transparency.eu/rethink-asset-recovery/>.

¹⁵ See BBC News, “Crackdown plan on Scottish limited partnerships,” Apr. 29, 2018, available at <https://www.bbc.com/news/uk-scotland-scotland-business-43935839>.

Question 2

The CTA limits the definition of reporting companies to corporations, LLCs, and other similar entities that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.”

- a. Does this language describe corporate filing practices and the applicable law of the states and Indian tribes sufficiently clearly to avoid confusion about whether an entity does or does not meet this requirement?**
- b. If not, what additional clarifications could make it easier to determine whether this requirement applies to a particular entity?**

The CTA’s inclusion of the phrase “with a secretary of state *or a similar office*” reflects the fact that while filings or registrations are made with a secretary of state’s office in many states, they are not made with such offices in every state. For example, in Arizona, most companies register with the Arizona Corporations Commission; and in Michigan, registration is with the Michigan Department of Licensing and Regulatory Affairs. The CTA thus deliberately includes “or a similar office” to make clear that it is the *role* that a state or tribal office plays with regard to covered entities, not the formal title or denomination of that office, that is determinative of what should be considered a “similar office.” To this end, an office like the Arizona Corporations Commission or Michigan Department of Licensing and Regulatory Affairs are clearly “similar” offices because of their role with regard to covered entities.

Along the same line, in some states, many entities (including sole proprietorships, limited liability companies (“LLCs”), corporations, and other similar entities) file a “doing business as” or “fictitious name” registration with a local or county office,¹⁶ while others, including partnerships, file for a state license with a separate state office.

Altogether, it is immaterial whether such offices (or any other office where entities are created or registered) happen to share any additional similarities with secretaries of state offices; an office need only play a similar role with regard to covered entities to be properly considered a “similar office.”

Question 3

The CTA defines the “beneficial owner” of an entity, subject to certain exceptions, as “an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise” either “exercises substantial control over the entity” or “owns or controls not less than 25 percent of the ownership interests of the entity.” Is this definition, including the specified exceptions, sufficiently clear, or are there aspects of this definition and specified exceptions that FinCEN should clarify by regulation?

- a. To what extent should FinCEN’s regulatory definition of beneficial owner in this context be the same as, or similar to, the current CDD rule’s definition or the**

¹⁶ See Legalinc, “Facts About Fictitious Business Name Filing,” June 8, 2019, available at <https://legalinc.com/blog/dba-name-filing/>.

standards used to determine who is a beneficial owner under 17 CFR §240.13d-3 adopted under the Securities Exchange Act of 1934?

- b. Should FinCEN define either or both of the terms “own” and “control” with respect to the ownership interests of an entity? If so, should such a definition be drawn from or based on an existing definition in another area, such as securities law or tax law?**
- c. Should FinCEN define the term “substantial control”? If so, should FinCEN define “substantial control” to mean that no reporting company can have more than one beneficial owner who is considered to be in substantial control of the company, or should FinCEN define that term to make it possible that a reporting company may have more than one beneficial owner with “substantial control”?**

The definition of “beneficial owner” is among the most critical aspects of the CTA, and embodies a number of key considerations and important decision points by its drafters. FinCEN must maintain the integrity of this definition in its implementing rules, in particular by adopting a broad interpretation of the “control” prong that specifies the indicators of company control.

First, the drafters deliberately included both the 25 percent “ownership” provision and the “substantial control” provision in recognition of alternative arrangements and of how ownership stakes can be manipulated or masked.

To the average person, the owner of a company is a straightforward matter. In fact, approximately 78 percent of all U.S. companies are nonemployer firms.¹⁷ For the plumbers, tax preparers, and many others who set up these companies, there is, generally, one person who is the owner, boss, and sole employee. But companies can divide up ownership interests of a company in many ways, including ways that mask the person(s) who controls how funds are allocated, and who benefits from the proceeds of the company. A company can easily, for example, create a class of nonvoting shares specifically to decouple equity ownership from company control. Or, imagine a company created and controlled by a corrupt official with a brother, spouse, and two children. If each has an equal “ownership” stake of 20 percent, then no one would have to be reported as owning the company.

Understanding these possibilities, the CTA does not simply rely on a percent ownership threshold. Instead, it also requires a reporting company to provide identifying information for every individual who exercises “substantial control” over the company, *beyond* any written ownership structure and whether or not the person owns any stock.

In fashioning this definition, Congress understood the difference between requiring identifying information for *one* individual that exercises substantial control over a corporation, LLC, or other similar entity, and requiring such information for *each* individual that does so. Awareness of this difference is made clear in the subsection on reporting requirements for certain pooled investment vehicles (“PIVs”), which reads in relevant part:

¹⁷ U.S. Census Bureau, “Nonemployer Statistics by Demographics (NES-D): Using Administrative and Census Records Data in Business Statistics,” Jan. 2019, available at <https://www2.census.gov/ces/wp/2019/CES-WP-19-01.pdf>.

Any corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(11)(B)(xviii) and is formed under the laws of a foreign country shall file with FinCEN a written certification that provides identification information of *an individual* that exercises substantial control over the pooled investment vehicle in the same manner as required under this subsection.¹⁸

In addition, the CTA states explicitly that a company cannot name an agent, nominee, or other stand-in as a beneficial owner. That means a company can't name a lawyer, employee, or corporate formation agent unless that person also has ultimate control over the company.

Second, the drafters of the CTA designed the definition of “beneficial owner” to close loopholes in the U.S. Customer Due Diligence (“CDD”) rule. Currently, the CDD rule defines “beneficial owner” as a person who owns 25 percent or more of the shares of a company. If no one meets that threshold, the CDD rule allows the company to name an officer or manager instead. But an officer or manager is not necessarily a company owner. That is why the CTA intentionally closes this loophole by requiring the disclosure of persons who either own *or* control the company—compelling disclosure of the individuals with actual, ultimate control of the company, and not simply an employee who can be fired by the true owners.

Third, the definition of “beneficial owner” was specifically designed to meet international standards. The Financial Action Task Force (“FATF”)—the multilateral body that sets international anti-money laundering standards—defines beneficial owners by looking at both ownership and control.¹⁹

Control is also included in definitions of ownership in the United Kingdom (“UK”)²⁰ and European Union (“EU”)²¹ rules for beneficial ownership reporting. Both rules require companies to consider not just the ownership of company shares, but also who has power to vote, direct votes, replace board members, and direct the selling of securities—all indicators of company control. Only if a company claims that no one meets either the ownership threshold or exercises those types of control over its operations do the UK and EU laws allow the company to list a senior manager instead. But, again, a manager who can be fired is not a beneficial owner. The better approach is to follow the FATF—and now U.S.—standard requiring the company to name who controls it, because someone always does. Especially companies engaged in wrongdoing.

Defining “control” of an entity broadly is also consistent with other U.S. federal laws where it is

¹⁸ Emphasis added.

¹⁹ See Inter-American Development Bank (“IDB”) and the Organisation for Economic Cooperation and Development (“OECD”), “A Beneficial Ownership Implementation Toolkit,” March 2019, available at <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>.

²⁰ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (2017 Regulations), SI 2017/692, art. 5 (UK).

²¹ See Transparency International, “European Union Beneficial Ownership Transparency,” 2015, available at, https://www.transparency.org/files/content/publication/2015_BOCountryReport_EU.pdf.

important to identify beneficial ownership of an entity. For example, the regulations governing the Committee on Foreign Investment in the United States (“CFIUS”)—an interagency committee overseen by Treasury—include an expansive definition of “control” to assert jurisdiction over a wide range of foreign influence over a U.S. business, reflecting CFIUS’s important mandate to protect U.S. national security. FinCEN’s mandate to safeguard the U.S. financial system and promote U.S. national security likewise counsels in favor of inclusive definitions of “substantial control” to determine beneficial ownership. In particular, the CFIUS regulations provide that “control” is the “power whether or not exercised” by any “means” to determine, direct, or decide important matters affecting an entity.²² Such a definition of “control” also makes clear that it is separate and distinct from “own[ing]” an interest in an entity, which incorporates elements of possession and legal title that are not necessary to exercise *control* over an entity. The CTA also requires that FinCEN define “substantial control” in a manner that permits more than one person to exert substantial control. Using the CFIUS regulations as an analogue, it is recognized that more one than one person can exert control over an entity through “formal or informal arrangements to act in concert.” In such circumstances, each person has the ability to exercise “substantial control” over the entity.

Finally, clarifying the indicia of company control is a necessary and important step toward the effective enforcement of the CTA’s strong definition of “beneficial owner.” At a minimum, the implementing rules should state that the term “control” means the power to vote, direct votes, appoint and replace board members, decide on the sale or termination of a company, and direct who takes possession of company funds or assets.

Question 4

The CTA defines the term “applicant” as an individual who “files an application to form” or “registers or files an application to register” a reporting company under applicable state or tribal law. Is this language sufficiently clear, in light of current law and current filing and registration practices, or should FinCEN expand on this definition, and if so how?

What is central to the definition of “applicant” is the *role* that this individual plays in the formation or registration process. To this end, FinCEN should make clear that an applicant need not be cabined to a person who plays such a role yet does not happen to “fil[e] an application” or “register”, or perform another equivalent action or process, in order to form or register the entity. Instead, “applicant” should be defined broadly to encompass any individual that files an application to form, or registers or files an application to register, or performs any functionally similar action or role with regard to forming or registering a reporting company. Such a definition will be structured to capture current and evolving filing, registration, and related practices as iterated in jurisdictions across the country—regardless of formalities or terminology.

Bottom line, every entity subject to the reporting requirement has a person who plays the functional role of the “applicant,” and so FinCEN’s implementing rules must make sure that for every reporting entity there is an accompanying “applicant,” regardless of their formal title.

²² See 31 CFR Sec. 800.

Question 5

Are there any other terms used in the CTA, in addition to those the CTA defines, that should be defined in FinCEN's regulations to provide additional clarity? If so, which terms, why should FinCEN define such terms by regulation, and how should any such terms be defined?

Yes, see our answers throughout.

Question 6

The CTA contains numerous defined exemptions from the definition of “reporting company.” Are these exemptions sufficiently clear, or are there aspects of any of these definitions that FinCEN should clarify by regulation?

TI's global network of experts and advocates have extensively documented how even small gaps in U.S. anti-money laundering laws can allow corrupt actors to exploit the U.S.'s financial system. The continuous emergence of ever-more complex and sophisticated financial vehicles and networks makes certain that if the U.S. fails to stay ahead of evolving illicit finance threats, it will be permitting corrupt actors to adapt and thrive outside its reach. The carefully limited exemptions to the CTA's baseline reporting requirement are therefore among the most important aspects of the new law.

Overall, while appearing to contain disparate and varied requirements, the elements of many of the most consequential exemptions in fact reflect clear and consistent themes, key decision points, and deliberate prerequisite conditions for exemption. Informed by this common background and approach, their further articulation should be relatively straightforward.

To accurately reflect the language and intent of the CTA, and to ensure a comprehensive regulatory regime that is sufficiently fortified against corruption and abuse, FinCEN's interpretation of the CTA's exemptions from the definition of “reporting company” must include the following components:

(vi)—Money transmitting businesses properly, actively, and continuously registered with Treasury

The CTA exempts money transmitting businesses (MTBs), as defined in 31 U.S.C. § 5330(d)(1), if they are properly, actively, and continuously registered with the Secretary of the Treasury according to 31 U.S.C. § 5330 and its accompanying regulations. For example, the MTBs must provide all the information required under 31 U.S.C. § 5330(b), including the name and address of every deposit institution at which the business maintains a transaction account.

(xiii)—Affirmatively and continuously authorized insurance producers

To qualify for this exemption, an insurance producer must be “authorized by a state.” This operative term, “authorized,” reflects the fact that insurance producers are regulated at the state level, and that such regulators, by practice, must affirmatively license an insurance

producer before it can, for example, sell, negotiate, effect, or deliver insurance.²³

Reflecting this industry practice, exemption (xiii) requires that an entity be *affirmatively and continuously* authorized—essentially precleared and actively licensed—by a state in order to be exempt. It is therefore insufficient that, for example, an entity has simply applied or filed the paperwork for a state insurance producer license, or that an entity was once properly authorized but has since fallen out of compliance for such authorization. Instead, the state must have issued an affirmative, final, and formal determination that the entity is authorized to operate as an insurance producer in the state, and that authorization must be active, ongoing, and in good standing.

(xviii)—Pooled investment vehicles publicly identified by name

To qualify for this exemption, an entity must be operated or advised by certain entities or persons (e.g., a bank, a federal or state credit union, a registered broker or dealer) and must either be an “investment company” (as defined in section 3(a) of the Investment Company Act of 1940) or a company that would be an investment company but for the exclusion provided from that definition by paragraph (1) or (7) of that section *and* that is identified by its legal name by the applicable investment adviser in its Form ADV or successor form filed with the Securities and Exchange Commission (“SEC”).

The publicly available Form ADV requires, among other items, a list of all private funds that the adviser manages. Though this list can include *either* the names of the private funds or numbers generated by the SEC that represent the names of these private funds, the CTA makes clear that to qualify for exemption xviii, an entity *must* be identified by its legal name. FinCEN must in turn ensure that this context and choice is reflected in its implementing rules.

(xix(III))—Charitable and Split-Interest Trusts

Trusts are a high-risk vehicle for money laundering, a fact that has been documented extensively. In particular, in 2010, the FATF authored a report titled “Money Laundering Using Trust and Company Service Providers,”²⁴ that documents these risks as they relate to corrupt officials and criminal networks. The organization also called for additional studies concerning the use of trusts for terror financing.²⁵

Through over a decade of negotiations, Congress articulated 23 highly specific and exactly detailed types of entities for exemption from the CTA’s reporting requirements. Such informed and precise determinations, and resulting text, reflect the obvious, but worthy, of restatement here, reality that the drafters of the CTA were well versed on the available

²³ See National Association of Insurance Commissioners, “State Insurance Regulation,” 2011, available at https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf.

²⁴ Financial Action Task Force, “Money Laundering Using Trust and Company Service Providers,” Oct. 2010, available at <https://www.fatf-gafi.org/documents/documents/moneylaunderingusingtrustandcompanyserviceproviders.html>.

²⁵ *Id.*

universe of entities for both inclusion and exemption. Here, from the larger universe of trusts, Congress specified two subcategories for exemption: *charitable* trusts and *split-interest* trusts. FinCEN must respect and reflect this granular demonstration of congressional intent by making clear that other types of trusts, namely, *non-charitable* trusts, are to be considered “similar entities” that are subject to the CTA’s reporting requirements.

Thus, while FinCEN cannot reverse the legislative text, which expressly exempts charitable and split-interest trusts, its implementing rules can ensure the harm done by exemption (xix(III)) is cabined to those specific kinds of trusts.

The implementing rules should make clear that the phrase “other similar entity” includes non-charitable trusts that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by filing a document with a secretary of state or a similar office under the laws of a State or Indian Tribe”—including those that file or register with a local or county office. Non-charitable trusts may file with a secretary of state office if, for example, they engage in business activity, but not necessarily. Trusts engaged in business activities may file a “doing business as” registration with a local or county office. Some trusts may file with a local, county or state court. This is the same reason, as raised earlier, that FinCEN should think expansively about filings with offices that are “similar” to that of a secretary of state.

(xx)—*U.S.-funded and owned financiers or governance rights holders of (xix) entities*

Exemption (xx) is available to an entity that meets four express conditions: It must operate *exclusively* to either provide financial assistance to, or hold governance rights over, an xix-exempted entity; it must be a United States person; it must be beneficially owned and controlled, *exclusively*, by one or more U.S. persons that are either U.S. citizens or lawfully admitted for permanent residence; and it must derive at least a majority of its *funding* or *revenue* from one or more U.S. persons that are U.S. citizens or lawfully admitted for permanent residence.

To illustrate the boundaries of this exemption: If a company engages in any activity whatsoever other than providing financial assistance to, or holding governance rights over, an xix entity, it would not qualify for the exemption. This includes the provision of any financing, however small, to any entity other than an xix entity.

The entity must also be exclusively beneficially owned, or exclusively controlled, by one or more U.S. citizens or green card holders. Thus, an entity that was exclusively beneficially owned by a U.S. citizen—but controlled by a second person who was not either a U.S. citizen or green card holder—would not qualify for the exemption.

Finally, the exemption was carefully drawn so as to make sure that exempted entities could not be used as conduits of unlimited illicit funds from foreign corrupt or criminal actors. Without a qualification that speaks to where an entity’s money is coming from, a foreign bad actor could launder unlimited illicit funds through an xix-exempted entity without any beneficial ownership information ever being reported. To foreclose such a possibility, a

majority of the entity’s “funding” or “revenue” must come from one or more U.S. citizens or green card holders. Note that “funding or revenue” connotes a source of cash flow either by contribution (funding) or sales of goods or services (revenue). Funding or revenue is distinct from “gross receipts,” a term used in an adjacent subsection, making clear that “funding or revenue” is not to be interpreted or defined in the same manner as “gross receipts.” “Gross receipts,” rather, are defined in the Internal Revenue Code to mean a broader array of income sources, including (a) amounts received from the sale or lease of property, (b) dividends and interest, and (c) commissions.²⁶ Accordingly, an entity would not be exempt under subsection (xx), for example, if it derived a majority of its available cash from the sale of property, as such cash would be a gross receipt, not funding or revenue. Similarly, an entity that derives a majority of its *assets*, or simply its *profits*, from U.S. citizens or green card holders would not qualify for the exemption.

In the same vein, the CTA makes clear that an entity must derive at least a majority of its *total* funding or revenue from such sources—not simply its funding or revenue for, say, the previous tax year.

(xxi)—Large U.S.-operating companies with over \$5 million in receipts or sales

Exemption (xxi) is available to an entity that:

- (I) employs more than 20 employees on a full-time basis in the United States;
- (II) filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of—
 - (aa) other entities owned by the entity; and
 - (bb) other entities through which the entity operates; and
- (III) has an operating presence at a physical office within the United States.

To qualify for this exemption, an entity must employ more than 20 *full-time*—meaning, according to the IRS, an employee employed on average at least 30 hours of service per week or 130 hours per month²⁷—*employees*, meaning that independent contractors and comparable agency relationships are not to be counted toward the threshold.

Additionally, an entity must demonstrate *in its previous year’s federal income tax returns*—not return(s) reflecting any other time period, and not income tax returns filed with any other political subdivision—that they had gross *receipts or sales* that exceeded \$5 million. Just as in exemption (xx), these terms have established and precise legal contours. Drafters of the CTA considered other potential demonstrations of economic activity such as “revenue,” “income,” and “assets,” and intentionally excluded these metrics from exemption (xxi).

(xxii)—Entities wholly owned by certain exempt entities

²⁶ See 26 CFR § 1.993-6.

²⁷ Internal Revenue Service, “Identifying Full-Time Employees,” Jan. 22, 2021, available at <https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees>.

Similar to the “dormant company” exemption discussed below, exemption (xxii) is available to an entity of which the ownership interests are 100 percent owned or controlled, directly or indirectly, by one or more certain entities exempted elsewhere.

Big picture, to exempt subsidiaries that are, say, *majority* owned, but not wholly owned, would not only exponentially increase the total universe of exempted entities, but would introduce serious risks that bad actors will gain access to the U.S. financial system through jointly owned entities or other types of joint ventures. Doing so would provide bad actors with a clear road map for penetrating the U.S. financial system: Simply find an exempt company to serve as a partner, or as a majority owner in a joint venture, and you can escape detection. Since the exempt entity has no responsibility to know who is behind a potential layer of shell companies, there is plausible deniability should law enforcement suspect illicit activity on behalf of the partner entity.

Instead, interpreting “owned or controlled” to mean that an entity is only exempt if *all* its ownership interests are owned or controlled by one or more certain entities exempted elsewhere by the CTA would be textually consistent with the statute. Where Congress intended to identify an ownership interest less than 100 percent, it did so, as in the definition of “beneficial owner,” where Congress specified that the term includes an individual who “owns or controls *not less than 25 percent* of the ownership interests of the entity.” In the absence of such a qualifier, as in exemptions xix and xxii, Congress plainly intended such ownership or control to mean 100 percent of the entity’s ownership interests.

Others may suggest that Treasury arbitrarily interpret “owned or controlled” to mean *majority* ownership, yet nowhere does the CTA indicate such an intent of Congress. Moreover, it would be inappropriate for Treasury to interpret the CTA’s exemptions broadly, as a tried-and-true canon of statutory interpretation presumes that exceptions are to be interpreted narrowly in order to preserve the primary operation of the provision.²⁸ Indeed, Treasury relies on a majority ownership policy when it intends to be *inclusive*, not exclusive, as in the Office of Foreign Assets Control’s (“OFAC”) “50 Percent Rule.” That policy provides that any entity owned 50 percent, directly or indirectly, by a person listed on OFAC’s “Specially Designated National and Blocked Persons List” is treated in the same manner as the listed person.²⁹ That expansive policy promotes OFAC’s mandate to reach as broadly as possible to persons and entities that threaten U.S. financial and security interests. An inclusive “50 Percent Rule” in the context of the CTA’s exemptions, therefore, has no place.

(xxiii)—*Dormant companies*

²⁸ See *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)). See also, e.g., *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“Any exemption from...remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.”).

²⁹ U.S. Department of the Treasury, “Frequently Asked Questions: Entities Owned by Blocked Persons (50% Rule),” available at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1521>.

Exemption (xxiii) is available to an entity that has been in existence for over one year, is not engaged in “active business,” is not owned, directly or indirectly, by a foreign person, and has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than \$1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity, or an affiliate of the entity, maintains an interest).

In defining the contours of this exemption, FinCEN must first make clear that it is intended for qualifying entities in existence *prior* to CTA implementation. In fact, the exemption is crafted in such a way as to make it functionally impossible for an entity formed *after* implementation to claim it.

FinCEN must then ensure that the term “active business” is interpreted broadly to reflect the drafters’ intent that it be available only to truly “dormant” entities—that is, entities that have zero discernable business activities whatsoever.

Finally, FinCEN must be mindful that this exemption incorporates one of the most important throughlines in the CTA: That Congress was acutely concerned about the risks posed by *foreign* ownership and/or an entity’s lack of a physical presence in the United States. Reflecting this concern, and just as in exemption (xx), which requires that an entity be exclusively beneficially owned or controlled by one or more U.S. citizens or green card holders, exemption xxiii states that an entity is exempt only if it is “*not owned, directly or indirectly, by a foreign person.*”³⁰ This is an intentionally narrow, zero-threshold bar for foreign-owned or -controlled entities, and FinCEN must reiterate Congress’s clear intent on the matter: To receive this exemption, an entity cannot have *any* ownership interest owned or controlled by a foreign individual or entity.

Question 7

In addition to the statutory exemptions from the definition of “reporting company,” the CTA authorizes the Secretary, with the concurrence of the Attorney General and the Secretary of Homeland Security, to exempt any other entity or class of entities by regulation, upon making certain determinations. Are there any categories of entities that are not currently subject to an exemption from the definition of “reporting company” that FinCEN should consider for an exemption pursuant to this authority, and if so why?

FinCEN should not create any novel exemptions this soon after the adoption of the CTA itself, and absent the required determinations and formal notice-and-comment process associated therewith. Some exemptions that have already been suggested, such as an exemption for small businesses, would disregard congressional intent, undermine the effectiveness of the law, and weaken its national security benefits.

Going forward, FinCEN must not engage in rulemakings that result in the creation of new, unjustified exemptions for favored or powerful constituencies that will lead to future abuse or exploitation.

³⁰ Emphasis added.

In the twelve years since the original version of a corporate transparency bill was introduced by Senators Carl Levin and Norm Coleman, the issue of exemptions from the reporting requirements has been among the most debated of any of the law's provisions. As discussed above, the final law settled on 23 highly specific and exactingly detailed types of entities for exemption.

When Congress included the beneficial ownership reporting requirements in the NDAA, it did so in recognition of the national security threat posed by anonymous companies. The extensive record of abuse of anonymous entities was determinative in moving Congress to include the CTA in the annual defense bill.³¹ From that record, FinCEN must draw the conclusion that it should employ a risk-based approach to exemptions, and as such, any future exemptions must be strictly limited to entities that already report beneficial ownership information to a government agency or that are sufficiently supervised and examined by an appropriate regulator.

In assessing such risk, FinCEN must not look to any magic number of instances of abuse within a type, class, or category of entity, but the overall potential risk. When the Iranian government, through its national bank, used a U.S. shell company to purchase property in New York City in violation of economic sanctions, it was only one instance, but an illustrative example of serious risk.

Question 8

If a trust or special purpose vehicle is formed by a filing with a secretary of state or a similar office, should it be included or excluded from the reporting requirements?

The CTA includes specific exemptions for *charitable* and *split-interest* trusts. How trusts were to be treated under the CTA was considered extensively during bill negotiations. The choice to omit *non-charitable* trusts from the list of exempted trusts makes clear that these entities were to be included as reporting companies.

Including trusts that are not otherwise expressly exempted would also be consistent with emerging international norms: The FATF, for example, includes trusts among its recommendations, and the EU includes trusts in their anti-money laundering directive on beneficial ownership reporting.

Special purpose vehicles ("SPVs") must also be included as reporting companies unless they otherwise claim an exemption, as a blanket exclusion of these types of entities could create a loophole for unscrupulous actors. SPVs often take the form of an LLC, limited partnership, or trust. SPVs formed by well-regulated entities such as public utilities or large financial institutions are of low risk and would be able to claim an exemption already detailed in the law. However, not all SPVs are low risk. SPVs, when filing with a secretary of state, submit very little

³¹ See The FACT Coalition, "Beyond Anecdotes: Data Demonstrate Anonymous Companies Are Dangerous and Prevalent," May 14, 2019, available at <https://thefactcoalition.org/beyond-anecdotes-data-demonstrate-anonymous-companies-are-dangerous-and-prevalent/>.

information, such as the name of the business and the address, and little to no information about the SPV's owner(s) or shareholders. SPVs can also be formed offshore and then file limited information in order to do business in the United States. This low threshold of reporting could make SPVs prime vehicles for the type of criminal and illicit activity the CTA was designed to guard against. A classic example of this is Enron Corporation's use of SPVs to falsify holdings, maintain off-the-books entities to hide its debt, and artificially inflate the company's stock price.³²

Question 9

How should a company's eligibility for any exemption from the reporting requirements, including any exemption from the definition of "reporting company," be determined?

- a. What information should FinCEN require companies to provide to qualify for these exemptions, and what verification process should that information undergo?**
- b. Should there be different information requirements for operating companies and holding companies, for active companies and dormant companies, or are there other bases for distinguishing between types of companies?**
- c. Should exempt entities be required to file periodic reports to support the continued application of the relevant exemption (e.g., annually)?**

The CTA requires that if an exempt entity no longer meets the relevant criteria for exemption, it must submit its beneficial ownership information to FinCEN "at the time" it no longer qualifies. This specific language—"at the time"—clearly means *simultaneously*. Timely update requirements are important as money laundering transactions can move through the system quickly. FinCEN should not open a door for otherwise legitimate financial gatekeepers to unwittingly assist criminals who seek to exploit gaps in the rules.

FinCEN must ensure that its implementing rules do not allow for a time frame that contrasts with such a clear directive (e.g., within 30 days, within six months, or even "promptly"). Instead, an entity must be required to submit its ownership information at the precise time that it no longer meets exemption criteria.

Finally, FinCEN should keep in mind that negligence is not punishable under the law. That is to say that a delay or omission would have to be willful to result in penalties (for example, not submitting a report for the purpose of evading detection after using a previously exempt company to launder illicit funds).

Question 10

What information should FinCEN require a reporting company to provide about the

³² See Adam Hayes, Investopedia, "Enron", Apr. 12, 2021, available at <https://www.investopedia.com/terms/e/enron.asp> ("The company set up special purpose vehicles (SPVs), also known as special purposes entities (SPEs), to formalize its accounting scheme that went unnoticed for a long time").

reporting company itself to ensure the beneficial ownership database is highly useful to authorized users?

The CTA requires that every reporting company provide a report that identifies “*each* beneficial owner” of the company “and *each* applicant” with respect to that reporting company by full legal name, date of birth, current—as of the date the report is delivered—a physical (not P.O. box) residential or business street address, and either a unique identifying number from an acceptable identification document or a FinCEN identifier.

Inherent in the text, intent, and common-sense operation of the law is also the requirement that reporting companies report the name of the entity itself. Since duplicative company names can exist across jurisdictions, it is also reasonable, for the most basic identification purposes, for FinCEN to request the jurisdiction in which the reporting company was formed. For U.S. companies, FinCEN should provide a drop-down menu for filers to select the appropriate state or other U.S. jurisdiction (such as tribe or territory). For foreign companies registering to do business in the U.S., FinCEN should request the jurisdiction in which the company was formed, or in which the company has its headquarters or principal place of business.

Question 11

What information should FinCEN require a reporting company to provide about the reporting company’s corporate affiliates, parents, and subsidiaries, particularly given that in some cases multiple companies can be layered on top of one another in complex ownership structures?

While it is not incumbent upon a reporting company to provide such information, the database itself must be able to link beneficial owners to corporate affiliates, parents, and subsidiaries in order to ensure the information is highly useful. The database should also be able to link beneficial owners to all the entities that that person owns in a single search. Mapping the corporate structure is important for creating useful reports for database users, including law enforcement officials and financial institutions. This is not particularly difficult or unusual technology (Facebook, with more than one billion users, for example, maps relationships with every search).

Denmark’s beneficial ownership directory, for example, allows users who search an individual’s name to see every company in which that individual is named as a beneficial owner. The Danish directory also allows users to see all the business listed at the same address. Search engines operate in Belgium, France, and other EU member states that allow users to find multiple data points as well. FinCEN should speak with these countries to learn what is most useful and to avoid mistakes that needed to be corrected later in the development process.

Given the steps required of users in order to receive approval for a single query to the U.S. database, it would be impractical and time consuming for users to only receive a single datapoint with each search (e.g., a single match of an owner and a company) if additional data exists. The directive in the CTA to make the information highly useful instead requires

FinCEN to create a database that will provide *all* relevant data with each search.

To illustrate the need for this interoperability, when Venezuelan General Vladimir Padrino laundered millions of dollars stolen from the public Venezuelan treasury, he established a front company in the United States and installed nominee owners.³³ Without a comprehensive view of the web of interconnected shell companies linked to a front company, law enforcement would find it nearly impossible to gain an understanding of an illicit network.

FinCEN should also ensure that the database is capable of linking beneficial owners to all corporate affiliates, parents, and subsidiaries. That information can in turn be used to automatically assign a unique identifier that links to all related entities in order to facilitate investigations and ensure the data is highly useful to users.

FinCEN should keep in mind that the vast majority of companies in the U.S. have simple structures. More than 99 percent of U.S. companies are considered small by the Small Business Administration (“SBA”).³⁴ Approximately 80 percent are nonemployer firms.³⁵ Larger firms that qualify for exemption (xxi) would not have to submit reports.

For those companies that do have more complex structures, FinCEN should be able to “connect the dots” with proper use of FinCEN identifiers. Beneficial owners can only receive one identifier, regardless of the number of entities with which they are associated. Subsidiaries of companies that receive identifiers will use the parent identifier, thus providing a map of the corporate structure.

There are inherent risks posed by small companies with complex structures (e.g., shell companies). Companies that are a part of a multilayered chain and that have parent companies who choose not to obtain a company identifier should be asked to list their parent companies. Similarly, parent companies without identifiers should be asked to name their subsidiaries. This is likely to be a very small percent of reporting companies, as legitimate companies will likely obtain identifiers for ease of compliance.

When designing the database and asking for information necessary for mapping corporate structure, FinCEN should consider that it is unreasonable for a firm to have the resources to afford lawyers or other agents to create a complex corporate structure, but then claim to not also have the resources to name those at the top of the structure.

³³ See Organized Crime and Corruption Reporting Project, “Vladimir Padrino has links to companies, real estate worth million,” Miami Herald, Apr. 13, 2020, available at <https://www.miamiherald.com/news/nation-world/world/americas/venezuela/article241970616.html>.

³⁴ See U.S. Small Business Association, Frequently Asked Questions, September 2012, available at https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

³⁵ See U.S. Small Business Association, “A Look at Nonemployer Businesses,” August 2018, available at <https://www.sba.gov/sites/default/files/advocacy/Nonemployer-Fact-Sheet.pdf>.

Question 12

Should a reporting company be required to provide information about the reporting company's corporate affiliates, parents, and subsidiaries as a matter of course, or only when that information has a bearing on the reporting company's ultimate beneficial owner(s)?

See our answer to Question 11 above.

Question 13

What information, if any, should FinCEN require a reporting company to provide about the nature of a reporting company's relationship to its beneficial owners (including any corporate intermediaries or any other contract, arrangement, understanding, or relationship), to ensure that the beneficial ownership database is highly useful to authorized users?

See our answer to Question 11 above.

Question 14

Persons currently obligated to file reports with FinCEN overwhelmingly do so electronically, either on a form-by-form basis or in batches using proprietary software developed by private-sector technology service providers.

d. Should FinCEN allow or support direct batch filing of required information?

Assuming that all covered entities provide timely, complete, and accurate information, we would not object to a database that permits and encourages batch filings.

Question 15

Section 5336(b)(2)(C) requires written certifications to be filed with FinCEN by exempt pooled investment vehicles described in section 5336(a)(11)(B)(xviii) that are formed under the laws of a foreign country.

a. By what method should these certifications be filed?

Exempt pooled investment vehicles ("PIVs") that are formed under the laws of a foreign country should be required to file written certifications with FinCEN via the same means and process that beneficial ownership reports are submitted.

b. What information should be included in these certifications?

In addition to the standard identifying information required of all reporting company beneficial owners, FinCEN should require that all such written certifications filed include the PIV's original (or reproduced original) incorporation documents, or jurisdiction-specific corollary, as evidence of its proper, qualifying formation under the laws of a foreign country.

- c. Should there be a mechanism through which such filings could be made to foreign authorities and forwarded to FinCEN, or should such filings have to be directly to FinCEN?**

Section 5336(b)(2)(C) requires certifications to be filed directly with FinCEN.

- d. What information should be included in these certifications (e.g., what information would allow authorities to follow up on certifications containing false information)?**

See our answer to part (b) above.

- e. Should these certifications be accessible to database users, and if so, should they be accessible on the same terms as beneficial ownership information of reporting companies?**

Yes. The provisions in the CTA establish a set of protocols for accessing the database, with penalties for misuse. There are ample mechanisms to protect the security of the information. Appropriate users should have complete access to all the information relevant to their investigation or CDD compliance programs. Creating additional roadblocks to data serves only to limit the usefulness of the data that users do receive.

Question 16

What burdens do you anticipate in connection with the new reporting requirements? Please identify any burdens with specificity, and estimate the dollar costs of these burdens if possible. How could FinCEN minimize any such burdens on reporting companies associated with the collection of beneficial ownership information in a manner that ensures the information is highly useful in facilitating important national security, intelligence, and law enforcement activities and confirming beneficial ownership information provided to financial institutions, consistent with its statutory obligations under the CTA?

Since cost estimates will vary widely, FinCEN should look to the actual, documented experiences of business owners who are filing very similar ownership information with other countries.

For example, after the UK established a beneficial ownership directory, businesses reported on their experiences.³⁶ The relevant data shows that for small/micro businesses, defined as those with less than 50 employees, there was an average initial cost of approximately \$155 and an ongoing annual compliance cost of approximately \$3.³⁷ According to one study of the UK directory, “The most common number of [beneficial owners] reported was one (43%), followed

³⁶ UK Department for Business, Energy & Industrial Strategy, “People of Significant Control (PSC) Register: review of implementation,” March 2019, available at <https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation>.

³⁷ *Id.*

by two (37%). Only 13% of business had three or more.”³⁸ FinCEN should reach out to those who designed the UK beneficial ownership registration system to discuss specific ways they made it easy and efficient for business owners to comply with the UK law.

Comparing the UK law with the CTA, we should expect compliance costs to be slightly less in the United States. The CTA caps reporting companies’ total employment at 20 full-time employees, so the U.S. will not have any of the potential complexity introduced by UK companies that employ between 21 and 50 employees. The UK law also requires slightly more information than the U.S. law. And the U.S. and UK both have a high percentage of companies that are nonemployer firms—approximately 80 percent of all U.S. businesses and approximately 76 percent of all UK businesses.

While there will not be a significant burden on the vast majority of reporting companies, there are a number of ways FinCEN can design the data collection process that will make it easier for companies to comply.

FinCEN should quickly reach out to state business licensing agencies to develop partnerships for state portals that link to the FinCEN database. While states are not required by law to collect information, incorporating a link to the FinCEN database into existing state incorporation and registration processes will become an important sign that states are trying to be business friendly. In fact, if states want to be most helpful to their in-state businesses, they would make filling out the FinCEN form mandatory to complete the incorporation or registration processes. To accommodate anyone who found their way directly to the FinCEN website or who files the information on paper, states could also add a checkbox through which those filers could confirm they have already provided the required information. States will not be held responsible if someone checks the box when they should not have, or if they simply do not check the box.

In addition, FinCEN should create a similar partnership with the Internal Revenue Service (“IRS”). This partnership would be quite helpful for informing reporting companies of the need to update their beneficial ownership information in the event it changes. Businesses filing quarterly or annual taxes would also have a ready reminder. For the vast majority of businesses, this will not be necessary, but for those who do have a change in beneficial ownership, it would be a way to offer an easy, “in the course of regular business,” way of staying in compliance.

FinCEN should creatively think about additional partnerships, but the above two are the most important at this point for helping with the mandate to ease burdens on businesses.

Question 17

Section 5336(e)(1) requires the Secretary to take reasonable steps to provide notice to persons of their reporting obligations.

- a. What steps should be taken to provide such notice?**
- b. Should those steps include direct communications such as mailed notices, and if so to whom should notices be mailed?**
- c. What type of information should be included in such a notice, for example, the**

³⁸ *Id.*

- purposes and uses of the data, and how to access and correct the information?**
- d. Should the notice be followed by an explicit acknowledgement of the reporting company, or consent of the beneficial owner or applicant if the owner or applicant is submitting the information, to the handling of beneficial ownership information as stated in the notice and applicable law?**

See our answer to Question 16 regarding notice to businesses. FinCEN should also partner with the SBA, with small business trade organizations who provide services to their members, and with the American Bar Association (“ABA”), whose members often assist with corporate formation.

Question 19

What should reporting companies or individuals holding FinCEN identifiers be required to do to satisfy the requirement of section 5336(b)(1)(D) that they update in a timely manner the information they have submitted when it changes, such as when beneficial owners or holders of FinCEN identifiers (i) transfer substantial control to other individuals; (ii) change their legal names or their reported residential or business street addresses; or (iii) die; or (iv) when a previously acceptable identification document expires? For example, should the reporting companies or individuals be required to file a new report, or provide notice only of the information that has changed?

The CTA requires that a reporting company “in a timely manner, and not later than one year after the date on which there is a change with respect to any information...submit to FinCEN a report that updates the information relating to the change.” FinCEN should make clear that this updated information has to be reported as soon as possible after a change has been made.

Furthermore, in determining what constitutes “a timely manner,” FinCEN should look to directories like those of France³⁹ and Luxembourg,⁴⁰ which require companies to update the directory within 30 days of any change to their beneficial ownership. In some countries, like Ireland, the update requirement is within fourteen days.⁴¹

We believe 30 days is a reasonable interpretation of “timely,” and matches an emerging global standard. However, if FinCEN chooses not to follow the direction of these countries, the implementing rules could allow instead for a 90-day update requirement. The vast majority, if not all, reporting companies file quarterly payroll taxes or estimated taxes. If FinCEN partners with the IRS, reporting companies can be provided a link during the tax filing process that takes the filer to their FinCEN account to review and provide any necessary updates. This would

³⁹ See Ashurst LLP, “Beneficial owner(s) disclosure requirement in France,” Apr. 18, 2018, available at <https://www.ashurst.com/en/news-and-insights/legal-updates/beneficial-owners-disclosure-requirement-in-france/>.

⁴⁰ See Dechert LLP, “Luxembourg Register of Beneficial Owners Has Arrived,” Jan. 18, 2019, available at <https://www.jdsupra.com/legalnews/luxembourg-register-of-beneficial-77362/>.

⁴¹ See Central Register of Beneficial Ownership, “FAQs, 11.16 How often do I have to file my Beneficial Ownership details?” <https://rbo.gov.ie/faqs/using-the-rbo-register-portal/how-often-do-i-have-to-file-my-beneficial-ownership-details.html>.

minimize any burden as reporting companies would be able to provide updates through their routine completion of existing compliance responsibilities without having to remember their FinCEN obligations separately. A 90-day update requirement was included in the bipartisan Senate corollary to the CTA, the ILLICIT CASH Act.

In addition, FinCEN must state clearly that *each and every change* must result in a report to FinCEN that updates an entity's information, and should consider making clear that it would be insufficient for an entity to submit, for example, one report each year, regardless of the number of intervening changes over that period.

Finally, there should be one standard that applies to all covered entities. Smaller companies are more likely to forego an identifier and, as the UK experience illustrates, updates will be straightforward and quick. There is no reason to provide additional time to those with more complex corporate structures, especially since a FinCEN identifier is available.

Question 20

Should reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis (e.g., annually)? How should such confirmation be communicated to FinCEN?

Reporting companies should confirm annually the accuracy of the previously submitted beneficial ownership information. Annual updates are not only necessary for law enforcement purposes, but these updates will ensure accuracy (and therefore ease the process) should owners apply for loans or open new bank accounts. Reporting companies without changes should be able to link to their FinCEN account as part of other interactions with state and federal government agencies. Reporting companies could then quickly review the data, make any necessary changes, and check a box to certify the information is accurate. Companies interact with the federal government, state government(s), and/or Tribal governments each year, as some states require companies to file an annual report, and as companies file annual (and most often quarterly) federal tax returns. FinCEN should establish links on these websites so that both initial reporting and updates can be completed when fulfilling other existing compliance requirements.

Question 21

For those reporting companies without FinCEN identifiers, what should be considered a “timely manner” for updating a change in beneficial ownership?

- a. **Should this period differ based on the type of reporting company?**
- b. **What factors should be taken into account in determining this period?**
- c. **How much time should reporting companies be given to update beneficial owner information upon a change of ownership?**
- d. **What are the benefits or drawbacks of allowing a longer period to report a change of beneficial ownership?**

See our answer to Question 19 above. Reporting companies or individuals without FinCEN identifiers must satisfy the same requirements as those with FinCEN identifiers.

Question 22

Section 5336(h)(3)(C) contains a safe harbor for persons who seek to correct previously submitted but inaccurate beneficial ownership information pursuant to FinCEN regulations. How should FinCEN's regulations define the scope of this safe harbor? Should the nature of the inaccuracy (e.g., a misspelled address versus the complete omission of a beneficial owner) be relevant to the availability of the safe harbor?

FinCEN should define this safe harbor narrowly to avoid exploitation by bad actors. The implementing rules should not differentiate between inaccurate spellings and complete omissions. Negligence is never punishable under the CTA, so the addition of a safe harbor provision for negligence would be duplicative and unnecessary. For a business owner to be liable under the law, even a misspelling would have to be willful. Any broad interpretation would only invite bad actors to hide behind its protection.

The safe harbor should be reserved only for those who correct the reported information within the time allotted and, critically, update the information for *all* persons who were beneficial owners during the period in which the absent, outdated, incomplete, or otherwise inaccurate information was reported. The implementing rules should make clear that if a reporting company does not know or cannot provide the complete and accurate record, it is ineligible for the safe harbor, and could also state that such activity could be considered a potential red flag that requires further investigation.

Question 23

What steps should reporting companies be required to take to support and confirm the accuracy of beneficial ownership information?

- a. Should reporting companies be required to certify the accuracy of their information when they submit it?**
- b. If so, what should this certification cover?**
- c. Should reporting companies be required to submit copies of a beneficial owner's acceptable identification document?**

Reporting companies should have to certify that the information is accurate and complete. This need not be complex or burdensome. A simple, check-the-box certification ensures that filers are aware of the legal implications of the willful provision of misinformation.

Question 24

What steps should FinCEN take to ensure that beneficial ownership information being reported is accurate and complete?

- a. With respect to other BSA reports, FinCEN e-filing protocols prohibit filings from being made with certain blank fields, and automatically format certain fields to ensure that letters are not entered for numbers and vice versa, etc. The filing protocols, however, do not involve independent FinCEN verification of information filed. Should FinCEN take similar or additional steps in connection with the filing of beneficial ownership information?**

b. If so, what similar or additional steps should FinCEN take?

Writ large, to ensure that the data is highly useful, FinCEN must adopt processes and mechanisms that require all fields to be populated and that sufficiently detect errors in entries.

FinCEN should also, where appropriate, create drop-down menus with prepopulated options for data fields such as date of birth, city, state, and zip code.

Importantly, FinCEN should use existing data to verify accuracy of reported information. FinCEN should create a partnership with the U.S. State Department to electronically check names and passport numbers. The State Department already has partnerships with other agencies including the Department of Homeland Security, the Department of Commerce, the Department of Defense, the Department of Justice, and the Office of Personnel Management.

In addition, FinCEN should create a partnership with the National Law Enforcement Telecommunications System (“Nlets”). Nlets is a data exchange platform that is, according to their website, “owned by the States [and] is a 501(c)(3) nonprofit organization that was created over 50 years ago by the principal law enforcement agencies of the States.”⁴² Through Nlets, FinCEN could access a national directory of state drivers’ licenses and state identification numbers. Nlets already has partnerships with the Department of Defense, the Department of the Interior, the Department of Justice, the Department of Veterans Affairs, Immigration and Customs Enforcement, and the Postal Inspection Service.

FinCEN could also explore additional partnerships with the U.S. Postal Service to check up-to-date addresses.

These checks should be automated and done in real-time (similar to instant confirmations of credit card information used by online merchants). These actions will provide a minimal level of assurance that the beneficial ownership data matches other existing data sources. Such measures have the additional and important benefit of making the process easier for businesses to correct inadvertent errors in the data so that they would not face delays in opening bank accounts or applying for loans.

Question 25

Should a reporting company be required to report information about a company’s “applicant” or “applicants” (the individual or individuals who file the application to form or register a reporting company) in any report after the reporting company’s initial report to FinCEN? Why or why not?

Applicant identifying information is important as it may be the only contact information available to law enforcement for a company used for corrupt or criminal purposes. This information, per the express language of the CTA, must be reported to FinCEN in the reporting company’s initial report, and must be maintained by FinCEN. However, the reporting company need not submit applicant identifying information in any subsequent report if that information

⁴² Nlets, “Who We Are,” available at <https://www.nlets.org/about/who-we-are>.

does not change. Should this information change, it would need to be reported within the time frame discussed in our answer to Question 19 above.

Question 26

In what situations will an individual or entity wish to use the FinCEN identifier? How can FinCEN best protect both the privacy interests underlying an individual's or entity's desire to use the FinCEN identifier, and the identifying information that must be provided to FinCEN by an individual or entity wishing to obtain and use the FinCEN identifier?

The original reason for granting an individual a FinCEN identifier (included in the U.S. House of Representatives' Corporate Transparency Act) was to reduce compliance costs for those beneficial owners who have multiple entities. Those individuals would have to enter or upload the beneficial ownership data for each company they own only one time, and then enter or upload subsequent changes only once. The identifier would then link to all companies registered under the individual's name using the identifier, and auto-populate the appropriate data fields.

The FinCEN entity identifier was included to prevent, in the very rare instance that this would be an issue, a subsidiary company from knowing the full corporate chain.

The FinCEN identifiers were *never* meant to be used to mask the identity of beneficial owners or the makeup of corporate structures from FinCEN itself, from law enforcement engaged in an investigation, or from financial institutions engaged in customer due diligence. FinCEN must not block access to beneficial ownership information or corporate structures from investigators, bank officers, or other certified users.

It should be noted that there are also advantages for the users of the data to incorporate identifiers. For example, there are likely to be fewer errors if a single identifier links affiliated companies.

However, this system works only if each individual receives only one identifier regardless of the number of entities in which the person is affiliated. Additionally, the identifier must only be issued upon its provision of beneficial ownership information to FinCEN. Earlier drafts of legislation similar to the CTA allowed for identifiers to be issued before beneficial ownership information was provided, and that model was debated and rejected by lawmakers. Similarly, reporting companies can only be issued identifiers if the beneficial ownership information has been reported to FinCEN. Once an identifier is issued, subsidiaries can then use that number in lieu of beneficial ownership information.

The use of identifiers provides FinCEN with a relatively straightforward way to link parents and subsidiaries and ultimate beneficial owners in order to map corporate structures.

Identifiers ease business burden, improve accuracy, and, if designed to help map corporate structures, make the information more useful for users of the data. Yet to be clear, there was never a debate, understanding, or expectation that identifiers could be used to preclude certified

users from accessing necessary information.

Question 28

How can FinCEN best ensure a one-to-one relationship between individuals or entities and their FinCEN identifiers, in light of the possibility that individuals and entities may mistakenly or intentionally attempt to apply for more than one FinCEN identifier?

There is no circumstance under which an individual should be able to obtain a second FinCEN identifier. Such a possibility would defeat the purpose of having a *unique* identifier to link businesses and their affiliates. Those who willfully seek multiple numbers may well be engaged in illicit activity. They could be looking to divide and isolate risk (like cells of a criminal network). The rules should clearly state that obtaining a second identifier is a violation of the law and can result in criminal and/or civil penalties.

The request for an identifier should include clear instructions and appropriate warnings. If someone inadvertently requests a second number, they will likely enter the same identification number and the database should be able to inform the filer that an account already exists. This is common technology and an important anti-fraud protection. If FinCEN does create partnerships with Nlets and the State Department, a fairly simple crossmatch of data could catch those who willfully or inadvertently seek double identifiers.

Question 30

As noted in the CTA, in some cases multiple companies can be layered on top of one another in complex ownership structures. Given that there may be multiple entities within an ownership structure of a reporting company that are identified by FinCEN identifiers, how can FinCEN implement the FinCEN identifier in a way that reduces the burden to financial institutions of using the FinCEN database when reporting companies with complex ownership structures seek to open an account?

Financial institutions should have access to the full record of the reporting company and its beneficial owners applying for an account, including any parent, subsidiary, or affiliate entities as linked through the FinCEN identifier. Keep in mind that it is the reporting company, not the individual, that is the potential client providing permission. The reporting company can give the bank permission to see its affiliates. It is inarguably highly useful for a bank to know that a reporting company applying for a bank account may have, say, Russian or Iranian parents. This is analogous to the reporting company permitting the bank to see all of its beneficial owners and not just one. In particular, this would assist banks significantly with their CDD requirements. And as a bank can only access the database with a customer's permission, and as the bank is legally barred from sharing database information or using it for any purpose other than due diligence, there should not be any corresponding security concerns.

Question 31

What should the process be to obtain a FinCEN identifier?

- a. Should the FinCEN identifier be secured by an applicant or beneficial owner prior to filing an application to form a corporation, LLC, or other similar entity under the laws of a state or Indian tribe?**
- b. How, if at all, should FinCEN verify an individual's identity before providing a FinCEN identifier?**
- c. If an applicant or beneficial owner chooses not to apply for a FinCEN identifier, should FinCEN create any limitations—in addition to those in the statutory definition of “acceptable identification document”—on the types of unique identifying numbers that can be submitted?**

FinCEN should allow requests for an identifier for a beneficial owner at any time—prior to or after company formation. This is a benefit for all stakeholders and should not be restricted by time of request. A company identifier cannot be assigned until after the beneficial owners have registered complete and accurate information for all the beneficial owners.

Beneficial ownership information should be verified in real-time for everyone who files, not just for those requesting a FinCEN identifier. As discussed elsewhere in this comment, partnerships with other agencies and organizations can accomplish this with readily available technology.

If the beneficial ownership information cannot be verified, FinCEN should deny assigning an identifier to the beneficial owner(s).

Acceptable identification documents are defined in the CTA. FinCEN should not look to create new or unauthorized methods of identification. With the exception of foreign owners, through the verification process, FinCEN should be able to cross-check an individual's use of different identification documents and limit a filer to one FinCEN identifier.

For foreign filers, FinCEN should prohibit the use of multiple identification documents. For example, if someone holds multiple passports and is affiliated with more than one reporting company, they should be required to choose one passport for use with all filings. Given the challenges of verifying a foreign passport, FinCEN should, at the least, require foreign owners of U.S. companies to upload a copy of the information page (with photo) of the foreign passport. FinCEN should also speak with Danish authorities who have implemented a sophisticated check on foreign ownership which includes, and even goes beyond, scanning passports.

Question 32

When a state, local, or tribal law enforcement agency requests beneficial ownership information pursuant to an authorization from a court of competent jurisdiction to seek the information in a criminal or civil investigation, how, if at all, should FinCEN authenticate or confirm such authorization?

The CTA makes clear that the Secretary of the Treasury must decline to provide information requested by a certified user when that request has not been submitted in the proper form and manner, and *may* decline a request submitted in the proper form and manner *only* upon finding that:

- (i) the requesting agency has failed to meet any other requirement of this subsection;
- (ii) the information is being requested for an unlawful purpose; or
- (iii) other good cause exists to deny the request.

Read together with the CTA's access language for state, local, or tribal law enforcement agencies, it is clear that if such an agency avers that a court of competent jurisdiction has authorized it to seek the information in a criminal or civil investigation, the inquiry stops there. *The CTA does not permit FinCEN to independently authenticate or confirm such an authorization*, let alone to condition release or receipt of the information on an actual demonstration or evidencing of such authorization. During legislative negotiations, the need for a subpoena (even an administrative subpoena) or summons was raised and rejected. Instead, FinCEN should simply ask that the certified user check a box to certify that they have obtained the authorization.

The three delineated findings upon which the Secretary of the Treasury may decline to provide the information is also instructive as to the degree of misuse that must be present to reject a request. The second finding is that "the information is being requested for an unlawful purpose." This context must inform and instruct the proper interpretation of the preceding and subsequent findings. Namely, that only in situations of extreme misuse, misconduct, or impropriety can "good cause" exist to deny a request, or can a requesting agency be found to have determinatively "failed to meet" a requirement. Any alternative interpretation and application will not only hinder timely access to the database—thus jeopardizing investigations—but disincentivize agencies from using it in the first place.

Question 33

Should FinCEN provide a definition or criteria for determining whether a court has "competent jurisdiction" or has "authorized" such an order? If so, what definition or criteria would be appropriate?

Yes. First, a "court of competent jurisdiction" should be defined to encompass any court of any political subdivision (federal, state, municipal, county, territorial, tribal, or otherwise) that, in proximity, practice, and/or by law, has or may have actual or potential jurisdiction over the relevant inquiry or investigation, or over any examination, investigation, prosecution, or other government action that could result in any way from the request.

FinCEN should similarly articulate a clear definition for "authorized." It is important to note that Congress considered, and rejected, alternative access schemes, including the requirement that a requesting agency first obtain a court order, the requirement that a requesting agency first obtain a subpoena, and the requirement that a requesting agency's request be reasonably relevant and

material to an investigation.

Instead, Congress chose an access scheme that permits law enforcement to request and receive beneficial ownership information so long as that request is authorized by an “officer of such a court.” Thus, the term “authorized” was deliberately chosen out of a spectrum of available options for its low barrier and lack of judicial formalism. Quite distinct from a court order from a judge or a subpoena from a prosecutor, *authorization* from a *court officer* was chosen to allow for a wide range of access options that required minimum involvement from the relevant court or tribal equivalent. Critically, the CTA does not limit an “officer of such a court” to a *judicial* officer, meaning it must be interpreted more broadly than just a judge or magistrate. Therefore, this requirement could be satisfied via a front-window court employee, such as a clerk, “authorizing” a request via email, phone, or online messaging function, among other options. And ultimately, the relevant law enforcement agency personnel must only be required to aver—to check a box—stating that a request has been so “authorized.”

FinCEN must also define the term “officer of such a court.” The lead negotiators of the CTA decided on this term knowing that Black’s Law Dictionary defines “officer of the court” as “[s]omeone who is charged with upholding the law and administering the judicial system. Typically, officer of the court refers to a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court.”⁴³ In defining “court officer,” FinCEN should expressly include this list of terms, along with a term that encompasses other officers with similar functions or authorities.

Question 34

As a U.S. Government agency, FinCEN is subject to strict security and privacy laws, regulations, and other requirements that will protect the security and confidentiality of beneficial ownership and applicant information. What additional security and privacy measures should FinCEN implement to protect this information and limit its use to authorized purposes, which includes facilitating important national security, intelligence, and law enforcement activities as well as financial institutions’ compliance with AML, CFT, and CDD requirements under applicable law? Would it be sufficient to make misuse of such information subject to existing penalties for violations of the BSA and FinCEN regulations, or should other protections be put in place, and if so what should they be?

No additional protections are needed. Additional security would likely yield few if any benefits and would hinder timely access to the database.

Writ large, investigating cases involving corrupt officials and other wrongdoers requires timely access to basic information, including the identities of hidden owners of legal entities. Drug cartels, human traffickers, illegal weapons dealers, kleptocrats, and others often have sophisticated financial networks in which time is critical to uncover, stop, and punish wrongdoing. Delayed or restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice.

⁴³ Black’s Law Dictionary (11th ed. 2019), officer of the court.

The CTA employs precise language enabling law enforcement and financial institutions to access beneficial ownership data. In order to ensure effective access in practice, the CTA’s implementing rules, in turn, must reflect the plain language and intent of the law.

Ensuring timely access to beneficial ownership information is also required by the international standards promulgated by the FATF, of which the U.S. is a founding member.

FinCEN already operates secure databases that house suspicious activity report (“SAR”) and currency transaction report (“CTR”) data. Protections for such data are already in place and work well. However, the CTA is quite specific regarding additional protections for accessing beneficial ownership information, and FinCEN should implement those protocols with care. In fact, in considering issues of access, FinCEN should consider the equally important mandate that this information be *highly useful*. In order for the data to be useful, it must be accessible.

Big picture, federal agencies, state, local, tribal and foreign law enforcement, financial institutions, and regulatory agencies should have access to the *full* record of ownership—including a list of all previous owners of the entities dating back to the first filing.

In particular, *federal agencies* need not be formally or informally deemed national security, intelligence, or law enforcement agencies; they need only be “engaged in” those activities. “Law enforcement” activities include criminal, civil, and administrative enforcement duties. Agencies need not have opened a formal investigation to access the database, but only an authorized investigation “*or activity*.”⁴⁴ Agency heads may delegate written certification requirements to subordinates and delegate certification-making authority to entire agency departments, subgroups, or classes of employees. To avoid duplicative and unnecessary requests and certifications, agency heads and delegees may submit one request and certification *per investigation*.

State, local, and tribal law enforcement access procedures should be modeled after existing state, local, and tribal procedures used to engage with FinCEN and other federal law enforcement agencies—such as the Federal Bureau of Investigation (“FBI”), Drug Enforcement Administration (“DEA”), Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), SEC, and Federal Trade Commission (“FTC”)—to access information on secure federal databases with sensitive information, including FinCEN’s SAR and CTR databases. As with federal agencies, state, local, and tribal agencies may be engaged in criminal, civil, or administrative enforcement investigations or activities. And in order to avoid duplicative and unnecessary requests and certifications, agency heads and delegees must be permitted to submit one request and certification *per investigation*.

Foreign law enforcement agencies and officials may access the database in furtherance of either *general* investigations or *specific* criminal, civil or administrative proceedings. Overall, the implementing rules should acknowledge and instruct federal agencies to assist foreign law enforcement information requests in order to facilitate similar information requests by U.S. law enforcement to their foreign counterparts. The rule should make clear that foreign agencies and

⁴⁴ Emphasis added.

officials may utilize an existing agreement (such as a mutual legal assistance treaty, extradition treaty, or international tax agreement) or, when such existing agreements are not available, may simply initiate a new official request from a law enforcement, judicial, or prosecutorial authority—so long as that request comes on behalf of a “trusted” foreign country. FinCEN should define the term “trusted” in this context to mean any country that is not subject to sanctions, as determined by OFAC. OFAC, FinCEN’s sister agency, already maintains a list of countries of concern⁴⁵—there is no need for FinCEN to “reinvent the wheel” by attempting to create its own list of “trusted” countries or by making its own determinations about which countries are not trusted. And, more broadly, such an interpretation is consistent with, and promotes, the CTA’s purposes by facilitating the sharing of beneficial ownership information with as many other countries as reasonably possible.

In developing the database, FinCEN should consult with countries in the EU and UK about the structure of their beneficial ownership databases. FinCEN should consider compatibility with such countries, should there be a future need for bulk transfer or exchange of information.

Again, to ensure the information is highly useful, timely access to the full record is extremely important. The certified users listed here—those who meet the law’s delineated protocols and certify that they have read and understand the penalties for misuse—must be able to see all of the entities connected to an individual beneficial owner, all of the beneficial owners of a given entity, and all of the parent and subsidiary entities of the entity under investigation. Without the full picture, law enforcement at all levels cannot effectively do their job, and narrower rules would potentially undermine the mandate in the law that the information be highly useful.

Question 35

How can FinCEN make beneficial ownership information available to financial institutions with CDD obligations so as to make that information most useful to those financial institutions?

- a. Please describe whether financial institutions should be able to use that information for other customer identification purposes, including verification of customer information program information, with the consent of the reporting company?**

Financial institutions should be able to use the data as an additional assurance/verification check. That being said, they cannot satisfy their CDD responsibilities by relying solely on the data provided by the database.

- b. Please describe whether FinCEN should make financial institution access more efficient by permitting reporting companies to pre-authorize specific financial institutions to which such information should be made available?**

Yes, FinCEN should permit reporting companies to pre-authorize specific financial

⁴⁵ See U.S. Department of the Treasury, “Sanctions Programs and Country Information,” available at <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information>.

institutions to which beneficial ownership information should be made available.

- c. In response to requests from financial institutions for beneficial ownership information, pursuant to 31 U.S.C. 5336(c)(2)(A), what is a reasonable period within which FinCEN should provide a response? Please also describe what specific information should be provided.**

Financial institutions, including banks, security firms, insurance companies, money service businesses, and more, must be granted real-time access to the database to fulfill their CDD obligations.

With approximately two million companies formed in the United States each year, and most needing to open bank accounts, it would take unimaginable resources for FinCEN to review requests manually with personnel and respond in any reasonable time period. The assumption has always been that the system would be automated and, as such, it would operate like other automated queries to a database and responses would be instantaneous.

The implementing regulations should make clear that financial institutions may designate frontline or back-office personnel to obtain training and certification, and to satisfy access requirements established by FinCEN. Similar to the certified users listed in Question 34, those who meet the delineated protocols and certify that they have read and understand the penalties for misuse should have full access to the records they need to effectively do their legally mandated customer due diligence. FinCEN would undermine its own anti-money laundering efforts if it created a robust database of information and then denied necessary access to that information to those our government officially deputizes to assist in enforcement.

As law enforcement officials must attest that any search is for an authorized investigation, bank officers could be required to attest, with full knowledge of the penalties for violating the law, that any search is for customer due diligence with the consent of the customer. That should provide any additional assurance needed that the data is secure.

Once the criteria for access is met, designated personnel at financial institutions should have access to the *full* records of clients, including any data on other companies or company affiliations such beneficial owners may have in the database. When an individual gives consent to the financial institution, the individual is not giving consent for themselves; rather, they are acting as an agent of the potential client (i.e., the entity) giving consent on behalf of the entity. Bank personnel should have access to all beneficial owners of the entity, all entities affiliated with those owners, and all parent and affiliate entities of the entity seeking an account.

One idea that was raised and rejected by lawmakers during the negotiations was for financial institutions to send in data provided by the client and to receive back a notice of a match or mismatch. Such an approach would fail to meet even the most basic requirements of customer due diligence and would likely be in conflict with mandates in the law. Misspellings or transposed numbers from an identification document would return as a mismatch. A so-called “red light/green light” approach does nothing to assist the financial institution (it does not provide useful information) in determining the appropriateness of the client, and raises a red

flag that they may determine requires them to file a SAR, creating new, entirely avoidable problems for the client seeking an account. Ultimately, the account opening or loan closing would be delayed, creating unnecessary burdens on the client who may be relying on timely financial services to start or expand a business. Finally, such a system would not provide banks with any assistance in the ongoing monitoring of suspicious accounts as required by the Bank Secrecy Act and implementing regulations.

Question 36

How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?

- a. If a requestor has previously requested and received beneficial ownership information concerning a particular legal entity, should the requester automatically receive notification from FinCEN that an update to the beneficial ownership information was subsequently submitted by the legal entity customer?**

Yes. The timely receipt of updated reporting information will be highly useful to law enforcement for ongoing investigations, and to banks in order to fulfill their CDD duties, including their ongoing monitoring of accounts.

- b. If so, how should this notification be provided?**

This notification should be provided to the requester through all of the means that previous requests were sent by FinCEN and/or received by the requester.

- c. Should a requesting entity have to opt in to receive such notification of updated reporting?**

No. As stated in our answer to part (a) above, this information is highly useful, and having an automated system is both easier and less expensive for FinCEN as it will reduce database administration costs and other associated costs.

Question 37

One category of authorized access to beneficial ownership information from the FinCEN database involves “a request made by a Federal functional regulator or other appropriate regulatory agency.” How should the term “appropriate regulatory agency” be interpreted? Should it be defined by regulation? If so, why and how?

The CTA provides that disclosure to an “appropriate regulatory agency” shall be consistent with subparagraph (C), which provides that such:

agency (i) is authorized by law to assess, supervise, enforce, or otherwise determine the compliance of the financial institution with the requirements described in [subparagraph (B)(iii) with respect to CDD requirements] and (ii)

uses the information solely for the purpose of conducting the assessment, supervision, or authorized investigation or activity described in clause (i).

Therefore, an “appropriate regulatory agency” must include any agency of a U.S. state, Tribe, or of a foreign country that assesses, supervises, enforces, or otherwise determines a financial institution’s compliance with CDD requirements.

The existing definition of “Federal functional regulator” provides additional guidance, as it is defined to include:

[T]he Board of Governors of the Federal Reserve System; (B) the Office of the Comptroller of the Currency; (C) the Board of Directors of the Federal Deposit Insurance Corporation; (D) the Director of the Office of Thrift Supervision; (E) the National Credit Union Administration Board; and (F) the Securities and Exchange Commission.⁴⁶

An “appropriate regulatory agency” necessarily ought to also include each U.S. state, Tribe, and each foreign country counterpart to each of the identified U.S. federal regulators of banks, savings and loans, credit unions, and any entity that is subject to securities and/or “blue sky” laws.

Question 38

In what circumstances should applicant information be accessible on the same terms as beneficial ownership information (i.e., to agencies engaged in national security, intelligence, or law enforcement; to non-federal law enforcement agencies; to federal agencies, on behalf of certain foreign requestors; to federal functional regulators or other agencies; and to financial institutions subject to CDD requirements). If financial institutions are not required to consider applicant information in connection with due diligence on a reporting company opening an account, for example, should a financial institution’s terms of access to applicant information differ from the terms of its access to beneficial ownership information?

Applicant information should be accessible on the same terms as beneficial ownership information, as many times, in situations involving illicit or criminal activity, an applicant may be the only contact, link, or data point available to law enforcement.

Such access plays a similarly significant role for banks—in order for them to effectively perform due diligence, banks need as much information as appropriately available, including information regarding the applicant who formed or registered an entity under examination.

Question 39

What specific costs would CTA requirements impose – in terms of time, money, and human resources – on small businesses? Are those costs greater for certain types of small

⁴⁶ 15 USC § 6809(2).

businesses than others? What specifically can FinCEN do to minimize those costs, for all small businesses or for some types in particular?

As noted in Question 16, the proven experience of businesses complying with a very similar law in the UK found very little annual costs for small businesses (less than \$3 per year) after an initial filing as the vast majority of reporting companies will involve simple, straightforward, and obvious structures.

For those reporting companies with more complex structures, as noted in Question 11, it is not possible for such a firm to have the resources to create a complex structure but then not have the resources to name the ultimate beneficial owners who are at the top of the corporate chain. Small companies with complex structures, including shell companies with numerous offshore affiliates and parents, represent some of the highest risk entities for hiding corrupt and criminal financial activity. It would undermine the core purpose of the law to exempt or make special accommodations for such entities.

Meaningful assistance to small businesses would focus on three areas:

1. FinCEN should establish public education partnerships with state secretary of state offices and other state corporate registration officers, the IRS and state revenue offices, small business organizations, the SBA, the ABA and state bar associations, corporate formation agents and corporate service providers, professional accounting associations, and others to publicize the new law. This will help educate businesses and those that assist them in compliance on the requirements of the new law.
2. FinCEN should engage the IRS and state revenue offices and state corporate registration offices to include a link to FinCEN's beneficial ownership registration system on their websites for businesses to submit and update information in the course of other business transactions with these agencies. This will help businesses seamlessly register and provide updates without separately having to remember to do so outside of existing practices.
3. FinCEN should partner with the State Department and Nlet, as other federal agencies have done, to utilize their systems of instant verification of information provided by reporting companies. This would not only improve the quality of the data but would provide a great benefit to small businesses seeking to open bank accounts or obtain financing or other financial services. Verification at the point of entry reduces instances of typographical errors that would slow access to financial services and require reporting companies to re-enter data before proceeding with applications for services.

Question 40

Are there alternatives to a single reporting requirement for all reporting companies that could create a less costly alternative for small businesses?

Assuming that all covered entities provide timely, complete, and accurate information, we would not object to a database that permits and encourages batch uploads.

Question 44

What burdens would CTA requirements impose on state, local, and tribal governmental agencies? In particular, what additional time, money, and human resources would state, local, and tribal governments have to secure and expend – or reallocate from other duties, and if the latter what duties would be compromised or services impaired? How, if at all, would any of these burdens or allocations of time or money vary according to the size or other characteristics of a jurisdiction – would smaller jurisdictions find it easier or harder to handle the costs associated with CTA requirements?

The CTA does enlist states to help inform reporting companies of the new requirement. There are no mandates or requirements that states collect any information or participate beyond a narrow requirement to make the reporting form either directly available to filers or to offer a link to the form on state websites. This was not seen as a significant burden by states, as they value being business friendly and often boast about certain measures they have taken to provide a positive environment for entrepreneurs. Providing information on the new law and easy access for compliance would be in keeping with a business-friendly environment. Even state officials who disagree with the law should want to assist reporting companies with compliance.

Question 45

How should FinCEN minimize any burdens on state, local, and tribal governmental agencies associated with the collection of beneficial ownership information, while still achieving the purposes of the CTA?

While the CTA does not require action from the states beyond a link on a website, FinCEN should reach out to states to establish partnerships as discussed in Question 44 above in order to educate reporting companies about the new law and to create links to FinCEN's beneficial ownership registration system on state websites. FinCEN should create sample materials for the states to adapt to explain the law and compliance requirements. FinCEN should also explore if any special software for adoption by states is needed.

FinCEN should also include in its budget request to Congress an estimate of costs for these partnerships and should pay for the costs borne by states.

Question 46

How can FinCEN best partner with state, local, and tribal governmental agencies to achieve the purposes of the CTA?

See our answer to Question 44.

Question 47

How can FinCEN collect the identity information of beneficial owners through existing Federal, state, local, and tribal processes and procedures?

- a. Would FinCEN use of such processes or procedures be practicable and

appropriate?

FinCEN cannot collect this information through existing processes because no government agency currently collects this information. This was studied and discussed in the negotiations over the CTA. In fact, some proposals were introduced in Congress to seek the information from existing databases, but it was determined that for the covered reporting companies, the information was not collected by any agency or jurisdiction.

Even if other agencies changed their laws to collect the appropriate information, it would not necessarily be practical for FinCEN to use that information. One proposal was for the IRS to update one of its forms to collect this information, but access to IRS data has an additional set of rules, thereby complicating access for some FinCEN-certified users. And it is unlikely that, for example, all 50 states would, on their own, adopt the same standard, making for a diverse and unusable dataset.

FinCEN, with existing relationships with law enforcement agencies at all levels of government and with financial institutions, is best positioned to collect and manage the unique dataset.

c. Would FinCEN use of existing Federal, state, local, and tribal processes and procedures help to lessen the costs to small businesses affected by CTA requirements, or would it increase those costs?

As mentioned earlier, real-time verification of filers' information, including passport and driver's license information, would reduce costs and burdens on small businesses. An instant check of the name and identification number with a rejection for mismatched data would lower costs and reduce future problems for small businesses.

Question 48

The process of forming legal entities may have ramifications that extend beyond the legal and economic consequences for legal entities themselves, and the reporting of beneficial ownership information about legal entities may have ramifications that extend beyond the effect of mobilizing such information for AML/CFT purposes. How can FinCEN best engage representatives of civil society stakeholders that may not be directly affected by a beneficial ownership information reporting rule but that are concerned for such larger ramifications?

Civil society stakeholders have extensively documented the problems created by the lack of transparency of beneficial ownership information. Beyond the national security and terrorist financing issues, civil society organizations ("CSOs") like TI have researched and clearly demonstrated the impact of the abuse of anonymous companies, including the bankrupting of necessary public services, environmental degradation, a squeeze on affordable housing, proliferation of the opioid crisis, human rights abuses, and more. We have seen a wide variety of structures used for illicit activity and have studied the strengths and weaknesses of different directories established in nations all over the globe.

We would encourage you to not only carefully consider our comments for this ANPRM but to maintain a regular dialogue with the CSO community over time in order to gain insights into best practices for stemming the harms that result from the abuse of corporate structures.

By incorporating the above recommendations, FinCEN can make a tremendous and immediate impact on the threats posed by illicit finance and corruption to U.S. interests both at home and abroad. If you have any questions, or for additional information on TI's work in this regard, please contact Gary Kalman, Director of TI-US, at gkalman@transparency.org.

Thank you for the opportunity to present these comments.

Respectfully submitted,

Gary Kalman
Director

Scott Greytak
Director of Advocacy

October 27, 2021

The Honorable Jack Reed
Chairman, Senate Armed Services Committee
U.S. Senate

The Honorable James Inhofe
Ranking Member, Senate Armed Services Committee
U.S. Senate

Re: Support for Including Six Bipartisan Anticorruption Measures in Forthcoming Defense Bill

Dear Chairman Reed and Ranking Member Inhofe,

As organizations and individuals who work to combat the abuse of power in the public and private sectors, we write to urge the Senate to include the six anticorruption measures passed by the House of Representatives as part of its National Defense Authorization Act for Fiscal Year 2022 ("NDAA") in the substitute amendment or the manager's package to the Senate NDAA.

Corruption is a driver of violent extremism, mass migration, environmental degradation, and economic volatility around the world, and the lifeblood of transnational criminal organizations, human rights abusers, drug trafficking organizations, and authoritarian governments. From our collective experience working and living around the world, we believe these six measures would help expose and counteract corruption in all corners of the world, and would begin to treat the fight against corruption and kleptocracy as a true national security priority.

Each of these six bills is bipartisan, will significantly advance the core U.S. national security interest of fighting corruption, and, as demonstrated here and elsewhere, has the overwhelming support of organizations and prominent individuals committed to eradicating corruption. In particular, the bills are:

1. **The Global Magnitsky Human Rights Accountability Reauthorization Act** (S. 93), offered by Sen. Cardin (D-MD) with Sen. Wicker (R-MS) as an original cosponsor, and approved by the Senate Foreign Relations Committee in June, would reauthorize and enhance the Global Magnitsky Act, a powerful anticorruption accountability tool focused on targeted individual sanctions;
2. **The Combating Global Corruption Act (CGCA)** (S. 14, H.R. 4322), offered by Sen. Cardin (D-MD) with Sen. Young (R-IN) as an original cosponsor, and approved by the Senate Foreign Relations Committee in June, would require the State Department to produce a public report that evaluates country-by-country compliance with internationally recognized anticorruption norms and standards, with corrupt officials in those countries that score in the lowest of three tiers being evaluated for inclusion on the Global Magnitsky list of sanctions designations;
3. **The "Navalny 35"** (S. 2896) offered by Sen. Cardin (D-MD) with Sen. Wicker (R-MS) as an original cosponsor, would require the administration to evaluate for Global

Magnitsky sanctioning the 35 human rights abusers and kleptocrats named by Russian political opposition leader Alexei Navalny;

4. **The TRAP Act** (Transnational Repression Accountability and Prevention Act) (S. 1591, H.R. 4806), offered by Sen. Wicker (R-MS) with Sen. Cardin (D-MD) as an original cosponsor, would establish priorities of U.S. engagement at INTERPOL, identify areas for improvement in the U.S. government's response to INTERPOL abuse, and protect the U.S. judicial system from abusive INTERPOL notices;
5. **The Justice for Victims of Kleptocracy Act** (S. 2010, H.R. 3781), offered by Sens. Blumenthal (D-CT) and Rubio (R-FL), would create a public Department of Justice database that lists, by country, the total amount of assets stolen by corrupt foreign officials that has been successfully recovered by the United States; and
6. **The Foreign Corruption Accountability Act** (H.R. 3887), offered by Sen. Blumenthal (D-CT) with Reps. Curtis (R-UT) and Malinowski (D-NJ) as original cosponsors in the House, would authorize visa bans on foreign persons who use state power to engage in acts of corruption against any private person.

These measures will enhance the U.S.'s ability to sanction corrupt actors, increase transparency, encourage cooperative anticorruption efforts among the U.S. and its allies, and provide actionable information to victims of corruption. On their own—but especially together—they can help provide strong new means of preventing and ameliorating some of the most harmful uses of corruption across the world.

We strongly urge the Senate to include each of these bipartisan anticorruption measures in the substitute amendment or the manager's package to the Senate NDAA as quickly as possible.

Sincerely,

Organizations

Accountability Lab

Africa Faith and Justice Network

Anti-Corruption Data Collective

Be Just

Bekker Compliance Consulting Partners, LLC

Campaign for America's Future

Coalition for Integrity

Financial Accountability and Corporate Transparency (FACT) Coalition

Freedom House

Human Rights First

Human Rights Foundation

Integrity Initiatives International

International Coalition Against Illicit Economies (ICAIE)

Never Again Coalition

ONE

Open Contracting Partnership

Oxfam America

Safeguard Defenders

The Free Russia Foundation
The Sentry
Transparency International – U.S. Office
Watchdog.MD Community

Prominent Individuals

Ambassador (ret.) Stephen McFarland, Former US Ambassador to Guatemala
Carrie F. Bekker, Senior Compliance Consultant
Eryn Schornick, Researcher and Advocate
Ilona Tservil, Current Foreign Policy Development Professional
Louise Shelley, Director, Terrorism, Transnational Crime and Corruption Center
Lieutenant Colonel (ret.) Jodi Vittori, PhD, Former Member, ISAF Task Force Shafafiyat
Michael Dziedzic, Author of *Criminalized Power Structures: The Overlooked Enemies of Peace*
Nate Sibley, Hudson Institute's Kleptocracy Initiative
Ntama Bahati, Policy Analyst, Africa Faith and Justice Network
Shaazka Beyerle, Author, *Curtailing Corruption: People Power for Accountability and Justice*



FIGHT FOREIGN CORRUPTION, PROTECT U.S. BUSINESS

PASS THE FOREIGN EXTORTION PREVENTION ACT

SUMMARY

American companies operating abroad are increasingly faced with demands from foreign officials for bribes, and with competition from unethical companies that are willing to pay them.

When foreign officials demand bribes, they steal from their citizens, reward and encourage unscrupulous business practices, punish law-abiding U.S. businesses, distort markets, sow the seeds of economic and social unrest, and often fortify and finance authoritarian regimes.

Current U.S. law does not punish foreign officials who demand bribes from U.S. companies. Instead, it only

punishes U.S. companies if they pay them. This imbalanced legal framework is at odds with dozens of other countries, including Germany, the United Kingdom, and France, who criminalize both the demanding and the giving of foreign bribes.

A short, simple, and bipartisan measure known as the Foreign Extortion Prevention Act (FEPA) would fix this imbalance, extend much-needed protections to U.S. businesses operating abroad, and equip the Department of Justice (DOJ) with a powerful new tool for combating corruption.

THE PROBLEM

A recent survey by the OECD [found](#) that foreign officials who demand or receive bribes are criminally sanctioned only 20% of the time. The report also concluded that “the information flow between demand-side and supply-side enforcement authorities is often slow.”

In Transparency International’s most recent study on the enforcement of anti-bribery laws, [Exporting Corruption](#), researchers concluded that to improve enforcement the UN, OECD, and G20 must “include issues on both the supply and demand side” of foreign bribery.

EXAMPLES



In **Hungary**, government officials [accepted bribes](#) from Microsoft vendors in exchange for rewarding the company with valuable contracts with government agencies. While Microsoft ultimately paid \$26 million in fines and penalties under the U.S. Foreign Corrupt Practices Act (FCPA), the Hungarian officials who accepted the bribes [have yet](#) to be held accountable.



In **Kazakhstan**, government officials threatened to arrest and deport employees of a U.S. oil and gas firm (NATCO) [unless NATCO paid a bribe](#). While NATCO ultimately paid tens of thousands of dollars in civil penalties under the FCPA for covering up the bribes, the Kazakh officials who extorted them have yet to be held accountable.



In **Haiti**, law-abiding companies were found to have faced an [“unfair and illegal” disadvantage](#) after Haitian officials working for the country’s sole provider of landline telephone service used their positions to accept [millions of dollars in bribes](#) from unethical telecommunications companies.



In **Russia**, officials in the Russian Attorney General’s office used their positions to [accept bribes](#) from Hewlett Packard in exchange for a valuable contract. While Hewlett Packard ultimately paid nearly [\\$60 million in FCPA fines](#), the Russian bribe-takers have yet to be held accountable.



In **Guinea**, the Guinean Minister of Mines used his position to [accept bribes](#) from Chinese state-owned companies, thus partially excluding law-abiding companies from a [billion-dollar](#) natural resource market.

HOW FEPA WOULD PROTECT U.S. BUSINESSES AND FIGHT FOREIGN CORRUPTION

FEPA would expand the current federal bribery [statute](#) to cover any foreign official or agent thereof who “corruptly demands, seeks, receives, or accepts” a bribe in or affecting U.S. interstate commerce.

The criminalization of foreign demand-side bribery is the law in the United Kingdom, Germany, France, and dozens of other countries, and is expressly encouraged by the United Nations Convention Against Corruption, to which the U.S. is a signatory.

Corrupt officials could face a criminal

fine of up to \$250,000 or three times the value of the bribe (whichever is greater), and a prison sentence of up to 15 years.

Reflecting the relationship between corruption, the rule of law, and economic stability, FEPA commits the proceeds of these sanctions to existing DOJ programs that will streamline its enforcement and counteract the emergence of corrupt foreign officials.

As many FEPA enforcement actions will rely on assistance from foreign governments, FEPA requires

the DOJ to provide data on how promptly the DOJ is responding to requests for assistance from foreign governments, and to study how the U.S. mutual legal assistance treaty (MLAT) process could be improved.

Finally, FEPA would require the DOJ to publish an annual report that summarizes the scale and nature of foreign bribery, that addresses the effectiveness of U.S. diplomatic efforts to protect U.S. companies from foreign bribes, and that discusses efforts of foreign governments to prosecute demand-side bribery cases.

November 2, 2021

The Honorable Jerrold Nadler
Chairman
U.S. House Committee on the Judiciary

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary

The Honorable Madeleine Dean
Ranking Member
U.S. House Committee on the Judiciary

The Honorable Chuck Grassley
Ranking Member
U.S. Senate Committee on the Judiciary

RE: Support for the Foreign Extortion Prevention Act

Dear Chairman Nadler, Chairman Durbin, Ranking Member Dean, and Ranking Member Grassley,

As organizations and individuals who work to promote accountability in government and combat the abuse of power in the public and private sectors, we write in support of the Foreign Extortion Prevention Act (“FEPA”). From our collective research and experience working and living around the world, we believe this short, simple, and commonsense measure would bring U.S. foreign bribery law into the 21st century by aligning it with contemporary legal frameworks used across the world, would equip the Department of Justice (DOJ) with a powerful new tool it needs to combat corruption, and would provide to American businesses protections that have become essential in today’s global business environment.

By permitting a small group of well-connected people to play by a different set of rules at the expense of the rest of us, bribery undermines public health and safety, ignores environmental standards and national security risks, and diverts scarce taxpayer money to wasteful projects. Writ large, such corruption sows the seeds of economic and social unrest, increases the cost of doing business, and makes it much harder for small and medium enterprises to do business abroad.

Since its adoption in 1977, the Foreign Corrupt Practices Act (“FCPA”)¹ has served as a model law for regulating the “supply side” of foreign bribery by prohibiting U.S. companies and individuals from offering or paying bribes to foreign officials in furtherance of a business deal. Long the standard-bearer for regulating corrupt business practices, the FCPA has helped build a fairer global economic playing field.

The FCPA also gave foreign officials greater opportunity to make decisions based on what’s good for the citizens of their countries, not simply on what’s in their own self-interest. Unfortunately, however, foreign officials in corrupt regimes are increasingly demanding bribes from honest companies, and honest companies are increasingly faced with competition from foreign companies, including state-owned enterprises in such countries.² Perhaps most alarming, a survey by the Organization for Economic Cooperation and Development (OECD) found that this corruption is

¹ 15 U.S.C. §§ 78dd-1, et seq.

² See Tom Firestone & Maria Piontkovska, “Two to Tango: Attacking the Demand Side of Corruption,” *The American Interest*, Dec. 17, 2018, https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/#_ftnref10.

rarely punished, as foreign officials who demanded or received bribes were criminally sanctioned in only 20 percent of surveyed schemes.³

The United Kingdom, Germany, France, and many, many other significant economic players have passed laws that criminalize both the “supply” and the equally pernicious “demand” side of foreign bribery.⁴ The importance of this two-directional legal framework has been reinforced by the OECD, which noted recently:

To have a globally effective overall enforcement system, both the supply-side participants (i.e., the bribers) and the demand-side participants (i.e., the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.⁵

U.S. law, however, only criminalizes the first half of this bribery equation. This incomplete legal framework forces American businesses to compete on an uneven playing field in the global economy and hamstrings U.S. law enforcement’s ability to protect U.S. interests beyond our borders.

Understanding the consequences of this “incomplete justice,” the DOJ has done what it can to fill the gap. When faced with prosecuting demand-side bribes, it has cobbled together elements of other, imprecise federal crimes such as the Travel Act, Sherman Act, and mail, wire, and financial institution fraud statutes.⁶ It has also attempted to read the FCPA itself broadly—an effort recently rejected by the U.S. Court of Appeals for the Second Circuit.⁷ It’s now abundantly clear that Congress, and Congress alone, is capable of giving U.S. law enforcement the tools they need.

FEPA would fill the gap by expanding the current U.S. federal bribery and gratuity statute⁸ to cover a foreign official or agent thereof who “corruptly demands, seeks, receives, accepts, or agrees to receive or accept” a bribe. This language, short and simple, would build upon the critical foundation established by the FCPA and provide another means of combating the harms to society and business caused by corruption.

Finally, reflecting the relationship between corruption, the rule of law, and economic stability, FEPA commits the proceeds of demand-side bribery sanctions to existing DOJ programs that will facilitate its effective enforcement (via the Office of International Affairs) and help counteract the emergence

³ See OECD, “Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?” Dec. 11, 2018, www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm. Notably, the report’s second main finding was that “the information flow between demand-side and supply-side enforcement authorities is often slow.”

⁴ Other countries that have criminalized demand-side bribery include Malaysia, Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Russia, Serbia, Slovenia, and Ukraine. See, e.g., *id.*

⁵ OECD, “Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?” 3, www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

⁶ 18 U.S.C. § 1952, 15 U.S.C. § 1, 18 U.S.C. § 1341, 18 U.S.C. § 1343, and 18 U.S.C. § 1344, respectively.

⁷ See *U.S. v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

⁸ 18 U.S.C. § 201.

of corrupt foreign officials (via the Office of Overseas Prosecutorial Development, Assistance, and Training, and the International Criminal Investigative Training Assistance Program).⁹

We applaud you for your leadership on FEPA and look forward to working with you to make this bill a reality. For any questions or additional information, please contact Scott Greytak, Director of Advocacy for Transparency International's U.S. office, at sgreytak@transparency.org.

Sincerely,

Organizations

Accountability Lab

Africa Faith and Justice Network

Anti-Corruption Data Collective

Citizens for Responsibility and Ethics in Washington

Coalition for Integrity

EG Justice

Freedom House

Global Financial Integrity

Greenpeace USA

Integrity Initiatives International

International Coalition Against Illicit Economies (ICAIE)

Oxfam America

Shadow World Investigations

The Financial Accountability and Corporate Transparency (FACT) Coalition

The Free Russia Foundation

The ONE Campaign

The Sentry

Transparency International – U.S. Office

UNISHKA Research Service

Visual Teaching Technologies, LLC

Prominent Individuals

Lieutenant Colonel (Ret.) Jodi Vittori, PhD, Shafafiyat Counter-Corruption Task Force (2011-2012); Global Politics and Security Co-Chair of Georgetown University's School of Foreign Service

Louise Shelley, Director, Terrorism, Transnational Crime and Corruption Center

Nate Sibley, Research Fellow, Kleptocracy Initiative, Hudson Institute

⁹ The U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs has explained that fighting corruption "promotes stability, the rule of law, human rights, and democracy," and "enhances economic growth in foreign markets, and levels the playing field for American businesses". U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs "Anticorruption Fact Sheet," Mar. 22, 2019, <https://www.state.gov/anticorruption/>. See also Freedom House, "Democracy is Good for Business," Aug. 3, 2015, <https://freedomhouse.org/blog/democracy-good-business> ("stable, transparent governments built on respect for human rights and the rule of law tend to foster environments that are conducive to the establishment and unfettered operation of private enterprises"); Transparency International, "The Impact of Corruption on Growth and Inequality," Mar. 15, 2014, https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf (identifying how corruption negatively impacts investment, taxation, public expenditures, and human development).

Shaazka Beyerle, Author, *Curtailing Corruption: People Power for Accountability and Justice*

cc: Members of the Congressional Caucus against Foreign Corruption and Kleptocracy

What Transparency International Chapters Around the World Are Saying About the Foreign Extortion Prevention Act

The Association for a More Just Society (Honduras):

FEPA has the potential of becoming a gamechanger in countries like Honduras, where national governments are unable or unwilling to prosecute officials due to their political or economic connections. For example, during the Covid-19 pandemic, a company registered in the US sold seven mobile hospitals worth 50 million dollars of Honduran taxpayers' money. Unfortunately, the hospitals were made of junk parts, reused medical equipment, and were not functional to treat Covid patients. It is widely believed that in order to effectuate the sales, Honduran officials solicited and received bribes from the company. Yet one year after the scandal, only two Honduran officials have been prosecuted, and the U.S. supplier remains at-large, as there are strong suspicions that a corrupt network of government officials is influencing the justice system.

Transparency International Malaysia:

FEPA is a brilliant idea and would add value to our anticorruption work. Currently, Malaysia has a law called the "Malaysian Anticorruption Act" that can be used to prosecute both the receiver and the giver of a bribe, including a foreign company and or foreign individual. If the United States was to have FEPA, it would build on our Act and help us work with the Malaysian government to hold corrupt officials accountable.

Transparency Venezuela:

We think that FEPA would be a good tool for going after corrupt officials in Venezuela. The prosecutor's office can prosecute petty corruption, but they cannot go after high-ranking officials, senior civil servants, or grand corruption. Grand corruption is rampant in Venezuela, and does not only involve high officials, but also the people who have worked with them, many of whom have companies in the U.S.

FEPA's "Victims of Kleptocracy Fund" would also be very interesting and relevant to our work because it would bring additional resources to mutual legal assistance treaties. We work to identify assets that have been stolen from corrupt actors in Venezuela, and a lot of these assets end up in the

United States. Our office has identified real estate, horses, luxury watches, and bank accounts that have been frozen by the U.S. Office of Foreign Assets Control. Most of these cases take place in South Florida and involve the beneficial owners of Venezuelan companies. If the United States could use FEPA's "Victims of Kleptocracy Fund" to help build these cases through better mutual legal assistance, it would be extremely beneficial for the people.

Transparency International Moldova:

FEPA is a positive initiative that could bring many benefits to Moldova. In Moldova, foreign companies are hesitant to bring their business to the country due to potential corruption issues and a corrupt justice system. There is significant risk for investors because of fear that their investments won't be protected. Moldovans are eager to have a stronger market for foreign investment that can help grow our economy. Even public awareness that the U.S. will seek to prosecute corrupt officials who demand bribes would be a good initiative for fighting corruption in Moldova, and could bring change.

What U.S. Experts Are Saying About the Foreign Extortion Prevention Act

Nate Sibley, Research Fellow for the Hudson Institute's Kleptocracy Initiative:

The Foreign Corrupt Practices Act was America's historic commitment not to export corruption overseas. But exporting corruption is precisely what China, Russia, Iran, and other authoritarian adversaries are now doing on a global scale, both to enrich their rapacious elites and advance malign political objectives that undermine U.S. security and prosperity. Empowering U.S. law enforcement to target corrupt foreign officials will protect American businesses from extortion, strengthen free-market capitalism and rule of law in the face of rising authoritarian cronyism, and support populations suffering under kleptocratic rulers through renewed American leadership.

Trevor Sutton, Senior Fellow for National Security and Foreign Policy at the Center for American Progress:

This legislation represents an important step forward for U.S. anticorruption efforts that will serve as a powerful deterrent to kleptocrats while helping American businesses compete overseas. Like the Foreign Corrupt Practices Act before it, FEPA will strengthen international transparency norms and help create a global economy that rewards fair and honest competition. Holding foreign officials accountable for corrupt solicitations is one area where the United States has lagged behind many of its peers—that needs to change.

Elaine Dezenski, Senior Advisor for the Foundation for Defense of Democracies, and Chief Growth Officer of Blank Slate Technologies:

The Foreign Extortion Prevention Act is perhaps the most important piece of legislation in support of a level global playing field in decades – allowing officials to aggressively target corruption at its source. With FEPA, the U.S. will finally be able to prosecute foreign officials who solicit bribes of corporations working abroad, joining nations such as France, Switzerland, and the United Kingdom. While China and other authoritarian regimes promote rampant corruption as a means of exerting influence and extracting resources, the U.S. is reinforcing its commitment to transparent and enforceable rules of engagement for doing business. That's better for U.S. companies operating overseas while simultaneously delivering more value for citizens around the world.



THE U.S. LEGAL FRAMEWORK FOR EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW & THE FOREIGN EXTORTION PREVENTION ACT

Scott Greytak
Director of Advocacy
Transparency International U.S. Office

 **TRANSPARENCY
INTERNATIONAL**
U.S. Office

THIS WHITE PAPER DISCUSSES THE U.S. LEGAL FRAMEWORK FOR APPLYING FEDERAL CRIMINAL LAWS OUTSIDE THE UNITED STATES, AND DETAILS HOW THAT FRAMEWORK WOULD SUPPORT THE ROBUST ENFORCEMENT OF THE FOREIGN EXTORTION PREVENTION ACT.

INTRODUCTION

The scope of Congress's authority to regulate criminal commercial conduct outside the United States is vast. In particular, the Interstate Commerce Clause and the Foreign Commerce Clause contained in Article I of the U.S. Constitution empower Congress to reach activity that has a substantial effect on commerce between the states or on commerce between the United States and foreign nations. Congress has broad authority to regulate such commercial activity and currently does so through a wide variety of federal criminal statutes.

The Foreign Extortion Prevention Act ("FEPA") is a proposed federal law that would build on this authority by criminalizing the demand- or recipient-side of foreign commercial bribery in order to protect U.S. businesses operating abroad and to address foreign corruption at its source. As discussed below, FEPA is clearly within Congress's ambit of authority, constitutional, and unimpeded by existing legal and doctrinal obstacles to robust extraterritorial application, making it enforceable as a matter of law.

As with other¹ U.S. laws that apply extraterritorially, FEPA would also be enforceable as a matter of practice.

Those indicted by the U.S. Department of Justice ("DOJ") for FEPA violations could be apprehended by U.S. law enforcement if present in, or upon entering, the territory of the United States, and by foreign law enforcement upon entering a jurisdiction with which the United States has a relevant extradition treaty, pursuant to a U.S. extradition request.² The U.S. government could also freeze assets associated with the planning, implementation, or concealment of a FEPA violation. And the threat of any of the above actions may increase the likelihood that the offender's home country pursues criminal and/or civil penalties, before a foreign government does.

This paper begins by providing a brief overview of FEPA and its relationship to the U.S. Foreign Corrupt Practices Act. From there, it discusses potential limitations on the extraterritorial reach of U.S. criminal laws, including due process considerations, treaties, diplomatic immunity, and the act of state doctrine—none of which are reasonably likely to curb the robust application of FEPA—before closing with four hypotheticals that help illustrate the elements, scope, and reach of the law in practical application.

¹ See *infra* I(A).

² See generally Casey Michel & Paul Massaro, "The U.S. Midwest is Foreign Oligarchs' New Playground," *Foreign Policy*, June 3, 2021, available at <https://foreignpolicy.com/2021/06/03/the-u-s-midwest-is-foreign-oligarchs-new-playground/> ("These kleptocrats can then be arrested and tried when they travel to the West to spend and launder their ill-gotten gains.")

OVERVIEW OF THE FOREIGN EXTORTION PREVENTION ACT

The Foreign Extortion Prevention Act is a proposed federal law that would criminalize the demand- or recipient-side of foreign commercial bribery. It rests on strong policy arguments: Bribery permits a small group of well-connected people to play by a different set of rules at the expense of the general public. It can undermine health and safety, create national security risks, and divert taxpayer money to wasteful or harmful projects. FEPA would empower law enforcement to combat the disruptive impacts of bribery, and to combat corruption at its source.

Furthermore, American companies increasingly must compete for business overseas in order to maintain profitability and growth. Such companies, and their personnel, are, of course, subject to the U.S. Foreign Corrupt Practices Act (“FCPA”),³ which criminalizes supply-side bribery, and therefore cannot pay bribes to foreign officials in order to secure business. Yet if a foreign government does not act effectively to criminalize bribery in its own country, law-abiding U.S. companies desiring to compete in that country are not only vulnerable to demands for bribes, but are at an obvious and significant competitive disadvantage compared to non-U.S. companies that are beyond the reach of the FCPA and that may be more than willing to pay such bribes. This is particularly disadvantaging when it comes to non-U.S. companies controlled by foreign governments that deliberately employ bribery as a means of securing commercial advantages or otherwise achieving discrete political or economic goals.

FEPA amends 18 U.S.C. § 201 to add foreign officials, defined as the officials and employees of foreign governments or public international organizations, to the class of persons covered by the statute. Then, through a new subsection (f)(1), FEPA makes it unlawful:

[F]or any foreign official or person selected to be a foreign official to directly or indirectly, corruptly demand, seek,

receive, accept, or agree to receive or accept anything of value personally or for any other person or non-governmental entity, in or affecting interstate commerce, including where a U.S. domiciled or incorporated entity is disadvantaged by the corrupt conduct, in return for—

(1) being influenced in the performance of any official act;

(2) being induced to do or omit to do any act in violation of the official duty of such official or person; or

(3) conferring any improper advantage;

in connection with obtaining or retaining business for or with, or directing business to, any person.

The statute would also enact a number of reporting, penalty, and publication provisions via subsections (f)(2) through (6).

FEPA would reach a wide range of foreign bribe-takers, as it criminalizes the solicitation or receipt of a bribe “in or affecting interstate commerce...in connection with obtaining or retaining business for or with, or directing business to, any person.”⁴ To this end, FEPA contains a blanket jurisdiction provision stating that an offense under FEPA “shall be subject to extraterritorial federal jurisdiction.”

Thus, while FEPA is in some respects the demand-side analog to the FCPA, it can also reach foreign bribe-takers in cases where the bribe *payers* themselves are beyond the scope of the FCPA. *See United States v. Hoskins*, 902 F.3d 69, 96 (2d. Cir. 2018) (“[T]he FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States.”).

³ Congress enacted the FCPA in 1977 following the discovery by the Office of the Watergate Special Prosecutor, the Securities and Exchange Commission, and the Senate Subcommittee on Multinational Corporations of widespread foreign bribery by U.S. entities in the mid-1970s. *See* Michael J. Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 929, 932 (2012) (discussing the legislative history of the FCPA).

⁴ This is a notable difference from the FCPA, which provides for jurisdiction over U.S. issuers and domestic concerns (*see* 15 U.S.C. §§ 78dd-1, 78dd-2), including foreign persons and businesses while in the territory of the United States (*see* 15 U.S.C. § 78dd-3). The FCPA initially targeted only the conduct of U.S. issuers and domestic concerns. *See* Barr Benjamin et al., *Foreign Corrupt Practices Act*, 53 Am. Crim. L. Rev. 1333, 1344 (2016). In 1998, Congress amended the FCPA to conform to the requirements of the OECD Convention. *See id.* The 1998 FCPA amendments (1) expanded the application of the FCPA to “any person,” irrespective of citizenship, residency, or location of business activity, who commits an act in furtherance of a foreign bribe on U.S. territory, and (2) provided for nationality jurisdiction, *i.e.*, jurisdiction over the acts of U.S. issuers and domestic concerns in furtherance of unlawful payments that take place wholly outside of the United States. *Id.* at 1344-45.

I. LEGAL FRAMEWORK FOR THE EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW: SOURCES OF CONGRESS'S AUTHORITY TO LEGISLATE EXTRATERRITORIALLY, NEXUS REQUIREMENTS, AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Article I of the U.S. Constitution limits Congress's power to act to the specific powers enumerated therein. The two powers most relied on to enact criminal statutes that apply extraterritorially are the power "[t]o define and punish Piracies and Felonies

committed on the high Seas, and Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, and the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

A. THE FOREIGN COMMERCE CLAUSE & THE INTERSTATE COMMERCE CLAUSE

The Supreme Court has not "thoroughly explored the scope of the Foreign Commerce Clause," but "[w]hat little guidance we have from the Supreme Court establishes that the Foreign Commerce Clause provides Congress a broad power." *United States v. Baston*, 818 F.3d 651, 667-68 (11th Cir. 2016), *cert. denied* 137 S. Ct. 850, 853 (2017). Because the Foreign Commerce Clause refers to commerce "with" foreign nations, there must be some "nexus between the United States and a foreign country" and accordingly, "Congress cannot regulate commerce 'among' foreign nations." *United States v. Bollinger*, 798 F.3d 201, 214 (4th Cir. 2015); *Baston*, 818 F.3d at 668 (Foreign Commerce Clause confers power to regulate "commerce between the United States and other countries").

However, Congress may regulate conduct that "occurs exclusively overseas" provided it is part of a class of "activities that have a 'substantial effect' on foreign commerce." *Baston*, 818 F.3d at 668 (analogizing the Foreign Commerce Clause to the Interstate Commerce Clause and reasoning that the Foreign Commerce Clause authorizes regulation of "channels" of foreign commerce, "instrumentalities" of foreign commerce, and conduct that has a "substantial effect" on foreign commerce); *see also Bollinger*, 798 F.3d 201, 214 (also borrowing from Commerce Clause jurisprudence, yet requiring only that overseas conduct "demonstrably affect" foreign commerce).

For example, in *Baston*, the defendant, a Jamaican national, was convicted of 21 counts of sex trafficking for acts that took place in the United States, the United Arab Emirates, and Australia. *Baston*, 818 F.3d at 659. The trial court ordered the defendant to pay restitution to his victims, but not for prostitution that occurred exclusively in Australia, reasoning that Congress lacked the power under the Foreign Commerce Clause to punish conduct that occurred exclusively overseas. *Id.* at 660. The Eleventh Circuit affirmed the convictions and reversed the restitution order, holding that under the Foreign Commerce Clause "Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country." *Id.* at 671.

The potentially vast breadth of Congress's power under the Foreign Commerce Clause has been criticized. For example, Justice Clarence Thomas has said in a dissenting opinion that extending the logic of certain lower court decisions on the Foreign Commerce Clause "would permit Congress to regulate any economic activity anywhere in the world," such as "prostitution in Australia," "working conditions in factories in China, pollution from power plants in India, or agricultural methods on farms in France." *Baston v. United States*, 137 S. Ct. 850, 853 (2017) (Thomas, J., dissenting from denial of certiorari).

When it comes to the Interstate Commerce Clause, Congress can regulate (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). To determine whether activity has a "substantial" effect on interstate commerce, courts consider the regulated activity "taken in the aggregate" rather than the activity of one individual or entity, *Raich*, 545 U.S. at 22, at least when the regulated activity is "economic." *United States v. Morrison*, 529 U.S. 598, 613 (2000). Congressional findings, while neither necessary nor sufficient to show a substantial effect on interstate commerce, *see Morrison*, 529 U.S. at 614, are frequently cited as grounds for determining that Congress had a rational basis to conclude that conduct substantially affects interstate commerce. *See, e.g., Raich*, 545 U.S. at 20.

Until recently, courts had held that a broad array of extraterritorial statutes, including those rooted in the Interstate Commerce Clause alone, implicitly applied to extraterritorial conduct, but recent Supreme Court rulings have required a clearer indication of extraterritoriality by Congress. For example, certain provisions of the Securities Exchange Act historically were interpreted as applying to extraterritorial misconduct and/or foreign actors. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (holding that foreign corporations may be liable under 15 U.S.C. § 78j(b) for transactions that occur outside the United States if the transactions involve stock registered and listed

⁵ Acknowledging these diplomatic challenges, the Senate passed Senate Resolution 265 in 1975, calling upon President Ford to seek multilateral solutions to foreign bribery pursuant to his authority under U.S. trade law. *Id.* at 982. The FCPA, adopted in 1977, initially targeted only the conduct of U.S. issuers and domestic concerns. *See Barr Benyamin et al., Foreign Corrupt Practices Act*, 53 Am. Crim. L. Rev. 1333, 1344 (2016). In 1998, Congress amended the FCPA to conform to the requirements of the OECD Convention. *See Barr Benyamin et al., Foreign Corrupt Practices Act*, 53 Am. Crim. L. Rev. 1333, 1344 (2016). The 1998 FCPA amendments (1) expanded the application of the FCPA to "any person," irrespective of citizenship, residency, or location of business activity, who commits an act in furtherance of a foreign bribe on U.S. territory, and (2) provided for nationality jurisdiction, *i.e.*, jurisdiction over the acts of U.S. issuers and domestic concerns in furtherance of unlawful payments that take place wholly outside of the United States. *Id.* at 1344-45.

on a national securities exchange and the alleged conduct is “detrimental to the interests of American investors”). In *Morrison*, however, the Supreme Court explicitly rejected the Second Circuit’s interpretation of the Exchange Act in *Schoenbaum* and held that the language of the statute did not provide an affirmative indication that it was intended to apply extraterritorially. *Morrison*, 561 U.S. at 265. In doing so, the Court quoted the statute’s reference in other sections to interstate commerce as evidence that the statute had an “exclusive focus on domestic transactions.” *Id.* at 268.

To this end, many criminal statutes that apply extraterritorially either contain elements requiring a nexus to the United States, its territories, owned or leased U.S. properties, or its nationals or permanent residents, or they apply to U.S. nationals overseas. For example:

- + The U.S. wire fraud statute, 18 USC § 1343, criminalizes acts of fraud that use wire, radio, or television communications “in interstate or foreign commerce.”
- + 18 U.S.C. § 33 criminalizes the destruction of motor vehicles or motor vehicle facilities “in interstate or foreign commerce.”
- + 18 U.S.C. § 470 criminalizes counterfeit acts committed outside the United States.
- + The U.S. money laundering statute, 18 U.S.C. § 1956(a) (2), states that extraterritorial jurisdiction exists if the transaction in question exceeds \$10,000, involves a non-U.S. citizen, and “the conduct occurs in part in the United States,” where the term “conduct” is defined as “includ[ing] initiating, concluding, or participating in initiating or concluding a transaction.”
- + The Rodchenkov Anti-Doping Act applies extraterritorially to any scheme to facilitate doping at a major international sports competition, so long as that scheme is “effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication,” the competition organizer or sanctioning body receives sponsorship or financial support from an organization that does business in the United States or received money for the right to broadcast the competition in the United States, the competition features at least one American athlete, and the competition is governed by the World Anti-Doping Agency Code.
- + The Trafficking Victims Protection Act, the statute upheld in *Boston*, applies extraterritorially to “(1) an alleged offender [who] is a national of the United States or an alien lawfully admitted for permanent residence....or (2) an alleged offender [who] is present in the United States, irrespective of the nationality of the alleged offender.” 18

U.S.C. § 1596.

- + The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (“PROTECT Act”)—upheld as a constitutional exercise of the foreign commerce power in *Bollinger* and other cases—criminalizes sexual abuse of minors in foreign countries when perpetrated by “[a]ny United States citizen or alien admitted for permanent residence.” 18 U.S.C. § 2423(c).
- + The FCPA criminalizes actions taken abroad in furtherance of corrupt payments by discrete categories of persons, including issuers of securities registered on stock exchanges in the U.S., and U.S. “domestic concerns” (U.S. citizens, nationals, corporations, or other business entities).⁶
- + Several other statutes criminalize conduct “[w]ithin the special maritime and territorial jurisdiction of the United States.” E.g., 18 U.S.C. § 1111 (proscribing murder “[w]ithin the special maritime and territorial jurisdiction of the United States”).

Nexus requirements serve at least three potential purposes. First, they can be used as means of demonstrating the enumerated constitutional power(s) that undergird a statute. For example, the 18 U.S.C. § 1111 reference to “maritime” jurisdiction may be intended to invoke Congress’s power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” U.S. Const. art. I, § 8, cl. 10; see Charles Doyle, *Extraterritorial Application of American Criminal Law*, CRS Report at 1 & n.7 (Oct. 31, 2016) (collecting cases). 18 U.S.C. § 33 similarly invokes both the Interstate Commerce Clause and the Foreign Commerce Clause in criminalizing the destruction of motor vehicles or motor vehicle facilities “in interstate or foreign commerce.” Nexus requirements may also help assure that a statute complies with due process. See *infra*. And they may simply represent a policy judgment of Congress as to the appropriate scope of a particular law.

The final consideration in the U.S. legal framework for the extraterritorial application of American criminal law is the presumption against extraterritoriality. Simply put, because U.S. statutes are presumed to operate domestically, any attempt to apply a statute to foreign conduct must overcome the “canon of statutory construction known as the presumption against extraterritoriality,” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). This presumption is overcome by a “clearly expressed congressional intent to the contrary.” *Id.* (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

The presumption against extraterritoriality is informed by concerns of separation of powers and international comity.

⁶ Courts have expressly rejected prosecutorial efforts to use conspiracy and aiding and abetting theories to expand the scope of the FCPA beyond these categories. See *Hoskins*, 902 F.3d at 83-97 (affirming dismissal of FCPA conspiracy and aiding and abetting charges against defendant who was a foreign national and did not enter the United States during the alleged scheme).

See *RJR Nabisco*, 136 S. Ct. at 2100 (presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries”); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 116 (2013) (“The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”). But once the presumption is overcome, these concerns do not affect the court’s subject-matter jurisdiction,⁷ or Congress’s power.

Congress’s intent that a statute is to apply extraterritorially can be demonstrated by including express language that the statute either applies to foreign conduct or confers

extraterritorial jurisdiction. See, e.g., 18 U.S.C. § 1957(d)(2) (criminalizing transactions in money from criminally derived property that “[take] place outside the United States”); 18 U.S.C. § 351(i) (“There is extraterritorial jurisdiction over the conduct prohibited by this section,” i.e., assassination of government officials); see also *RJR Nabisco*, 136 S. Ct. at 2101-02 (holding that these two statutes rebutted the presumption against extraterritoriality).

B. APPLICATION TO THE FOREIGN EXTORTION PREVENTION ACT

As discussed above, the Interstate Commerce Clause provides a constitutional basis for statutes that apply to extraterritorial conduct or actors, so long as the activity is “economic” and, “taken in the aggregate,” has a substantial effect on interstate commerce. See *Morrison*, 529 U.S. at 613; *Raich*, 545 U.S. at 22. FEPA expressly invokes Interstate Commerce Clause authority by stating:

It shall be unlawful for any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value personally or for any other person or non-governmental entity, in or affecting interstate commerce...in connection with obtaining or retaining business for or with, or directing business to, any person.

FEPA’s nexus requirement, therefore, is functionally the same as the requirement drawn from the Interstate Commerce Clause that the regulated activity affect interstate commerce. This reference to Congress’s vast regulatory power over interstate commerce is sufficient to establish the nexus between the proscribed conduct and the United States. As discussed above, there are other criminal statutes that rely upon interstate commerce that reach conduct committed extraterritorially. And because the economic conduct FEPA regulates (foreign bribery schemes), when taken in the aggregate, would clearly have a substantial effect on interstate commerce—for example, by putting U.S. companies at a competitive disadvantage—FEPA is clearly a constitutional exercise of Congress’s power to regulate interstate commerce under the Interstate Commerce Clause. In turn, congressional findings demonstrating these effects would likely be sufficient to provide a rational basis for Congress to conclude that the conduct FEPA regulates has a substantial effect on interstate

commerce. See *Boston*, 818 F.3d at 668 (holding that “Congress had a ‘rational basis’ to conclude” that sex trafficking – “even when it occurs exclusively overseas – is ‘part of an economic class of activities that have a ‘substantial effect’ on commerce between the United States and other countries” (citations omitted)).

Finally, FEPA provides that “[a]n offense under paragraph (1) shall be subject to extraterritorial Federal jurisdiction.” This clear expression of congressional intent to overcome the presumption against extraterritoriality, as well as the law’s clear application to foreign conduct, are more than sufficient to overcome the presumption against extraterritoriality.

FEPA need not, but could, also include an express invocation of the Foreign Commerce Clause. Many existing extraterritorial criminal statutes rely upon the Foreign Commerce Clause in addition to the Interstate Commerce Clause. See, e.g., 15 U.S.C. § 1 (the Sherman Act); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 1591(a) (sex trafficking); 18 U.S.C. § 2423 (transportation with intent to engage in criminal sexual activity); 18 U.S.C. § 1962 (the RICO Act); 18 U.S.C. § 1959 (Violent Crime in Aid of Racketeering Act). Adding an express invocation of the Foreign Commerce Clause would be consistent with these statutes.⁸ See, e.g., 15 U.S.C. §§ 1, 6a (Foreign Trade Antitrust Improvements Act (“FTAIA”)) (limiting the Sherman Act’s extraterritorial reach to conduct that “has a direct, substantial, and reasonably foreseeable effect” on “import trade or import trade or import commerce with foreign nations” or on domestic commerce). Other federal statutes invoke foreign commerce authority and expressly apply extraterritorially without limitation. See, e.g., 18 U.S.C. § 2339D(b)(5) (receipt of military training from a foreign terrorist organization); 18 U.S.C. § 2332b(b)(1)(B) (acts of terrorism transcending national boundaries). Still others

⁷ The Supreme Court in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), clarified that extraterritoriality does not implicate subject-matter jurisdiction. While noting that several Circuit Courts of Appeals had held that extraterritoriality was a question of subject-matter jurisdiction, the Court stated that the extraterritorial reach of a statute “is to ask what conduct [the statute] prohibits, which is a merits question” rather than a question of the power of the court to hear the case. *Id.* at 254.

⁸ Doing so would also assist in avoiding potential Fifth Amendment issues, as discussed in section B.1 *infra*.

invoke foreign commerce authority and expressly apply extraterritorially if certain conditions are met. *See, e.g.*, 18 U.S.C. § 1591(a)(1) (sex trafficking, which under 18 U.S.C. § 1596 applies extraterritorially if the alleged offender is a U.S. national or permanent resident or is present in the United

States); 18 U.S.C. § 175c(b)(1) (regarding variola virus, which under 18 U.S.C. § 175 applies extraterritorially if the offense is committed by or against a U.S. national). However, these statutes generally target universally condemned crimes against humanity, not commercial activity alone.

II. POTENTIAL LIMITING FACTORS ON THE EXTRATERRITORIAL REACH OF AMERICAN CRIMINAL LAW

A. FIFTH AMENDMENT DUE PROCESS CONSIDERATIONS

The Fifth Amendment, to the extent it applies to foreign criminal defendants based outside the territorial United States, could be used by courts to rein in an extraterritorially applied criminal statute if wielded too broadly.

The concept of personal jurisdiction, requiring “minimum contacts” with a forum, does not arise in the criminal context. *See United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013). A criminal defendant present in a United States court—even if forcibly brought there—will fall within a court’s jurisdiction. *See, e.g., United States v. Pryor*, 842 F.3d 441, 448 (6th Cir. 2016); *United States v. Rendon*, 354 F.3d 1320, 1326 (11th Cir. 2003); *United States v. Rosenberg*, 195 F.2d 583, 602 (2d Cir. 1952). Nevertheless, some criminal defendants have argued that the Fifth Amendment’s Due Process Clause provides its own “minimum contacts” requirement, arguing that it would violate their due process rights to try them as non-U.S. citizens or residents for conduct that did not occur in the U.S. or affect U.S. interests. Although courts have thus far been reluctant to dismiss indictments on this basis, they have generally supported the notion that the Fifth Amendment could limit the United States’ power to prosecute foreign defendants for conduct committed wholly abroad.

While so far this Fifth Amendment doctrine has been fairly ineffectual for defendants, it is conceivable that it could develop into a viable tool for defendants should a statute like FEPA be applied broadly to extraterritorial foreign officials for actions taken wholly outside the United States.

i. The Fifth Amendment’s Application to Non-Resident Alien Defendants

Although the Supreme Court has not addressed the question directly, case law to date indicates that non-resident alien criminal defendants have rights under the Fifth Amendment. For example, in *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply to extraterritorial searches of alien defendants. 484 U.S. 259, 271 (1990). However, the Court’s holding did not extend to the Fifth Amendment, because the Fifth Amendment provides “fundamental trial right[s]” to criminal defendants, which therefore apply when a non-resident alien is present in the United States, as opposed to the alleged Fourth Amendment violation, which occurred outside the United States. *Id.* at 264. As Justice Kennedy stated in his concurring opinion,

“[t]he United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.” *Id.* at 278 (Kennedy, J., concurring).

Accordingly, many federal courts have acknowledged that non-resident defendants have due process rights when tried for violations of U.S. criminal law. *See, e.g., United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016); *United States v. Hayes*, 99 F. Supp. 3d 409 (S.D.N.Y. 2015) (rejecting government argument that the Fifth Amendment was inapplicable to a Swiss citizen being tried for criminal activity conducted abroad); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (“When Congress so intends, we apply a statute *extraterritorially as long as doing so does not violate due process.*”); *In re Hijazi*, 589 F.3d 401, 406-12 (7th Cir. 2009) (emphasis added).

ii. Due Process Limitations on Extraterritorial Application of U.S. Criminal Law

The Due Process Clause prohibits the exercise of extraterritorial jurisdiction over a defendant when it would be “arbitrary or fundamentally unfair.” *Baston*, 818 F.3d at 669 (quoting *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011)); *see, e.g., Al Kassar*, 660 F.3d at 118; *United States v. Rojas*, 812 F.3d 382, 393 (5th Cir. 2016); *United States v. Mohammed-Omar*, 323 F. App’x 259, 261 (4th Cir. 2009); *United States v. Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990). To assess whether jurisdiction would be “arbitrary or fundamentally unfair,” courts generally analyze two concerns: nexus and notice.

According to many courts, the Fifth Amendment requires a “sufficient nexus between the defendant and the United States.” *Al Kassar*, 660 F.3d at 118; *see, e.g., Baston*, 818 F.3d at 668-70 (“The Due Process Clause requires at least some minimal contact between a State and the regulated subject.”); *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006).⁹ One method to demonstrate this nexus is showing that “the aim of that [extraterritorial] activity is to cause harm inside the United States or to U.S. citizens or interests.” *Al Kassar*, 660 F.3d at 118; *see Davis*, 905 F.2d at 249. Other courts rely on international law to assess whether “contacts are adequate to support the U.S. proceeding,” typically leading to

⁹ Other circuits, like the First and Third Circuits, have held that the Fifth Amendment does not impose a nexus requirement where a statute does not explicitly contain one. *See United States v. Cardales*, 168 F.3d 548, 552 (1st Cir. 1999) (addressing the Maritime Drug Law Enforcement Act); *United States v. Martinez-Hidalgo*, 993 F.2d 1052 (3d Cir. 1993) (same).

the same result: where the conduct “has substantial, direct, and foreseeable effect upon or in” the United States, or was intended to have such effect, jurisdiction is appropriate. *Hijazi*, 589 F.3d at 412 (quoting Restatement (Third) of Foreign Relations Law § 403(2)); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 7 (1st Cir. 1997) (citing Restatement (Third) of Foreign Relations Law § 415(2)). Still, this is merely a *sufficient* basis on which to demonstrate nexus, not a necessary one. See *Ali*, 718 F.3d 944-45. Where a foreign official solicits or accepts a bribe from a U.S. company, there is a clear argument that the requisite “harm inside the United States” is present via the economic loss caused to the company, the relevant industry, and/or the broader economy.

Many non-resident alien defendants also argue that criminal charges violate their due process rights on the basis that they were not sufficiently notified that they might be tried for their conduct in the United States. See, e.g., *United States v. Henriquez*, 731 F.2d 131, 134 n.5 (2d Cir. 1984). Yet “[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.” *Al Kassar*, 660 F.3d at 119 (emphasis in original); see also *Ali*, 718 F.3d at 944.

To assess whether this requirement is met, many courts look again to international law to determine whether the defendant’s conduct complied with international law. See *Boston*, 818 F.3d at 669. For crimes that are “universally condemned,” a defendant is on notice that he may be tried in the United States. See, e.g., *United States v. Naik*, 2020 U.S. Dist. LEXIS 16684, at *10 (D.D.C. Feb. 2, 2020) (rejecting defendant’s argument that he lacked notice that he could be prosecuted for sexual assault in the United States, given that sexual assault is proscribed in all countries “with a plausible interest in this prosecution”). *Reumayr*, 530 F. Supp. 2d at 1223; *Martinez-Hidalgo*, 993 F.2d at 1056.

There is a strong argument that bribery is a “universally condemned” crime, given criminal statutes adopted worldwide since the 1990s, the stance against corruption adopted by the

United Nations in 2004, and the growing number of nations that now criminalize demand-side bribery. Regardless, as with nexus, compliance with international law is a sufficient but not necessary method to satisfy the notice requirements of the Fifth Amendment. See *Boston*, 818 F.3d at 669 (citing *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 815 (1993) (explaining that Congress “clearly has constitutional authority” to confer extraterritorial jurisdiction in violation of international law if it so chooses)).

In sum, although many courts have recognized due process protections for non-resident aliens charged in U.S. courts, the due process challenge is an uphill battle for a defendant. “[C]ases in which even the extraterritorial application of a federal criminal statute has been ‘actually deemed a due process violation’ are exceedingly rare, and a defendant’s burden ‘is a heavy one.’” *Hayes*, 99 F. Supp. 3d at 422 (quoting *Ali*, 718 F.3d at 944 n.7); see *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1223 (D.N.M. 2008) (“[I]t appears that no federal court has invalidated the extraterritorial application of U.S. law on due process grounds” (citing *Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1221 n.12 (1992))). As the international community continues to act to criminalize the demand side of bribes, defendants’ notice argument will likely weaken.

As with other extraterritorially-applied criminal laws, see 15 U.S.C. § 78dd (the FCPA); 18 U.S.C. § 1956(f) (money laundering), FEPA contains a jurisdictional provision limiting its scope to defendants engaging in conduct within or affecting interstate commerce. Without it, the scope of the potential application of FEPA may have invited challenges on Fifth Amendment grounds that could be more persuasive to courts than those asserted by defendants facing criminal charges thus far. Yet the express inclusion of this provision ensures that FEPA will not test the relationship between the nexus requirement that some courts have acknowledged is required by the Fifth Amendment and Congress’s authority to legislate under the Interstate Commerce Clause.

B. TREATIES

Several treaties address transnational bribery and corruption. None would pose an impediment to FEPA. This section summarizes the three anti-bribery and corruption treaties to which the United States is a signatory.¹⁰

i. The OECD Anti-Bribery Convention

The OECD Convention addresses supply-side bribery only, and therefore, would not be an obstacle to the enactment of FEPA. Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”) art. 1, ¶ 1-2, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (describing the offering of bribes, and the conspiracy,

aid, or authorization thereof, and the obligation of parties to the treaty to criminalize such behavior). The Commentaries to the Convention make this even more explicit: the Convention “deals with what, in the law of some countries, is called ‘active corruption’ or ‘active bribery’, meaning the offence committed by the person who promises or gives the bribe, as contrasted with ‘passive bribery,’ the offence committed by the official who receives the bribe.”

Given the scope of the OECD Convention, the absence of any prohibition, explicit or implicit, regarding the criminalization of demand-side bribery, and the fact that numerous signatories have criminalized demand-side bribery, see *Lucinda A. Low*,

¹⁰ Other major anti-bribery and corruption treaties include the African Union Convention on Preventing and Combating Corruption of July 11, 2003, and the Civil Law Convention on Corruption (1999) and its Additional Protocol. See generally *Lucinda A. Low, Sarah R. Lamoree, and John London, The Demand Side of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn’t Enough*, 84 Fordham L. Rev. 563, 579 (2015). However, the United States is not a signatory to these conventions.

Sarah R. Lamoree, and John London, *The Demand Side of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 Fordham L. Rev. 563, 579 (2015) (compiling examples of laws criminalizing demand-side bribery adopted by various countries, including the U.K., Germany, France, and Poland), the OECD Convention does not pose an obstacle to FEPA.

ii. *The Inter-American Convention Against Corruption*

The Inter-American Convention Against Corruption likewise would not impede FEPA. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724. Unlike the OECD Convention, the Inter-American Convention expressly contemplates the criminalization of demand-side bribery. *Id.* art. VI, ¶ 1 (the Convention is applicable to “[t]he solicitation or acceptance, directly or indirectly by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions”).

However, the Convention only mandates that parties establish jurisdiction over demand-side bribery and other enumerated acts of corruption when they take place in the party’s own territory. *Id.* art. V, ¶ 1. That mandate has been construed to cover only offenses committed wholly within the party’s territory—a standard that complex anti-bribery and corruption offenses will often fail to meet. Low et al. *The Demand Side of Transnational Bribery and Corruption, supra*, at 573. The establishment of extraterritorial jurisdiction over acts of corruption, in contrast, is optional. Inter-American

Convention, art. V, par. 4 (“[t]his Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law”).

Thus, the Inter-American Convention Against Corruption mandates the criminalization of only a subset of demand-side bribery, yet explicitly permits the criminalization of much more. Additionally, the Inter-American Convention contemplates criminalization of corruption, including demand-side bribery, within the domestic legal systems of the parties. *See Inter-American Convention*, arts. VI, VII, III, and X. Thus, the Convention both allows for and contemplates legislation like FEPA.

iii. *The United Nations Convention Against Corruption*

The United Nations Convention Against Corruption likewise would not prohibit the criminalization of demand-side corruption. United Nations Convention Against Corruption, Dec. 9, 2003, 35 I.L.M. 724 (the “U.N. Convention”). The U.N. Convention requires the criminalization of international supply-side corruption, *see id.* art. 16, ¶ 1, but makes optional the criminalization of international demand-side corruption, *see id.* art. 16, ¶ 2 (stating that “[e]ach State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage”). Thus, like the Inter-American Convention, the U.N. Convention both allows for and contemplates legislation like FEPA.

C. DIPLOMATIC IMMUNITY

Diplomatic immunity is a robust, though narrow, doctrine, which, in the context of FEPA, would only be implicated if a diplomat were to be involved in the solicitation or receipt of a covered bribe.

The relevant authority with regard to diplomatic immunity is the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227.¹¹ The class of individuals who enjoy immunity under the Vienna Convention is very narrow. However, the protections it grants are significant. The Vienna Convention applies, to varying degrees, to diplomatic agents, members of their families, and support staff. Vienna Convention, art. 1. A “diplomatic agent” is defined to include the head of the mission or a member of the diplomatic staff of the mission, *see id.* art. 1(e). Article 29 of the Vienna Convention provides that “the person of a diplomatic agent shall be inviolable” and that they shall not be subject to arrest or detainment. *Id.* art. 29.

Article 31, moreover, provides that a diplomatic agent “shall enjoy immunity from the criminal jurisdiction of the receiving state.” Further, diplomatic agents cannot, *inter alia*, be taxed (Article 34), be compelled to pay into social programs or serve

in the military of the host country, (Article 35), or have their personal baggage inspected except under extraordinary circumstances (Article 36). These protections also apply to the families of diplomatic agents, and to a slightly more limited extent the service staff and employees of the mission. *Id.* art. 37.

Under the Vienna Convention, diplomatic immunity attaches to individuals rather than activities. *See id.* arts. 29-31. That is to say that a diplomatic agent would be immune from prosecution because of his or her status as a diplomat, rather than because of their engagement in diplomacy. This is illustrated by the immunity from prosecution diplomats enjoy for acts with little to no bearing on their official function. Hence, if an individual soliciting or receiving a bribe is entitled to diplomatic immunity under the Vienna Convention, he or she would be immune from prosecution under FEPA.

This would not be a problem unique to FEPA—indeed, it is a limitation faced by every other U.S. criminal law, state or federal—nor one with great significance for the enforceability of the statute.

¹¹ Also implicated is 22 U.S.C. §§ 251-259, which incorporates the protections of the same and applies them to the diplomats of non-signatory nations.

D. ACT OF STATE DOCTRINE

The act of state doctrine prohibits the courts of the United States from declaring invalid the official act of a foreign sovereign. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990).¹² Because bribery is not an official act, as understood in relevant case law, the doctrine would not present an impediment to the enforceability of FEPA. The doctrine therefore does not present an impediment to the enforceability of the statute.

With regard to foreign officials and employees, the conduct contemplated by FEPA—demand-side bribery—would be excluded from the scope of the act of state doctrine, because courts would not be required to adjudicate an official act of a foreign state in holding a foreign official liable for bribery. In *W.S. Kirkpatrick*, a case concerning bribes paid by a company executive to Nigerian government officials in order to secure a procurement contract in that country, the U.S. Supreme Court held that the conditions necessary for the application of the act of state doctrine were not present. *Id.* at 406. The Court explained that “[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of an official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.” *Id.* (emphasis in original).

The effect of the Court’s language in *W.S. Kirkpatrick* was to impose two requirements for the act of state doctrine to apply: First, that the case concern the “official action by a foreign sovereign,” and second, that the case specifically go to the effect of that action. *Id.* Courts have consistently held that bribes do not meet those prerequisites, and hence, that adjudicating the payment of a bribe is not covered by the act of state doctrine.¹³ A judicial determination as to the existence of a bribe does not require that the court pass upon the validity of an official action of a foreign sovereign.

Such is the case with FEPA. While liability under FEPA requires a finding of corruption, and so strongly suggests impropriety, and potentially even invalidity, as to the resulting official act, it does not necessitate it. In other words, proof of a violation of FEPA may call into question the legality of the official act, but the court’s legal inquiry will not reach that question. Having held that a payment or other thing of value was corruptly demanded or accepted by the foreign official, there is nothing

left for the court to pass upon, such that the act of state doctrine would not be triggered. See *W.S. Kirkpatrick*, 493 U.S. at 406 (stating that “[r]egardless of what the court’s factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision which the act of state doctrine requires”) (citing *Sharon v. Time, Inc.* 599 F. Supp. 53, 546 (S.D.N.Y. 1984) (“The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred”).

By contrast, in *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897), distinguished in *W.S. Kirkpatrick*, the act of state doctrine applied to a tort claim for, essentially, wrongful detention of the plaintiff by a military commander. Because holding for the plaintiff would necessarily require finding that the military commander’s conduct was tortious, and thus require a predicate finding that the government’s conduct was illegitimate, the act of state doctrine was implicated. Similarly, in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), also cited in *W.S. Kirkpatrick*, the Court refused, on the basis of the act of state doctrine, to hold that the expropriation of certain property by the Mexican government was invalid. Likewise, in *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 U.S. Dist. LEXIS 72231 (D.D.C. 2006), the act of state doctrine barred the plaintiff oil companies’ suit because, for the court to find that the plaintiffs had a “right to compete or bid” for certain government contracts issued long before the litigation and procured by a bribe from ConocoPhillips, the court would have not only had to find that there was a bribe, but also that the contracts awarding the concession rights were invalid. As the latter finding went to a sovereign act, the act of state doctrine barred suit.

Like *W.S. Kirkpatrick*, and unlike the examples above, prosecution under FEPA would not trigger the act of state doctrine. Since ruling on whether a bribe was paid would not require a court to “enforce or disturb” the actions of the foreign sovereign, the factual predicate for the act of state doctrine would not exist. *In re Yukos Oil Sec. Litig.*, No. 04 Civ. 5243, 2006 U.S. Dist. LEXIS 78067 (S.D.N.Y. Oct. 25, 2006).

¹² The act of state doctrine would not be relevant to employees and officials of international organizations, as it covers only foreign sovereigns and their agents. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (explaining that one of the limits of act of state doctrine is the necessity that the action be taken by a foreign sovereign).

¹³ See, e.g., *Republic of Iraq v. ABB AG*, 768 F.3d 145 (2d Cir. 2014) (citing *W.S. Kirkpatrick* and stating that “[h]ere, similarly, although a finding against the defendants would tend to imply that the Hussein Regime violated its international obligations by corrupting the Programme ... no aspect of the Republic’s claims turns on the validity of the Hussein Regime’s conduct”); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (“[I]f the bribes underlying the civil RICO and Robinson-Patman Act claims in *Kirkpatrick*, the payments made by the defendants in this case to induce favorable action in Venezuela may support the plaintiffs’ antitrust claims. Because the antitrust claims at issue in this suit merely call into question the contracting parties’ motivations and the resulting anticompetitive effects of their agreement, not the validity of any foreign sovereign act, the district court erred in applying the act of state doctrine”); *Mt. Crest, SRL LLC v. Anheuser-Busch InBev SA/NV*, 937 F.3d 1067, 185 (7th Cir. 2019) (“[h]olding Anheuser-Busch and Molson Coors liable ... and requiring them to pay damages ... would not, on its face, invalidate Ontario’s chosen regulatory scheme”); *Forum Fin. Group v. President & Fellows of Harvard College*, 173 F. Supp.2d 72 (D. Maine 2001) (act of state doctrine not implicated when “the Contract with the Russian SEC is not itself at issue ... rather, it is the alleged tortious interference therewith”).

III. HYPOTHETICAL APPLICATIONS OF THE FOREIGN EXTORTION PREVENTION ACT

Hypothetical 1: A senior vice president of project development at Big Oil, Inc., a U.S. public company headquartered in Houston, Texas, with operations in several foreign countries, oversees Big Oil's operations in the Middle East and Asia, and has been in contact with public officials in a number of Central Asian countries regarding plans to develop oil fields in the region. Recently, the VP met with the Minister of Natural Resources of a Central Asian country at a hotel in its capital city to discuss a potential concession agreement with Big Oil. During their conversation, the Minister tells the VP that he is in discussions with several of Big Oil's competitors, and that Big Oil's chances of securing the contract would be enhanced by a "premium" payable to a British Virgin Islands-based company. The VP tells the Minister that the premium should be feasible, and arranges for Big Oil's finance department to issue a \$100,000 check to the company. The country ultimately awards the contract to Big Oil.

Analysis: This would likely be a straightforward violation of FEPA. The Minister is clearly a "foreign official" as defined in the statute, and directly and explicitly sought and accepted a "thing of value" (U.S. dollars) in order to influence the "performance of an official act" (the award of an oil concession on behalf of the government), thereby acting "corruptly." Although the Minister did not request a bribe explicitly, in the likely view of the U.S. Department of Justice ("DOJ"), his suggestion of a premium, acceptance of the payment, and awarding of the contract to Big Oil shortly thereafter provide strong circumstantial evidence that the payment was solicited with corrupt intent. Moreover, the Minister violated FEPA even though the payment was directed to an offshore entity rather than the Minister personally, and even though the Minister did not make explicit whether he had an interest in it, since FEPA covers bribes solicited "personally or for any other person or non-governmental entity."

Hypothetical 2: The Director of Global Sales at GiantTelecom US, Inc., the U.S. operating subsidiary of GiantTelecom AG, based in Dusseldorf, Germany, has been leading a pitch to the Ministry of Communications in an Eastern European country for a \$50 million contract to develop a broadband network in the country's rural northwestern region. During a recent Zoom meeting, a deputy minister in the Ministry of Communications suggested that the Director reach out to a consultant based in the Eastern European country, with whom the deputy minister has worked in the past on similar deals.

The deputy minister also mentions that the consultant happens to be planning a visit to San Diego, where GiantTelecom US is headquartered, following a visit to the Cayman Islands, and would be happy to meet with the Director in person. At a meeting in the Director's office, the consultant tells the Director that the deputy minister is likely to show her gratitude to GiantTelecom US in the contracting process if the company could arrange an internship for the deputy minister's daughter at the offices of GiantTelecom AG's French subsidiary in Paris. The deputy minister asked the consultant to make this request shortly before his trip. The Director arranges for

an internship offer, and within a week, is informed that the Ministry of Communications has decided to award the project to GiantTelecom US.

Analysis: Again, the foreign official here would likely be liable under FEPA. Although GiantTelecom US is owned by a non-U.S. company, it is still a U.S. domiciled or incorporated entity. The fact that the "thing of value" was conveyed to a third-party intermediary rather than to the deputy director directly would not be a defense, since FEPA prohibits foreign officials from corruptly seeking anything of value "directly or indirectly."

Hypothetical 3: DefenseCo is a defense contracting company based in Lyon, France, with affiliates and operations in other European countries, but not in the U.S. DefenseCo's Vice President of Sales for the Americas Region has responded to an RFP from the air force of a Latin American country and been invited to meet with the country's Minister for Procurement. The VP travels to the country's capital city and meets with the Minister at a restaurant, where the VP proposes that DefenseCo pay ten percent of the contract price to the Minister, in a manner of the Minister's choosing, should the ministry accept DefenseCo's bid and award it the contract. The Minister nods her approval, and DefenseCo wins the contract, which is worth 50 million euro. The following week, DefenseCo wires 5 million euro from France to a Swiss-based account controlled by the Minister.

Analysis: Even though the kickback paid by DefenseCo has no direct connection to the U.S.—it was paid by a non-U.S. company, was not planned or carried out on U.S. soil, involves no U.S. nationals, and was not paid through the U.S. banking system—it could still fall within the scope of FEPA inasmuch as it "affect[s] interstate commerce." The application of FEPA to a foreign official on these facts is consistent with the Interstate Commerce Clause, as U.S. courts have interpreted it to date, since foreign bribery, even when it does not involve U.S. persons or entities, has a substantial effect on interstate commerce by disadvantaging U.S. businesses.

Hypothetical 4: MotorCo is a global auto manufacturer headquartered in Chicago. Recently, MotorCo participated in an RFP from an Asian-based airline to supply vehicles for use in the airline's ground operations at airports around the world. The airline's majority shareholder is the Asian country's Ministry of Transportation, which appoints a majority of the airline's board of directors. During a meeting at a hotel cocktail lounge in the Asian country between MotorCo's Senior Vice President of Sales for the Asia-Pacific Region and the airline's Chief Procurement Officer ("CPO"), the CPO tells the VP that he generally looks favorably on "additional consideration" in contract awards and writes the figure "100K" on a cocktail napkin, which he slides over to the VP's end of the table. MotorCo remits \$100,000 to an account specified by the CPO and wins the contract.

Analysis: The CPO would likely be liable under FEPA as the employee of an "instrumentality" of a foreign government, which falls within the statute's definition of a "foreign official."

In the FCPA context, whether an entity qualifies as an instrumentality of a foreign government involves a fact-specific analysis of the entity's ownership, control, status, and function. Because the airline in this case is majority-owned by the

Asian government, and the government controls the airline's management through its majority representation on its board, the airline would probably be deemed an instrumentality of the country's government under FEPA.

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PRIVATE INVESTMENT FUNDS ARE A HIGH RISK FOR MONEY LAUNDERING ADVISERS SHOULD KNOW WHO'S INVESTING

SUMMARY

Investing involves placing money in a company or other asset for a return on that investment. But rarely do investors directly wire money to a company. Instead, they use intermediaries called “investment advisers.”

According to a draft [2015 U.S. Treasury Department rule](#), “Investment advisers provide advisory services to many different types of clients, including individuals, institutions, pension plans, corporations, trusts, foundations, mutual funds, private funds, and other

pooled investment vehicles.”

There are almost [13,000 registered investment advisers in the United States, managing more than \\$80 trillion in assets](#). This number reflects the number of SEC registered advisers, which includes those who manage \$100 million or more in assets. It does not, however, include advisers managing less than the \$100 million threshold, who are not required to register with the SEC.

SUBSTANTIAL RISK IN THE MARKET

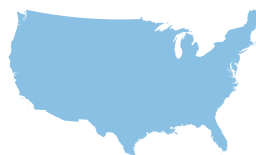
U.S. commercial banks now hold approximately [\\$17 trillion in deposits](#). Recognizing the inherent risks in the commercial banking sector, Congress adopted anti-money laundering rules in the Bank Secrecy Act that date back to the 1970s. Additional safeguards were put in place in the wake of the September 11 attacks.

Private investment firms have fewer safeguards than traditional banks—despite having a financial portfolio that will soon be an equivalent size. This lack of customer due diligence (“CDD”) rules (aka know your customer or KYC rules) prompted the FBI to note in a May 2020 [report](#) on private equity firms that “threat actors exploit this vulnerability to integrate illicit proceeds into the licit global financial system.”

The FBI’s report cited examples as varied as cybercrime, sanctions evasion, and drug smuggling, including:



A New York-based private equity firm “received more than **\$100 million** in wire transfers from an identified Russia-based company allegedly associated with Russian organized crime.”



A U.S.-based law firm allegedly assisted with secretly moving **\$400 million** in a fraudulent cyber currency scheme “through a series of purported private equity funds holding accounts at financial institutions, including those in the Cayman Islands.”



In Los Angeles, a Mexican drug cartel “recruited and paid individuals to open hedge fund accounts at private banking institutions.”



A London- and New York-based hedge fund proposed “using a series of shell corporations to purchase and sell prohibited items from sanctioned countries to the United States.”



SAFEGUARDS FOR INVESTMENT ADVISERS DON'T COMPARE WITH BROKER DEALERS OR COMMERCIAL BANKS

Currently, commercial banks have CDD requirements that include identifying the beneficial owners of companies that open accounts, initiating investigations into those owners to identify money laundering risk, filing suspicious activity reports with Treasury's Financial Crimes Enforcement Network (FinCEN) when sufficient risk is identified, and monitoring accounts with a higher risk profile on an ongoing basis. Banks can and have been fined for failing to meet their anti-money laundering responsibilities.

Investment brokers, those who assist firms with identifying investors, also have KYC obligations. Not all investment advisers use registered brokers and, therefore, can escape the most basic anti-money laundering checks.

Instead, investment advisers themselves are only required to ensure that they take on certain types of investors called "qualified purchasers" or "accredited investors." These requirements call for the adviser to ensure the investor can afford the investment and the

investment risk—but they are not required to engage in due diligence to guard against money laundering, terrorist financing, corruption financing, or other criminal activity. Ensuring investors can afford the risk is a laudable goal, but it is not a substitute for protecting against corrupt and criminal actors accessing our financial system. A corrupt official seeking to launder stolen money using an offshore company would be able to invest that money easily through a U.S. investment adviser today, and that must change.

UPDATE AND FINALIZE THE DRAFT CDD RULE FOR INVESTMENT ADVISERS

FinCEN should issue new rules that require investment advisers to engage in customer due diligence for prospective investors. A rule for investment advisers would level the playing field across all investment vehicles. KYC requirements for investment brokers prove these checks can be done in the sector. The rules should require all investment advisers to know their customers, including by requiring the identification of the beneficial owners of companies that open accounts, initial investigations into those owners to identify money laundering risk, the filing of suspicious activity reports with FinCEN when sufficient risk is identified, and the ongoing monitoring of accounts with a higher risk profile.

The rules should cover the full range of advisers to avoid loopholes that allow for exploitation by bad actors. The rules should cover:

1. Advisers currently registered with the SEC
2. Advisers with less than \$100 million of assets under management
3. Advisers working solely with venture capital funds
4. Advisers working solely with rural business funds
5. Advisers working solely with family funds

FinCEN already has the authority to require financial institutions to keep records and file reports that have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." The Treasury Secretary is further authorized to include "additional types of businesses within the [Bank Secrecy Act] definition of financial institution if the Secretary determines that they engage in any activity similar to, related to, or a substitute for, any of the listed businesses."

In 2015, a CDD rule for certain investment advisers was proposed by FinCEN. This rule should be updated so that it reflects the continuously developing private investment fund market, and then quickly finalized.